COUNCIL ON COURT PROCEDURES

Saturday, September 8, 1990 Meeting
9:30 a.m.

Oregon State Bar Center
5200 SW Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Approval of minutes of June 9, 1990

2. Introduction of new member, Judge De Muniz

3. Remarks by Chief Judge Owen Panner

4. Expert discovery - subcommittee report and public comment

5. Public comments on proposed amendments (see packet of comment letters attached)

6. Remarks by Bernie Jolles regarding sealing settlement records (see letter attached)

7. ORCP 68 - application to dissolution cases (Judge Welch) (see attached letter from Paul Saucy)

8. NEW BUSINESS

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of September 8, 1990

Oregon State Bar Center
5200 SW Meadows Road
Lake Oswego, Oregon

Present:	Richard L. Barron	Winfrid K.F. Liepe
	John E. Hart	Robert B. McConville
	Lafayette G. Harter	Ronald Marceau
	Maury Holland	Jack L. Mattison
	Bernard Jolles	J. Michael Starr
	Lee Johnson	Elizabeth Welch
	Henry Kantor	Paul De Muniz
	Richard T. Kropp	
Absent:	Richard Bemis	William F. Schroeder
	Susan Bischoff	William C. Snouffer
	Susan P. Graber	Laurence Thorp
	John V. Kelly	Elizabeth H. Yeats

Also present were Chief Judge Owen Panner and Judge Milo Pope. The following attorneys were present: Jeffrey Foote, Bob Maloney, Mike Phillips, Frank Pozzi, Greg Smith, Charles Tauman, Gayle Troutwine, Michael Williams, Charlie Williamson.

Also present were Fredric R. Merrill, Executive Director, and Gilma J. Henthorne, Executive Assistant.

The meeting was called to order by Chairer Ron Marceau at 9:30 a.m.

The Chairer welcomed the visitors and stated they would be given an opportunity to present their views regarding expert discovery after Chief Judge Panner's remarks.

Agenda Item No. 1: Approval of minutes of June 9, 1990. The minutes of the Council meeting held June 9, 1990, were unanimously approved.

Agenda Item No. 2: Introduction of new member, Judge De Muniz. The Chairer announced that Judge De Muniz had been appointed to succeed Judge Graber as the representative from the Court of Appeals (Judge Graber had been appointed as the Supreme Court representative to succeed Judge Van Hoomissen when he resigned in May).

Agenda item No. 3: Remarks by Chief Judge Owen Panner. The Hon. Owen M. Panner, Chief Judge of the U.S. District Court, Portland, addressed the Council. A copy of the text of his

remarks is attached as Exhibit No. 1.

Agenda Item No. 4: Expert discovery. A memorandum (attached as Exhibit No. 2 to these minutes) dated August 31, 1990, from John E. Hart, member of the expert discovery subcommittee, regarding an expert discovery rule was distributed to those present at the meeting. The Expert Discovery Subcommittee's August 31, 1990 memorandum (with Judge Johnson's and Mike Starr's memoranda attached) were attached to the agenda for this meeting. House Bill 3140 (attached as Exhibit No. 3 to these minutes), sponsored by the Committee on Judiciary at the request of the Oregon Association of Defense Counsel during the 1989 Regular Session of the 65th OREGON LEGISLATIVE ASSEMBLY, was also distributed to those present at the meeting. The bill proposed the promulgation of a new rule (Rule 42) on expert witnesses. Copies of both documents are being mailed to those Council members not in attendance.

The Chair invited the guests (proponents and opponents) to present their comments at this time on expert witness discovery.

Bob Maloney (Attorney, Portland) stated that he supported the adoption of a rule that would permit limited discovery of an expert witness who is going to testify at trial. He favored the adoption of a rule (similar to HB 3140) permitting discovery of the identity of an expert witness, qualifications of the expert, and the expert's opinion, 30 days before trial. He argued that allowing pretrial discovery of the identity and substance of testimony was necessary because of the importance of experts in many cases and the need to develop adequate cross-examination. He said that preventing such discovery was unfair and that free discovery of experts would promote settlement and shorten trials. He also said that disclosure of information about expert witnesses was consistent with the present rule requiring a personal injury plaintiff to disclose medical reports.

Mike Phillips (Attorney, Eugene), Greg Smith (Attorney, Salem), Gail Troutwine (Attorney, Portland), Michael Williams, (Attorney, Portland), Jeff Foote (Attorney, Portland and President of the Oregon Trial Lawyers Association), Frank Pozzi, (Attorney, Portland), and Charles Tauman (Attorney, Portland) all testified against allowing any discovery of expert witnesses. They argued that allowing discovery of expert witnesses would increase costs of litigation and create additional work for lawyers and judges. They argued that the existing Oregon system disposes of cases efficiently and expert discovery would reduce that efficiency. They also argued that expert witness discovery would deter experts from testifying, particularly in medical malpractice cases. They stated that Oregon code pleading gives fair warning of the opponent's position and an opportunity to prepare for cross-examination of experts. Several witnesses, including Frank Pozzi, testified that providing defense attorneys

with information about expert witnesses 30 days or so before trial would result in a significant increase in motions to continue trials, thus giving what could be an unlimited time to "prepare" for the expert witnesses. Mike Phillips submitted a study comparing cost of litigation with and without expert discovery (attached as Exhibit No. 4). Greg Smith submitted Ethics Opinion 530 of the Oregon State Bar and an article on a medical malpractice case (attached as Exhibit Nos. 5 and 6). Frank Pozzi submitted an example of a witness list (circulated to those present) in a federal court case that was 100 pages long and involved 22 doctors (attached to the original minutes only as Exhibit No. 7). Gail Troutwine, Michael Williams, Jeff Foote, and Greg Smith submitted written testimony (attached as Exhibit Nos. 8, 9, 10, and 11, respectively).

John Hart, Mike Starr, and Judge Johnson summarized their views as expressed in their respective memoranda (mentioned above).

The Council discussed House Bill 3140 mentioned earlier. The Chair reminded those present that whatever action the Council takes will be taken at its December 10, 1990 meeting and that it would defend its action during the legislative session.

A discussion followed among Council members. Various suggestions were made as to whether the Council favored some expansion and/or identity of witnesses and substance, and whether or not a specific proposal should be prepared. A motion was made by Judge Johnson, seconded by John Hart, to adopt the language set forth in paragraph 2A on page 2 of the expert discovery subcommittee report mentioned earlier. Henry Kantor made a motion, seconded by Mike Starr, to table. The motion passed with 11 in favor, 4 opposed, and one abstention.

Judge Liepe made a motion, seconded by Judge Mattison, that the Council proceed to consider the subject of expert discovery without any commitment as to whether or not it would be approved. The motion passed with 10 in favor, 4 opposed, and 1 abstention.

Further discussion followed. Judge Welch wanted to know exactly what the problem was and whether it involves a few complicated cases. Henry Kantor questioned whether there was enough data to support a change. Maurice Holland suggested that some empirical studies had been made. The Executive Director said that he would look at the current literature and report back at the next meeting. Judge Johnson suggested that the matter be referred back to the expert witness subcommittee to formulate the basic policy questions.

Judge Liepe moved, seconded by Maury Holland, that the expert discovery subcommittee be charged with the task of drafting simple, direct questions to be considered by the Council

regarding whether or not it wants some kind of discovery, the name of the expert, and discovery regarding qualifications and opinions. The motion passed with 9 in favor and 6 opposed.

Agenda Item No. 5: Public comments on proposed amendments (comment letters regarding Rules 7, 18, 55, and 68 were attached to the agenda for this meeting and an additional comment letter regarding Rule 18 was distributed at this meeting, copy attached as Exhibit No. 12). The Chair stated that the Judicial Department subcommittee had sent a memorandum regarding the Rule 68 revisions and that the memorandum had been forwarded to the Council's judgment subcommittee for their review and comment. The Chair stated that discussion regarding the Rule 68 revisions would be placed on the agenda for either the October or November meetings. The Executive Director was asked to review the comment letters regarding Rules 7, 18, and 55 and to prepare a memorandum for the Council's consideration at the next meeting.

Agenda Item No. 6: Remarks by Bernie Jolles regarding sealing settlement records. This agenda item was deferred until the next meeting.

Agenda Item No. 7: ORCP 68 - application to dissolution cases (Judge Welch). Judge Welch had written a letter on June 4, 1990 (attached as Exhibit 2 to the minutes of the Council meeting held June 9, 1990) wherein she had requested the deletion of the exception in Rule 68 C(1)(a) for dissolution cases. Council staff had requested a response from the Family and Juvenile Law Section of the Bar regarding this proposal, and the section (by letter dated August 17, 1990 from Paul Saucy, attached to the agenda for this meeting) wholeheartedly supported the elimination of that provision. The Executive Director stated that he would prepare a draft of the rule deleting the exception for the Council's review.

The meeting adjourned at 12:34 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

PRESENTATION TO THE OREGON COUNCIL ON CIVIL PROCEDURE

ON DISCOVERY RE: EXPERT WITNESSES

Saturday, September 8, 1990

The Federal Rules of Civil Procedure aren't what they were cracked up to be. Since the Pound Conference sponsored by the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in 1976, they've been under serious attack. The Chief Justice at that conference seriously attacked the rules and issued an ultimatum for reform. While there had been earlier efforts to reform, this was the beginning of a serious attack. The ABA, leaders of the bar, some justices of the Supreme Court, and numerous federal judges have continued the assault. They have been described as "insanely expensive and very nearly endless." Our own Judge Leavy has characterized them as practically guaranteeing that a complicated case will never get to trial and if it does, that it will never get finished.

The modest efforts of reform have been very weak. In 1980 when the minor amendments were transmitted from the court to the Congress, Justice Powell, joined by Justices Stewart and Rehnquist dissented, saying:

> . . . [T]he changes embodied in the amendments fall short of those needed to accomplish reforms in civil litigation that are long overdue.

EXHIBIT NO. 1 TO MINUTES OF COUNCIL MEETING OF 9/8/90

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> The American Bar Association proposed significant and substantial reforms. Although the Standing Committee initially favored most of these proposals, it ultimately rejected them in large part. The ABA now accedes to the Standing Committee's amendments because they make some improvements, but the most recent report of the ABA Section of Litigation makes clear that the "serious and widespread abuse of discovery" will remain largely uncontrolled. There are wide differences within the profession as to the need for reform. The bench and bar are familiar with the existing Rules, and it often is said that the bar has vested interest in maintaining the status quo. I imply no criticism of the bar or the STanding Committee when I suggest that the present recommendations reflect a compromise as well as the difficulty of framing satisfactory discovery Rules. But whatever considerations may have prompted the Committee's final decision, I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems associated with discovery. The Court's adoption of these inadequate changes could postpone effective reform for another decade.

In 1938, when they were adopted, they were hailed as a solution to all our problems. Those of us who were in law school shortly after that time accepted them cheerfully as the best thing since sliced bread. Some fifty plus years later, we are beginning to learn that "more is not better."

This Council came about as a result of a carefully planned effort to avoid wholesale adoption of the federal rules. I commend you for your resistance over the years in moving cautiously. The subject I want to speak about today is another area for real caution. The only real progress that has been made to curb the abuses of discovery in federal court has been the

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1983 amendment to Rule 26(b)(1). That amendment, in effect, encouraged judges to limit discovery if the court determines that it's unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient and less burdensome or less expensive, there has been ample opportunity for discovery already, the discovery is unduly burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources and the importance of the issues at stake in the litigation. Had this been in the federal rules in 1938, we might have a totally different concept. The language in the original rules indicating that it was not ground for objection that the information sought would be inadmissible at the trial if it was calculated to the discovery of admissible evidence has created serious problems. Not enough lawyers know about or understand the amendment in the 1983 amendment and it's seldom used, even though it should be used on a regular basis.

Now let's talk about one of the many subjects that you are concerned with -- discovery concerning expert witnesses.

As you are aware, Rule 26 allows a party to get the name of adverse expert witnesses, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The rule goes on to allow

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further discovery upon order of the court by other means, subject to the payment of fees and expenses.

It also allows discovery of the facts known or opinions held by an expert who has been retained by another party and who is not expected to be called as a witness when there's been an adverse medical examination or on a showing to the court that the information is not otherwise obtainable.

There is, of course, provision for protective orders, but judges have been reluctant to stop discovery. That reluctance is changing somewhat, but is still very prevalent.

The result of this rule has been to encourage lawyers not to formally retain an expert, to deny that they have an expert for as long as possible. Lawyers regularly ask for the names of the opposing party's expert and all of this information that's allowed by 26. More often than not, the other side denies they have an expert until the very last minute. Frequently there are motions to compel and the dance goes on.

In the ordinary diversity case involving personal injuries, there is usually no problem. Medical reports are exchanged freely by competent lawyers and depositions are not requested.

I have developed a procedure that solves many of the problems. I deny requests to take the deposition of opposing experts unless there is some very unique situation. When I set the case for trial, an order is issued setting a pretrial conference and requiring that both parties furnish witness statements of their experts which contain all of the information discoverable under Rule 26(b)(4). When the parties occasionally attempt to obtain that information sooner, I advise them that it will be available to them ten days before the pretrial conference and if they can make some serious showing of surprise, I will consider giving them further discovery at that time. It is very rare that there are any problems. Usually then the only problem is that one party may need another expert to refute something they hadn't anticipated.

Allowing the depositions of opposing experts will increase the costs of litigation substantially. The most serious problem in the legal profession today is the mounting legal costs and we should not encourage depositions of opposing experts. At

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some point not too long before the trial, each party should be required to furnish a written report to the other furnishing information from the expert as outlined in 26(b)(4). This eliminates surprise and saves the cost of depositions, discovery motions and posturing. Certainly, parties should exchange medical reports in personal injury cases.

If there is to be any modification in the rules allowing the deposition of experts, it should be very restrictive. It should be limited to situations where no comprehensive written report is available and where there is a showing that the party has a real need that cannot otherwise be met.

Depositions of experts by ingenious lawyers where the purpose is not truly discovery, but rather cross examination and harassment is not uncommon and should be discouraged. It is difficult enough to obtain competent experts for trial without subjecting them to additional obligations of giving a deposition.

Understand now, I am not talking about perpetuation depositions. Those serve a real purpose and their use should be expanded.

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A balance must be achieved. Allowing parties to conceal the identity and the subject matter of an expert's testimony until actual time of trial is unrealistic. While many of us think that the system would be better off going back to the "trial by ambush", that's not going to happen. I have some copies of my order setting forth the disclosure requirement that must be made simultaneously ten days before the pretrial conference. Sometimes a defense lawyer will complain that they can't employ there experts until they know who the plaintiff's experts are and what they have to say. It's a very rare case when this occurs. With our pleading rules in Oregon, enough detail must be disclosed so that there are few surprises. I've heard this argument a number of times. My standard answer is that if you're totally surprised when the disclosures are made, I'll evaluate it at that time. I have yet to have to do so.

It seems to me the federal rules have demonstrated over the years that it is very, very difficult to have absolute rules covering every discovery situation. The tenor of the rules is extremely important. An unqualified statement that depositions of experts may be taken would be disastrous. If they are to be taken at all, they should be discouraged and allowed only under a showing to the court that it is absolutely necessary. As a matter of fact, in the drafting of your discovery rules, you might want to consider giving the trial judge a great deal of

discretion and indicating what is now in Rule 26. That is, that discovery should be limited, taking into account the following factors:

1. Whether it's reasonably cumulative or duplicative;

2. Whether it's obtainable from some other source that is more convenient and less burdensome and expensive;

3. Whether there has been ample opportunity for discovery already; and

4. Whether discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources and the importance of the issues at stake in the litigation.

This language from Rule 26 would encourage trial judges to tighten up on discovery abuses.

One of the most serious flaws in the federal rules is notice pleading. The theory is wonderful. It is possible to go all through discovery without really knowing what the case is all about. While there may be a few injustices caused by code pleading, there are many, many more injustices caused by notice pleading. Cases linger on and drift aimlessly. In the Oregon District Court we have yearned for code pleading. Our pretrial order rules now require code pleading in effect as part of the

pretrial order. Unfortunately, this is at the end of the discovery period. It is very difficult to conduct reasonable discovery and to frame the issues reasonably early in the case with our notice pleading. Notice pleading expands unnecessarily the discovery that must be taken and the hours of preparation that must go into getting ready for trial. In my judgment, it would be a serious mistake to go to notice pleading.

Ron asked me to comment on the "Judicial Improvements Act of 1990" proposed by Senator Biden, S. 2648. This bill has passed the Senate and comparable legislation is being considered in the House. The Senate version contains provision for 77 new federal judgeships which are badly needed. It also has a title dealing with "micromanagement of the court's dockets" which makes little, if any sense. It is true that litigation is expensive and it is slow. However, generally, it's as fast in the federal courts as it is in most state courts. The bill has been improved greatly since it was first introduced. However, it still has some provisions that would involve telling us how to calendar and manage our caseloads. Not surprisingly, it is the general consensus among judges that we don't need any help in that area, and that the provisions would be expensive and consume even more time. There is some serious question as to whether it's appropriate or constitutional in light of the rule making procedure that is now in place.

CONCLUSION

I conclude by remarking that it is no secret the judicial system is in trouble. It is taking too much time and it costs too much money. In the decade of the '90's, we need to simplify and expedite. We have spent a lot of years making things more complex and convoluted. It is time to reverse that process. You, as members of the council have an opportunity to assist. I would encourage you to try to simplify and make litigation more efficient at the time you consider a matter. Too often, what appears to be "motherhood and apple pie" results in more lengthy and complex activities by we lawyers and judges.

Thank you for the opportunity of appearing before you.

Owen M. Panner, Chief Judge

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August 31, 1990

TO: Council on Court Procedures

FROM: John E. Hart, Member of Expert Discovery Subcommittee

RE: Expert Discovery Rule

As part of the Expert Discovery subcommittee, I wanted to memorialize my viewpoint with respect to the first three issues the subcommittee did not agree upon. Briefly, I believe expert discovery is long overdue in Oregon (Issue B-1). I also believe that potential expert witnesses' names, business addresses and recent resumes should be exchanged by litigants (Issue B-2). Finally, I believe the lofty purposes of limited expert disclosure are only achieved when full disclosure occurs well before trial; accordingly, Alternative 3-A is much preferable; it requires disclosure more than 30 days before trial and court approval for modifications or additions within the last 30 days (Issue 3).

EXPERT DISCLOSURE IS LONG OVERDUE IN OREGON

For 16 years, I have represented defendants in civil lawsuits where, more and more, substantial sums of money are at stake. I have seen some awfully puzzled expressions on the faces of clients such as doctors, businessmen, and individuals (usually lacking enough liability insurance for the particular claim) when I answer their logical pretrial question: "Who(m) will the other side be calling as expert witnesses to support their claims?" Somewhat embarrassed, I tell them I simply do not know. I explain that, unlike all other civil jurisdictions in America, Oregon's unique procedural rules prevent the trial lawyer from learning anything about the other side's experts until the jury is empaneled and trial is in progress. Perceptive clients ask: "Well, that won't give you much time to investigate their expert's background, experience or credibility before cross-examination, will it?" Sarcastic clients remind me that a civil trial is supposed to be a search for the truth following thorough investigation and unsuccessful settlement negotiation grounded upon the lawyer's thorough knowledge of the facts of the case. Uniformly, my clients cannot understand the unique void in Oregon's discovery laws relating to information about the other side's expert witnesses.

Trial lawyers who practice outside Oregon are even more astonished than my clients. Last year, I served as President of the Oregon Association of Defense Counsel and submitted a discovery questionnaire to comparable defense associations in each

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EXHIBIT NO. 2 to MINUTES OF
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of the other 49 states. Compiling the results of this survey demonstrated that Oregon has the most regressive discovery laws in the 51 jurisdictions (namely, 50 state courts, as well as the Federal Rules of Civil Procedure applicable in Federal courts). Fifty out of the 51 jurisdictions permit expert disclosure. Actually, the vast majority of jurisdictions permit pretrial depositions of disclosed experts. Consequently, it is not unusual for non-Oregon trial attorneys to ask:

> "Now, let me get this straight: Before trial, Oregon litigants don't have to answer written interrogatories; don't have to provide the names of expert witnesses, their resumes or written statements; don't depose these central witnesses; and, nevertheless, judges do not have the power of additur or remitter?"

My response has been: "Yes, but it's different in Federal courts in Oregon."

These same non-Oregon lawyers want to know how I can honestly advise my clients about settlement or the likelihood of trial success without using discovery procedures that are taken for granted everywhere else in the United States (except New York to a limited extent). They wonder how compatible our expert procedural rules are with rules of evidence that (a) permit experts to testify without disclosing the basis for their opinions--ORE 705, and (b) permit expert testimony based upon hearsay evidence--ORE 703.

Thus, while Easterners as well as lawyers from Washington, California and Idaho fully investigate their cases <u>before trial</u>, Oregon lawyers begin trial with extremely thin files and conduct what is termed "discovery" in other jurisdictions right before the Oregonians comprising our trial jury.

In my opinion, Oregon's present discovery laws with respect to expert witnesses are antiquated and out of step. Trial by ambush should be discouraged, first to serve the interests of "fairness" for litigants and, secondly, to perhaps reduce the court's crowded docket. The singular historical reason Oregon state procedure does not permit expert discovery can be traced to the political acumen of Frank Pozzi, Charlie Burt, and other luminaries of the plaintiffs' bar in the late 1970's. Our own Council on Court Procedures debated and promulgated ORCP 42 (permitting limited expert discovery) only to have Oregon's legislature eliminate the promulgated rule by a political majority. Seventy-odd other procedural rules survived the legislative vote, but ORCP 42 currently reads, "Reserved for Expansion." This "expansion" is 15-20 years overdue.

But what about the arguments advanced by plaintiffs'

attorneys against limited expert disclosure?

First, not all plaintiffs' attorneys oppose expert disclosure. The Council's own Bernie Jolles, former OTLA President David Jensen, Leo Probst, and many other plaintiffs' attorneys support disclosures about expert witnesses.

Second, the opponents' primary objection about potential harassment of experts is simply unproven. In his memorandum, my friend, Mike Starr argues:

> "Disclosure will result in some experts being harassed, intimidated or coerced, especially in medical malpractice claims. (Disclosure will make it even more difficult to obtain medical, dental, legal, etc. experts in professional liability claims.)"

Charlie Burt says the same thing in his "An Unnecessary Burden" article. But, in spite of my professional admiration for both Mike and Charlie, the actual experiences in 49 other jurisdictions invalidates their contention: Professional liability claims and trials have geometrically increased in all jurisdictions that provide for expert discovery as every member of the Council can attest. This growth could not have occurred without willing expert witnesses whose identities were disclosed. In short, the cloud of harassment and peer pressure has not discouraged experts from offering their opinions against other professionals. And, judging from my daily mail from advertising experts of all kind and description, there is no shortage of potential expert witnesses for future cases. Thus, opponents in Oregon can speculate that harassment, intimidation or coercion will be effective, but there is no pattern of this occurring in jurisdictions where expert disclosure has been in place for many years. The real issue is fairness; expert witness disclosure is required in Oregon's criminal cases, civil trials in Federal court, and should be in civil trials in Oregon's state courts.

Third, plaintiffs' attorneys argue against change, namely increased paperwork as well as having to spend more time on each case. These arguments should not overcome fairness considerations. Plaintiffs' attorneys in Oregon charge the same contingent fees for personal injury cases involving expert witnesses as the attorneys practicing in other jurisdictions. If more time or paperwork is required in order to inject fairness into our civil litigation system, these are small sacrifices for which they are already being paid.

Before leaving the debate about whether we should have expert disclosure at all, I must respond to Mike Starr's final point; that is, Mike notes that the Oregon State Bar's Procedure and Practice Committee could not agree upon expert disclosure and,

Mike suggests, so should this Council. In my opinion, the question of expert disclosure should not be determined by popular vote; similarly, the Bar committee's political inaction should not serve as our precedent. The Council should support limited expert disclosure because it is the right thing to do.

EXPERT WITNESSES' RESUMES SHOULD BE EXCHANGED

Nearly two years ago, I represented a civil defendant in an automobile case where the plaintiff sought more than $1 million. Besides the treating doctors, the plaintiff's attorney called as "expert witnesses" (a) engineers for purposes of accident reconstruction, (b) an economist to calculate damages, (c) vocational rehabilitation specialists who had evaluated plaintiff's ability to change employment and (d) so-called "behaviorialists" to explain how motorists think and behave when they operate their cars. The plaintiff's attorney did not call a handwriting analyst, an annuitist, or a standard of care witness, but surely could have. In each instance, the expert witness was introduced and the witness's credentials were painstakingly outlined. Throughout this preliminary questioning, I did not know who these witnesses were; of course, I had not checked their credentials in advance of seeing them in the courtroom; and, significantly, I could only guess about what issues these "possible" experts might offer opinions. At the counsel table, then, and addressing this memorandum to you, now, I cannot understand how such secrecy aids a search for the truth, the central theme of a civil trial. I believe experts' identities should be exchanged and, additionally, the most recent resume for any possible expert should be delivered as well. In this way, trial attorneys can investigate the proposed expert's background, experience and credibility before trial. Cross-examining can be based upon knowledge, not intuition. Finally, furnishing a recent resume would impose no additional burden or expense upon counsel or expert witnesses since virtually all professionals keep a resume on file for professional reasons.

EXPERT DISCLOSURE SHOULD OCCUR MORE THAN 30 DAYS BEFORE TRIAL AND LAST-MINUTE MODIFICATIONS SHOULD BE SUBJECT TO COURT SCRUTINY

Alternative 3-A within Fred Merrill's summary requires court intervention if trial lawyers seek to change disclosures about expert witnesses in the 30 days immediately before trial. Alternative 3-B does not. In my opinion, the discovery role of expert disclosure is defeated unless Alternative 3-A is promulgated. Alternative 3-A permits the good faith practitioner the same ability to supplement and/or modify expert witness disclosures as currently followed to amend their pleadings in the last 30 days prior to trial. Fundamental fairness is the test and courts freely permit amendment "whenever justice so requires." Such a standard prevents the unscrupulous, sand-bagging attorney (for plaintiff or defendant) from emasculating the expert

disclosure rule by delayed production or last minute trial preparation. With an eye to fairness, the trial judge should determine the relative fairness of last-minute modifications in accordance with Alternative 3-A.

Thank you for your consideration.

JOHN E. HART

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SCHWABE WILLIAMSON & WYATT
ATTORNEYS AT LAW

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JOHN E. HART

June 27, 1990

✓Mr. Fred Merrill
Executive Director
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Mr. J. Michael Starr
Attorney at Law
96 E. Broadway, #8
Eugene, OR 97401

The Honorable Lee Johnson
Circuit Court Judge
528 Multnomah County Courthouse
Portland, OR 97204

Gentlemen:

In accordance with Mike's request of June 22, I have enclosed a copy of the proposed rule the OADC submitted to the 1989 Legislature. I will look forward to meeting with you on July 9, 1990.

Yours very truly,

John E. Hart

JOHN E. HART

JEH:mfh
Enclosure

House Bill 3140

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Association of Defense Counsel)

SUMMARY

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

Amends Oregon Rules of Civil Procedure by adding new rule. Requires litigants to give to opposing parties name, address and brief statement of substance of testimony of any expert witness litigant expects to call at trial. Specifies procedure for giving such information. Provides sanctions for failure to give such information. Defines "expert witness" for purposes of rule.

A BILL FOR AN ACT

Relating to civil procedure.

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

SECTION 1. Oregon Rules of Civil Procedure is amended by adding a new rule to read:

EXPERT WITNESSES

RULE 42

A. Summary statement on expert witnesses; delivery. Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and address of any person the other party reasonably expects to call as an expert witness at trial and stating the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial.

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

C. Sanctions. If a party fails to comply with the duty to furnish or supplement a statement as provided by section A. or B. of this rule, the court may exclude the expert's testimony if offered at trial.

D. Definitions. As used in this rule, the term "expert witness" includes any person who is expected to testify at trial in an expert capacity, regardless of whether the witness is also a party, an employe, an agent or a representative of the party or has been specifically retained or employed.

E. Rule not exclusive. Nothing contained in this rule shall be deemed to be a limitation of the party's right to obtain discovery of another party's expert witness not covered under this rule, if otherwise authorized by law.

EXHIBIT NO. 3 TO MINUTES OF COUNCIL MEETING HELD 9/8/90

NOTE: Matter in bold face i to be omitted

Medical Negligence

	Example A Med.Neg./Wrongful Death Oregon State Court	Example B Toxic Shock/Wrongful Death
Depositions	$3,626.29	$11,330.25
Travel expenses	0	29,812.12
Experts	8,810.50	16,034.95
Total Costs Advanced	23,554.16	69,924.84
Time Costs	62,876.00	145,320.00

	Example C Medical Negligence Oregon State Court	Example D Medical Negligence Other Federal Court allowing for discovery
Depositions	2,627.50	5,781.41
Travel	3,157.83	10,522.66
Experts	4,200.00	8,370.00
Total Costs Advanced	15,001.24	31,019.94
Total Time Costs	55,009.00	51,269.00

NOTE: Both cases filed in Oregon state courts were resolved by settlement within one year of the date of filing. In contrast, the cases filed in the two other state courts (where broad discovery of experts was allowed) were not resolved for two to three years following the date of filing.

Trucking Accidents

	Example E Trucking Accident Oregon State Court	Example F Trucking Accident Other State Court allowing for discovery
Depositions	2,480.79	6,855.15
Travel	784.31	7,960.94
Experts	4,453.61	8,954.80
Total Costs Advanced	12,196.00	48,920.50
Total Time Costs	70,321.00	90,348.14

EXHIBIT NO. 4 TO MINUTES OF
COUNCIL MEETING HELD 9/8/90

FORMAL OPINION 530

COMMUNICATION WITH ADVERSE EXPERT WITNESS

FACTS:

During the course of trial preparation in a civil case, the defense attorney learned the identity of one of plaintiff's experts. The expert had been retained by plaintiff's attorney to testify at trial as a non-fact witness. The defense attorney initiated repeated phone calls to this expert, probing him for information and opinions supplied to the plaintiff's attorney, and repeatedly stating that the expert should not testify for the plaintiff or provide any other assistance to the plaintiff in the case. Two weeks from the date of trial, the expert withdrew from further participation in plaintiff's case because, he said, "I can't take the heat."

QUESTIONS PRESENTED:

1. May an attorney contact an adverse expert for the purpose of obtaining information and opinions furnished to the adverse party's attorney?

2. May an attorney ethically attempt to dissuade an adverse witness from testifying?

ANSWERS:

1. No.

2. No.

DISCUSSION:

1. A lawyer's ethical duty to recognize and comply with the rules of privilege was discussed in Opinions 248 and 331. Although no disciplinary rules were cited in those Opinions, the basis for such an ethical obligation can be found in DR 1-102(A)(1), DR 7-102(A)(8), and DR 7-106(C)(7).

DR 1-102(A)(1) provides:

"(A) It is professional misconduct for a lawyer to:

(1) Violate these disciplinary rules, knowingly assist or induce another to do so, or do so through the acts of another."

DR 7-102(A)(8) states:

"(A) In the lawyer's representation of a client, a lawyer shall not:

* * * * *

(8) Knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule."

DR 7-106(C)(7) states:

"(C) In appearing in the lawyer's professional capacity before a tribunal, a lawyer shall not:

* * * * *

(7) Intentionally or habitually violate any established rule of procedure or of evidence."

In this case, the expert witness was a representative of the plaintiff's lawyer within the meaning of Oregon Evidence Code 503 and, as such, was covered by the attorney/client privilege as well as the work product privilege described in ORCP 36B(3). The Oregon and Federal Rules of Civil Procedure both specify the methods and circumstances for discovery of experts. By providing for limited and controlled access to retained experts and their opinions, the rules impliedly prohibit all other forms of contact.

The information and opinions of the expert witness were confidences and secrets of the plaintiff which plaintiff's lawyer had an ethical duty to protect from disclosure under DR 4-101(D), which reads:

"(D) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer in connection with the performance of legal services from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee."

It would make little sense to impose upon lawyers a duty to prevent disclosure while permitting an adverse party's lawyer to induce a breach of the applicable privilege. Furthermore, if the privilege to prevent disclosure is to be effective, the client must have an opportunity to assert it. Direct ex parte contacts with the expert afford no such opportunity.

By directly contacting the expert, defense counsel circumvented the rules of privilege and civil procedure, and interfered with the obligation of plaintiff's counsel to maintain confidences and secrets of the client. This conduct violated DR 7-106(C)(7) and DR 7-102(A)(8). Because the standard practice with respect to contacting an adverse party's expert is well known and well established, it could also be said that deliberate disregard of the practice is generally prejudicial to the administration of justice within the meaning of DR 1-102(A)(4). See 1 Hazard and Hodes, The Law of Lawyering, 378.4 (1988 Supp) and In Re Dixson, 305 Or. 83, 750 P.2d 157 (1988).

EX 5-2

2. Since we have concluded that the contact between defense counsel and plaintiff's expert was prohibited, it goes without saying that efforts to persuade the expert against testifying are also improper. In the case of a witness not otherwise covered by a privilege, a lawyer's contacts with an adverse witness are subject to the limitations imposed by other disciplinary rules. In an appropriate case, it may be permissible to attempt to persuade a witness that his or her opinion, observation, or recollection is in error. The lawyer may not threaten, harass, or otherwise attempt to influence the witness by improper means. If nothing else, such conduct would violate DR 1-102(A)(4) which provides:

> "(A) It is professional misconduct for a lawyer to:
>
> * * * * *
>
> (4) Engage in conduct that is prejudicial to the administration of justice."

Also applicable is DR 7-109(B) which provides:

> "(B) A lawyer shall not advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."

(See also ORS 162.285, Tampering with a Witness).

[Approved by the Board of Governors March 10, 1990]

EX 5-3

damage ceiling which did not exist, since the statutory scheme does not explicitly limit the Fund's liability to $400,000. This justice asserted that the majority had improperly avoided addressing the constitutionality of the $500,000 damage ceiling and thereby created unnecessary uncertainty among attorneys, health care providers and malpractice victims. — ***Williams v. Kushner***, 549 So.2d 294 (La. 1989).

Notes

The intermediate court in *Williams* had sustained the $500,000 damage ceiling against a constitutional challenge (at 524 So.2d 191) and has twice reaffirmed that view. See *LeMark v. NME Hospitals Inc.*, 542 So.2d 753 (La. App. 1989); and *Kelty v. Brumfield*, 534 So.2d 1331 (La. App. 1988).

Discovery

Court Prohibits *Ex Parte* Contacts Between Defense Counsel And Malpractice Claimant's Treating Physicians.

Defense Must Use Formal Discovery Methods

An Arizona appellate court has ruled that defense counsel in a medical malpractice action may not engage in *ex parte* discussions with the plaintiff's treating physicians.

Plaintiff alleged that he suffered injuries as a result of defendant's negligent diagnosis and treatment. Defendant's counsel conducted *ex parte* interviews with a number of physicians who had treated plaintiff and were not named as defendants in the lawsuit. When defense counsel submitted a list of witnesses who would testify at a prelitigation review panel hearing, these physicians were identified on the list. Asserting that the *ex parte* contacts were improper, plaintiff filed a motion to bar these physicians from testifying for the defense and to disqualify defense counsel from the case. The trial court ruled that the *ex parte* communications violated Arizona's statutory physician-patient privilege and issued an order barring the treating physicians from testifying as experts for defendant unless they were first offered as witnesses by plaintiff. The court declined, however, to disqualify defense counsel from further participation in the case. Defendant appealed, challenging the trial court's order.

The appellate court ruled that defense counsel in a medical malpractice action may not engage in nonconsensual *ex parte* discussions with the plaintiff's non-party treating physicians. The court began its analysis by finding that plaintiff had waived his statutory physician-patient privilege by initiating a lawsuit which placed his medical condition at issue. The court concluded, however, that this waiver was not absolute and waived only the right to object to discovery of medical information which is sought through formal methods of discovery. In the court's view, permitting discovery through informal *ex parte* meetings would undermine the physician-patient relationship, which gives rise to a fiduciary duty on the part of the physician to maintain the patient's confidences and to act in the patient's best interests. The court reasoned that only formal methods of discovery — where the courts may resolve disputes over the scope of the waiver of the physician-patient privilege — can ensure that a treating physician will not divulge information which is not relevant to the litigation. In addition, the court concluded that although a treating physician is free to decline a defense attorney's request for an *ex parte* interview, the physician may not understand the significance of the difference between formal and informal discovery methods and thus might feel compelled to comply with the request. A related concern cited by the court was that because many physicians in Arizona are insured by the same company, a treating physician may feel compelled to participate in an *ex parte* interview because it is likely that his insurer will also be the insurer of the defendant in the lawsuit in question. Finally, the court concluded that participation in *ex parte* discussions appeared to violate a physician's ethical obligations toward his patient and could subject a physician to tort liability for violating a

patient's confidences. The court acknowledged that permitting *ex parte* communications would enhance the efficiency of the discovery process, but concluded that such practical considerations were outweighed by the public policy supporting the sanctity of the physician-patient relationship.

The court proceeded, however, to vacate the trial court's order prohibiting the treating physicians in the instant case from testifying for the defense. Because the law regarding *ex parte* communications in Arizona was unsettled prior to the appeal in this case, the court found that it would be improper to impose sanctions upon the defense. The court added that if plaintiff could show that the defense had obtained information through the *ex parte* interviews which they could not have obtained through formal methods of discovery, the trial court could fashion a remedy to preclude the use of that information. — ***Duquette v. Superior Court,*** 778 P.2d 634 (Ariz. App. 1989).

Analysis

The *Duquette* court's ruling is in accord with a growing number of decisions which have disapproved private discussions between defense counsel and a personal injury claimant's treating physicians. These rulings have been based on several different rationales, such as the lack of authorization for *ex parte* interviews in state and federal rules of discovery, the importance of protecting the confidentiality of the physician-patient's relationship, and the potential for abuse by defense attorneys. See *Lawrence v. Bay Osteopathic Hospital, Inc.*, 437 N.W.2d 296 (Mich. App. 1989); *Jordan v. Sinai Hospital of Detroit*, 429 N.W.2d 891 (Mich. App. 1988); *Ritter v. Rush-Presbyterian-St. Luke's Medical Center*, 532 N.E.2d 327 (Ill. App. 1988) *Yates v. El-Deiry*, 513 N.E.2d 519 (Ill. App. 1987); *Karsten v. McCray*, 509 N.E.2d 1376 (Ill. App. 1987); *Matter of Hellman*, No. 85-24-EG (Mass. Board of Registration in Medicine June 24, 1987); *Schwartz v. Goldstein*, 508 N.E.2d 97 (Mass. 1987); *Roosevelt Hotel Limited Partnership v. Sweeney*, 394 N.W.2d 353 (Iowa 1986); *Petrillo v. Syntex Laboratories*, 499 N.E.2d 952 (Ill. App. 1986), *cert. denied*, 107 S. Ct. 3232 (1987); *Stoller v. Jun*, 499 N.Y.S.2d 790 (App. Div. 1986); *State ex rel. Klieger v. Alby*, 373 N.W.2d 57 (Wis. App. 1985); *Alston v. Greater Southeast Community Hospital*, 107 F.R.D. 35 (D. D.C. 1985); *Fields v. McNamara*, 540 P.2d 327 (Colo. 1975); *Weaver v. Mann*, 90 F.R.D. 443 (D. N.D. 1981); *Garner v. Ford Motor Company*, 61 F.R.D. 22 (D. Alaska 1983); *Anker v. Bordnitz*, 413 N.Y.S.2d 582 (Special Term 1979), *aff'd mem.* 422 N.Y.S.2d 887 (App. Div. 1979); *Ellis v. Sisters of Mercy of Butler County Ohio*, No. CV 84-05-0480 (Butler County Court of Common Pleas, Ohio Jan. 4, 1985); and *Barkin v. Skokie Valley Community Hospital*, No. 76L 23428 (Cook County Cir. Ct., Ill. June 22, 1982).

See also *Manion v. N.P.W. Medical Center*, 676 F. Supp. 585 (M.D. Pa. 1987) (defense counsel in medical malpractice action may not privately interview nonparty treating physician without notice to claimant); *Johnson v. District Court of Oklahoma County*, 738 P.2d 151 (Okla. 1987) (trial court in medical malpractice case may not order discovery by *ex parte* interview); and *Jaap v. District Court*, 623 P.2d 1389 (Mont. 1981) (same).

Other courts, however, have concluded that *ex parte* interviews were proper, reasoning that this informal method of obtaining information is efficient, is not specifically prohibited by applicable discovery rules, and is likely to promote candor and encourage early settlement of claims. Additionally, since a personal injury claimant's counsel is entitled to meet privately with the claimant's treating physicians, some courts have concluded that it would be unfair to prohibit defense counsel from doing so. See *Langdon v. Champion*, 745 P.2d 1371 (Alaska 1987); *Lazorick v. Brown*, 480 A.2d 223 (N.J. App. 1984); *Cogdell v. Brown*, 531 A.2d 1379 (N.J. Super. 1987); *Clark v. Lewis*, No. 85-0156-R (E.D. Va. Jan. 16, 1986); *Stempler v. Speidell*, 495 A.2d 857 (N.J. 1985); *State ex rel. Stufflebaum v. Applequist*, 694 S.W.2d 882 (Mo. App. 1985); *Trans-World Investments v. Droby*, 554 P.2d 1148 (Alaska 1976); and *Doe v. Eli Lilly & Company*, 99 F.R.D. 126 (D. D.C. 1983).

Although the plaintiff in the *Duquette* case succeeded in persuading the appellate court that *ex parte* interviews are improper, the court declined to grant the sanction which plaintiff requested — exclusion of the treating physician's testimony — because the law was unsettled at the time of the interviews in question. A Michigan court recently

EX 6-2

rendered a similar ruling, holding that defense counsel in a malpractice action had acted improperly in meeting privately with the claimant's treating physicians, but that sanctions should not be imposed for this conduct because the law was unclear at the time the meeting took place. There is precedent, however, for prohibiting a plaintiff's treating physicians from testifying as defense experts in cases where *ex parte* interviews were deemed improper. See *Manion v. N.P.W. Medical Center*, 676 F. Supp. 585 (M.D. Pa. 1987); *Yates v. El-Deiry*, 513 N.E.2d 519 (Ill. App. 1987); and *Karsten v. McCray*, 509 N.E.2d 1376 (Ill. App. 1987). On the other hand, in *Schwartz v. Goldstein*, 508 N.E.2d 97 (Mass. 1987), the Massachusetts Supreme Judicial Court ruled that although *ex parte* discussions between defense counsel and a claimant's treating physician were improper, the contents of these discussions were admissible to impeach the treating physician's testimony on behalf of the claimant.

Recent cases from Minnesota and Florida indicate that the propriety of *ex parte* communications may ultimately be determined through legislative action. In *Wenninger v. Muesing*, 240 N.W.2d 333 (Minn. 1976), the Minnesota Supreme Court disapproved this informal method of discovery. Subsequently, the Minnesota legislature enacted a statute specifically authorizing the practice. See Minn. Stat. §595.02. This statute requires a malpractice claimant to authorize informal discussions between his treating physicians and defense counsel and further provides for deposition without a court order in the event that a treating physician declines to participate in such a meeting. The statute was recently examined in *Blohm v. Minneapolis Urological Surgeons, P.A.*, 442 N.W.2d 812 (Minn. App. 1989), *appeal pending*, which held that the informal discussions are a form of discovery and thus are subject to time constraints set forth in local rules of discovery.

In Florida, the converse situation has arisen. The Florida Supreme Court approved *ex parte* communications in *Coralluzzo v. Fass*, 450 So.2d 858 (Fla. 1984). The Florida legislature later enacted a statute prohibiting physicians from discussing a patient's medical condition with anyone other than the patient or his legal representative or other health care providers. See Fla. Stat. §455.241(2). This statute was recently discussed in *Avis Rent-A-Car System, Inc. v. Smith*, 548 So.2d 1193 (Fla. App. 1989), which arose prior to the statute's effective date and thus did not require an analysis of how the legislation would affect the *Coralluzzo* rule.

One other method that has been employed to deal with the issue of *ex parte* communications is the adoption of voluntary inter-professional guidelines by local legal and medical professional associations. Such guidelines had been adopted by the local bar association and medical society in the county where the *Duquette* case arose, and those guidelines prohibited *ex parte* interviews in the absence of a signed release from the patient. Similar guidelines were recently adopted in Michigan by the local bar association and medical society for the Detroit area. — *Detroit Lawyer*, Vol. 56, No. 1 September 1989, pp. 1, 6-8.

Emergency Medical Care

Good Samaritan Statute Does Not Apply Where Physician-Patient Relationship Is Established.

Physician Examined Plaintiff in His Office

The Idaho Supreme Court has reversed a trial court's ruling that a physician was statutorily immune from liability for negligence in diagnosing the condition of a patient whom he examined in his office in his capacity as a hospital emergency on-call physician.

When plaintiffs' three-year-old son became ill with diarrhea and vomiting, his pediatrician examined him and concluded that he was recovering. The next day, however, the child became listless and disoriented and was unable to walk. Plaintiffs telephoned the pediatrician, who advised them to take the child to a local doctor.

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FAX NUMBER:
(503) 295-3720

September 12, 1990

Mr. Frederic R. Merrill, Esq.
University of Oregon
School of Law
Eugene, OR 97403

SUBJECT: Council on Court Procedures/
Discovery of Experts

Dear Frederic:

I appreciated the opportunity to share with the Council my thoughts on discovery of experts. I had more comments but because it got so late, I saved my thoughts for this letter.

A popular trial lawyer philosophy is to "think of everything"; leave no stone unturned. The result of this philosophy is delay, expense, and multiple-week trials with consequential inaccessibility of the courts to those whose damages are under "six figures." Instead, the goal of the good trial lawyer should be to simplify and uncomplicate. Discovery of experts would complicate, not simplify, and will increase the tasks, costs, and paper of litigation.

"Trial by ambush" connotes unfair surprise. I do not describe the Oregon system by that term; rather, I call our system one of the fastest, least expensive in America. We urge you not to change the system we currently enjoy.

Bob Maloney of Lane, Powell, Spears & Lubersky said the primary purpose of trial is a "search for the truth." I do not agree. I believe it is to provide expedient, economical dispute resolution with recompense for the injured where appropriate. "Search for truth" to many means unfettered discovery wholly disproportionate to the amount of injury. The proposed discovery of experts is one more step towards the "search for truth" synonymous with increasing litigation costs.

EXHIBIT NO. 8 TO MINUTES OF
COUNCIL MEETING HELD 9/8/90

Ex 8-1

Finally, I have two specific comments regarding the proposal. First, the provision that the party requesting the expert report must pay for it, does not make anything more fair. We have no control over the number of our opponent's experts or the size of their fees. The defendant could list dozens of experts (as in Mr. Pozzi's example), all of whom charge more than $300 per hour for time spent writing reports. We are totally powerless to control the situation. Second, the proposal could prevent parties from being able to fully present their cases. An example is the neighbor of our client, Melinda Hevel. The neighbor was a fact witness to the activities Melinda Hevel no longer participated in. During trial preparation and only a few hours before the neighbor took the stand, we learned she had been employed for 15 years by the Workers' Compensation Division of the State of Oregon as a Vocational Opportunity Analyst. Needless to say, at trial, the neighbor expressed an expert opinion on the employability of Melinda Hevel. This is not an example of a fluke; but, rather, a frequent experience. Under the proposal, we could not have used this expert testimony because we had not listed her as an expert.

Thank you for this opportunity to share my thoughts. I do not know a quicker, less expensive court system in America than ours. Let's not change it.

Sincerely,

WILLIAMS, TROUTWINE & BOWERSOX, P.C.

Gayle L. Troutwine

GLT:cb

pc: Mr. Charlie Williamson

EX 8-2

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October 1, 1990

Frederick R. Merrill
Attorney at Law
University of Oregon
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Eugene, OR 97403

Subject: OSB Council on Court Procedures
Proposed Discovery of Experts

Dear Fred:

I am writing to summarize the oral remarks I made at the September 8, 1990, meeting of the Council on Court Procedures in opposition to the proposed changes in the Oregon Rules of Civil Procedure regarding discovery of experts.

I believe it would be a grave mistake to change current procedures in any way, and here is why:

1. The present system is working just fine: "If it ain't broke, don't fix it."

   (a) There simply is no current unfairness or injustice that is gumming up the works. Counsel for defendants have not come forward with a single persuasive example of a bad result because of the current rule.

   (b) The main proponents of the change are lawyers specializing in the defense of medical malpractice claims. Yet medical malpractice insurance premiums are declining precipitously at present, for the first time in 15 years. I enclose a copy of an article from the September 23, 1990, Sunday Oregonian confirming this.

   (c) The dockets of our state courts have never been in better shape. The current rules of discovery pertaining to expert witnesses are clearly not blocking settlements or delaying trials; to the contrary, because our court system is working more efficiently than any other court system in the country, this is not the time to tinker with it.

EXHIBIT NO. 9 TO MINUTES OF COUNCIL MEETING

EX 9-1

2. Allowing discovery of "reports" will increase the cost and delay of litigation.

   (a) Putting aside for a moment the issue of whether the names of experts should be disclosed, the proposal to require that parties exchange written reports from experts other than treating medical doctors, or independent medical examiners, would greatly increase the cost of litigation to the parties, and thus be especially unfair to the plaintiffs, who do not have the resources of most defendants in cases where experts are retained.

   This increase would come in at least three different ways:

   (i) The defendants will name several experts, and plaintiffs will be required, in order to avoid malpractice and by the practicalities of any serious case, to order and pay for a written report from every defense expert. This is an expense plaintiffs do not have to incur now.

   (ii) Plaintiffs will have to pay their own experts for earlier and more extensive preparation in order for them to prepare written reports when the defense requests them.

   (iii) In many instances, experts from whom written reports would never be required, and whose trial preparation is not necessary until literally the last week prior to trial, such as economists and vocational rehabilitation specialists, will now have to be paid by plaintiffs to prepare reports weeks if not months prior to trial, in cases that would have settled anyway. This is absolutely an unnecessary cost to put on plaintiffs.

   (b) Requiring the exchange of written reports will also increase the burden on the courts and judges, because there will be numerous objections to the sufficiency of the reports, which will lead to another whole round of discovery motions prior to the trial of any case. It will also cause many major cases to be delayed, because in the last few weeks before trial both sides will claim that the other side has not adequately disclosed its experts' opinions or the bases thereof, and there will have to be hearings and postponements to resolve all these issues.

(c) Trials will last longer, because any good lawyer will object at least once during every adverse expert's testimony that the expert is going beyond the written report, and then judge and counsel will have to exclude the jury, examine the report, argue, get a ruling, and then call the jury back to resume the trial.

3. Disclosure of the names of experts will lead to difficulty for plaintiffs of retaining qualified experts, and intimidation of those retained, in any negligence claim brought against a prominent local professional.

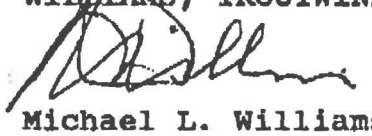
Any trial lawyer who has actually represented a plaintiff in a professional negligence case knows that when you represent a party who is making a major claim of professional negligence against a local doctor, attorney, accountant, or engineer, you must have at least one other, and hopefully more than one, well qualified local professional from that field to testify as an expert witness. Most local professionals in the same field are very reluctant to get involved, and if they knew that their involvement was going to be revealed as a certainty, even if the case is obviously one that should settle, it will be very difficult for plaintiffs to obtain qualified local experts to review and to agree to testify in cases involving prominent local defendants. I know this to be true from my personal experience in a major medical malpractice case I handled several years ago involving a local plastic surgeon, and also in a major legal malpractice case I handled recently against the largest divorce firm in the state of Oregon.

4. A favorite argument the proponents of this change make is: Oregon should enter the twentieth century like all the other states. This argument proves too much - we would have interrogatories, notice pleadings, and jammed dockets if we were like the other states. The Oregon court system is better than those in other states because of its difference.

I urge you to leave the discovery of experts alone. We do not need a change in the current practice. The proposed changes would increase costs unnecessarily, increase costs unfairly to the plaintiffs, burden the courts, and lead to practical immunity for prominent local professionals who commit negligence.

Yours truly,

WILLIAMS, TROUTWINE & BOWERSOX, P.C.



Michael L. Williams

MLW:tmf

Malpractice insurance premiums decline

By ROBERT PEAR
New York Times News Service

WASHINGTON — Medical malpractice insurance premiums, after rising sharply for more than a decade, are declining in many states around the country.

Premiums are showing declines of 5 percent to 35 percent as states have set limits on malpractice lawsuits and as doctors, faced with the possibility of damage claims in the millions of dollars, apparently have become more careful.

Medical Liability Mutual Insurance Co. of New York, which is owned by doctors in the state and is the second biggest writer of malpractice insurance in the nation, has reduced rates by an average of 5 percent.

"That's the first time our rates have gone down since the company was founded in 1975," said Donald J. Fager, vice president of the company.

Another insurer, St. Paul Fire & Marine Insurance Co., the largest source of malpractice insurance in the United States, is reducing premiums in 22 of the 42 states where it writes policies for doctors.

Beth M. Hamel, a spokeswoman for the company, which insures 30,000 doctors, said the cuts ranged from 6 percent to 25 percent.

Experts list several reasons for the decline in malpractice premiums.

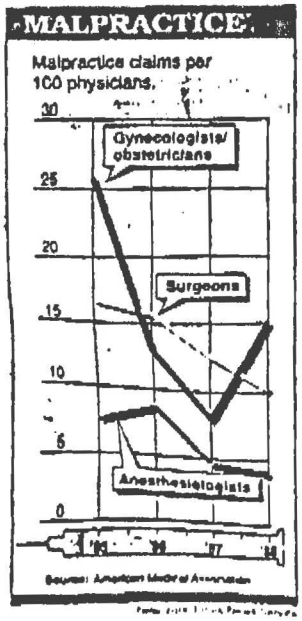
Lawsuits have prompted doctors to act aggressively to prevent injuries.

Some specialists, like anesthesiologists, have adopted standards of patient care requiring new safeguards.

Research done by the American Society of Anesthesiologists suggests that the proper use of new monitoring devices, to measure the level of oxygen in the blood, could have prevented death or serious injury in nearly one-third of the cases where anesthesiologists were accused of malpractice.

In cases where the injury was deemed preventable, the patient recovered an average of $494,000 by filing a malpractice claim.

Under a standard that took effect this January, the society requires its members to use certain monitoring devices.



Many insurers have recognized such efforts by reducing premiums for anesthesiologists.

Dr. James S. Todd, executive vice president of the American Medical Association, said 55 percent to 60 percent of doctors in private practice were now insured by doctor-owned companies.

The 43 doctor-owned companies generally do not seek to make a profit and use any profits that might be earned to reduce doctors' premiums.

The doctor-owned companies systematically review claims to identify the most frequent causes of lawsuits, like brain damage to infants or the failure to diagnose breast cancer in women, and they teach doctors how to minimize the risk of such errors.

Some of the doctor-owned companies say they have reduced the number of successful claims by showing doctors how to improve "communication skills," how to elicit more information from patients and how to keep better medical records, so they can defend their performance in court.

"A misfiled lab report can be disastrous," said Adam P. Wilczek vice president of the Medical Inter-Insurance Exchange of New Jersey, a doctor-owned company.

About half the states have adopted laws limiting the amount or type of damages that can be recovered in malpractice lawsuits. Such laws often restrict damages for "pain and suffering."

Some states permit arbitration or require the screening of claims by an administrative tribunal before lawsuits can be tried in court.

Some states have also passed laws to penalize patients who file frivolous claims.

Taken together, the changes seem to have made lawyers more selective in the cases they file on behalf of patients.

Michael Maher of Orlando, Fla., president of the Association of Trial Lawyers of America, which has 65,000 members, said doctors deserved credit for adopting guidelines and standards to reduce injuries to patients.

But he said, "Doctors are responding to the fact that they are the subject of lawsuits for negligence, and there is a great deal left to be done in encouraging quality care."

Hospitals, state government agencies and the federal government are also making more systematic efforts to identify doctors with a history of malpractice.

On Sept. 1, the U.S. Public Health Service established a national computer file to keep track of doctors who are successfully sued for malpractice or are disciplined for incompetence or improper conduct.

As a result of such actions, malpractice insurance premiums have declined dramatically in some states.

In Kansas, the premiums were cut by an average of 25 percent, effective last July 1.

In Pennsylvania, the insurance company owned by the state medical society reduced malpractice insurance premiums twice this year, by 6.7 percent on Jan. 1 and by a further 15 percent on July 1.

In Minnesota, rates for a major underwriter dropped 15 percent on July 1.

Over the last 15 months, insurance companies have reduced malpractice premiums by an average of 10 percent in Colorado, 23 percent in Georgia and 32 percent in Maine.

From 1982 to 1988, premiums rose nationally by an average of more than 18 percent a year, according to the American Medical Association.

But in the last few years, insurers say, the number and frequency of malpractice claims have declined, so they can reduce premiums because they built up enough reserves to pay claims and other expenses.

EX 9-3

Oregon Trial Lawyers Association

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September 21, 1990

Council on Court Procedures
University of Oregon School of Law
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ATTN: Gilma Henthorne

Re: Discovery of Experts

Dear Council Members:

The purpose of this letter is to summarize my oral presentation before the Council on September 8, 1990 on the subject of disclosure of expert witnesses.

I practice with a small firm, myself and one associate. My practice is limited to a plaintiff's tort practice. My personal position, and that of the OTLA are in opposition to any amendments allowing discovery of experts. The reason for my position is as follows:

1. Economics. As lawyers and judges, we are the protectors or the champions of our civil justice system. We must balance all proposals for change against the impact they will have on the access to the civil justice system. The proposals for discovery of experts, by increasing the cost of litigation, effectively deny citizens with legitimate disputes access to the court system.

Presently, in products liability or professional negligence cases, the claims cannot be economically pursued unless you are dealing with a value somewhere in the six figures. Adding the additional cost layer of discovery of experts will have further exacerbate that problem. We simply cannot allow the courtroom to be denied to those without adequate resources.

The proponents of the various proposals point out that the individual seeking the discovery would be responsible to pay the costs of the expert for whatever statements or reports are prepared. That may be, but a rule change which allows discovery of the expert, will, for all practical purposes, mandate it in all cases. Even if the defense lawyer will pay for the discovery

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EX 10-1

of my expert, if discovery is allowed, I will have no choice but to seek the same information from a lawyer on the other side. That will cost my clients additional sums of money.

2. Additional Motions. The proposed rules to allow discovery of experts will undoubtedly lead to more pretrial motions to determine the sufficiency of the expert witness statements, motion to exclude testimony that isn't in the witness statement, etc. The federal system provides a poor model. In my most recent federal court products liability case, during the last 30 days there were numerous motions to allow the amendments of agreed facts in the pre-trial order, add new experts to the list of witness, etc. Our case was prepared and we were prepared to deal with our experts. The entire stage shifted within that last 30 days. This type of motion practice will put the trial judge in the uncomfortable position of balancing the rights of one party to have full information and full discovery, against the rights of the other party to effectively present its case. It is an uncomfortable position for a judge to be in, and one that can be avoided by simply not allowing the discovery of experts. The proposals will foster these kinds of disputes and take up more court and lawyer time.

Presently, for my small office I employ a legal assistant who works almost full-time responding to requests for information, both formal and informal. These requests generally come from large firms and are "computer driven." Much of the requests are boiler-plate, often times seeking information that is not at all related to the lawsuit.

In addition to my responsibilities with the Oregon Trial Lawyers Association, I spent six years as one of Oregon's delegates to the Association of Trial Lawyers of America. Through this work, I have become acquainted with lawyers from around the country, practicing in states that allow discovery of experts. Much of their time is spent on the road dealing with this issue of discovery of experts. They refer to Oregon as a "breath of fresh air," in that we are able to avoid this time-consuming and expensive process.

3. Code Pleading. Proponents for discovery of experts say that this is the only way that they are going to get a clear understanding of what the opponents case is. Oregon's code pleading rules provide that indication without the necessity of the discovery of experts.

4. Settlement. An argument in favor of discovery of experts is that it will encourage settlements. Arguments are made that once the other side knows who the experts are, this will allow them to settle the case. All this does is encourage a system where a premium is placed on the name of the expert, rather than the merits of the case. The present system makes the lawyer focus on the facts and the merits of the case, not who may or may not be called as an expert. Settlement valuation should be based on the merits, not the perceived advantage or disadvantage of this or that expert.

We have a civil justice system in Oregon that, for the most part, we can be proud of. Our docket is remarkable that in most jurisdictions we can get a case to trial in six to twelve months. This is unheard of in most jurisdictions. Adding additional layers of motions and delay will interfere with this process.

I strongly encourage you to defeat any attempts to change the ORCP to allow discovery of experts.

Sincerely yours,

Jeffrey P. Foote
President

JPF:pb

EX 10-3

BURT, SWANSON, LATHEN, ALEXANDER & McCANN, P.C.

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DAVID W. HITTLE

September 24, 1990

Gilma Henthorne
c/o Counsel on Court Procedures
University of Oregon Law School
Eugene, Oregon 97403

Re: Outline of Testimony of Greg Smith /
Pre-Trial Identification of Medical Experts
in Medical Negligence Litigation

Dear Ms. Henthorne:

I am an associate at the law firm of Burt, Swanson, Lathen, Alexander and McCann. Prior to attending law school, I received my B.S. in nursing and practiced in intensive care units in hospitals located in Minnesota, California and Oregon.

Approximately 75 percent of my current practice involves medical negligence litigation. I am testifying solely on the issue of pre-trial identification of medical experts in medical negligence litigation. Enclosed is ethics opinion 530 which was written by the Oregon State Bar at my request. It involves the efforts of a Portland defense lawyer in a well known Portland defense firm to dissuade an expert whose identity was accidently revealed to him by me from testifying in a trial. These efforts included not only telephone contact from the defense lawyer to the expert, but also, at his initiation, telephone calls from medical peers of the expert. The identity of the expert was revealed to the defense lawyer approximately four to six weeks before trial. Approximately two weeks before trial the expert contacted me and stated that he would not be able to testify because, "I can't take the heat."

I have also enclosed an article excerpted from Medical Liability Reporter which shows that defense lawyers have routinely, in the majority of states polled, attempted to breach the clearly recognized physician/patient privilege with improper ex parte contacts with the Plaintiff's treating physician. Although the majority of appellate courts who have dealt with this issue have found that such contact is improper, no true sanctions have been developed and, as every trial lawyer knows, it is impossible to "unring the bell."

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EX II-1

The pool of potential medical experts to testify regarding standard of care issues against their medical peers in Oregon is exceedingly small compared to states such as Florida, California, New York, Illinois, etc. When considering mandatory identification of these experts, take that fact into consideration. Additionally, professionals in the medical field deal with each other on a "collegial" basis, rather than the adversarial basis of the legal profession. Once a medical professional is identified as intending to testify against one of his Oregon peers, it is, in my experience, very common for that expert to receive phone calls from other individuals questioning his motives, experience, qualifications and information regarding the proposed testimony. This process, additionally, only works to the detriment of the Plaintiff (typically a layman without substantial contacts in the medical community).

It is also important to realize that the majority of medical doctors sincerely fear being exposed as sympathetic to Plaintiff's causes in medical negligence cases. Accordingly, many doctors would not agree to even review medical records much less testify without the assurance that their identities / participation will not be revealed unless attempts at settlement fail. The "chilling effect" of pre-trial identification of these medical practitioners would again work only in favor of the Defendant physicians/insurance companies. Additionally, by preventing adequate pre-filing review - with the assurance of continued confidentiality up to the date of trial - it is likely that more, rather than fewer, frivolous law suits will be filed since Plaintiff's attorneys will be increasingly hard pressed to find a courageous medical practitioner available to review the merits of a potential claim.

The current system involving non-disclosure of <u>both</u> sides' medical liability experts, while imperfect, provides an equality of ignorance to each litigant. Neither side knows precisely which experts will be testifying for their adversary; neither side knows precisely what those experts will say. However, given the relatively specialized nature of medical negligence litigation, both sides, by the time the trial draws near, generally know what the relative strengths and positions of their - and their adversary's - cases will be. Given the well

documented abuses of Plaintiff's privileges nationwide, (Medical Liability Reporter article) combined with past abuses in Oregon, I believe that the current system is best suited to keep the parties on an equal playing field while, at the same time, minimizing the cost of litigation - including the needless intimidation of courageous medical doctors willing to review a case for an injured patient.

Sincerely,

BURT, SWANSON, LATHEN, ALEXANDER & McCANN

Gregory A. Smith

GAS/de

cc: Charles Williamson
1300 The Banks California Towers
707 S.W. Washington Street
Portland, Oregon 97205-3572

EX 11-3

LANE
POWELL
SPEARS
LUBERSKY

September 6, 1990

Fredric R. Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Re: ORCP 18

Dear Mr. Merrill:

I am writing to you to oppose the proposed amendment to ORCP 18, which would eliminate subsection B(3).

My term on the Uniform Civil Jury Instruction Committee has just expired, and the Committee spent much time in the past three years discussing the tort reform amendments to ORCP 18 (substituting the prayer from the complaint with a statement of the amount of noneconomic damages).

Given the political nature of the UCJI committee (it is composed, generally, with an equal number of plaintiff and defense personal injury lawyers), we did not reach a consensus as to how to instruct the jury. See UCJI 30.01A and the Comment thereto. But I believe it is fair to say that we did reach a consensus as to the background of the 1987 changes to ORCP 18.

As you probably know, the 1987 changes to ORCP 18 were the brainchild of Senator Frye, who wanted to get big numbers, taken from personal injury complaints, out of the headlines. Senator Frye never publicly stated any intent to do away with the concept of a cap, set by plaintiff, on the amount a plaintiff can recover. It appears that Senator Frye believed this new statement of noneconomic damages would substitute for the old prayer.

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A Partnership Including [illegible] sional Co[illegible]orations

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London, England
Los Angeles, CA
Mount Vernon, WA
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Seattle, WA
Vancouver, WA

Tokyo, Japan

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EX 12-1

It seems obvious that Senator Frye and the Legislature intended the same procedural rules apply to this new statement of damages as applied to the old prayer. That is, one would need a stipulation or order of the court to amend the statement, and the statement would set a cap as to the amount of noneconomic damages recoverable. It is not unusual for things not "part of the trial court file" to have a binding effect in the case. (This is true of most discovery now. That is, most discovery is no longer filed with the court, but often is brought to the court's attention by affidavit or otherwise, and is used by the court to make rulings, both pretrial and at trial.)

If you want "to fix" Rule 18, don't eliminate subsection 18(B)(3). Rather, you could eliminate Rule 18(B) altogether (and the exception provided in Rule 18(A)(2)). But in keeping with Sentator Frye's intent, I would suggest the following language be added to Rule 18(B)(3):

> "Once the statement has been given, it can be amended only upon written leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires. The jury, upon request of any party, shall be instructed as to the amount of noneconomic damages claimed, which will be the limit of noneconomic damages which can be recovered."

The first sentence adopts language from Rule 23 relating to amendment of pleadings. The second sentence reflects Oregon law relating to the prayer of the complaint. I believe my language takes care of the inquiries received by the Council and reflects the original intent of the 1987 Rule 18 tort reform changes. On the other hand, the Council's proposed elimination of Rule 18(B)(3) does not reflect the original intent of these 1987 changes.

Please call me if you have any questions. Thanks for your consideration of this matter.

Very truly yours,

James L. Hiller

EX 12-2

July 30, 1990

MEMORANDUM

TO: **EXPERT DISCOVERY SUBCOMMITTEE:**

Lee Johnson, Chair
John Hart
Mike Starr

FROM: **Fred Merrill**

RE: **Draft Memorandum to Council**

The following is a suggested draft of a memorandum to the Council for discussion at our meeting at 10:00 a.m on Monday, August 13, 1990, in Mike Starr's office. It would be nice if we could move a few more points up into the section of agreed points.

MEMORANDUM

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: **EXPERT DISCOVERY SUBCOMMITTEE**

RE: **Expert Discovery Rule**

The subcommittee believes that the Council should take up the area of discovery of facts known and opinions held by expert witnesses. The members agree that the rule relating to expert discovery should be codified and included in the ORCP so there is uniform treatment of the issue in all courts in the state. The subcommittee has also identified the following as the issues that should be addressed in the codification, but has been unable to agree on the way to resolve the issues. Possible language for drafting the rule is given for each issue. Provisions relating to discovery of expert witnesses would most logically fit under ORCP 36 B(4).

1. Should there be any discovery from expert witnesses at all?

Except as otherwise provided in these rules there shall be no discovery of facts known and opinions held by persons to be called as expert witnesses except upon stipulation between or among disclosing parties. (Adapted from Bar committee)

2. Should the identity of the expert witness be discoverable?

A. Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and address of any person the other party reasonably expects to call as an expert at trial. (OADC draft)

B. Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney stating the subject matter on which each expert whom the other party reasonably expects to call as a witness at trial is expected to testify. (Bar committee draft)

3. Should the qualifications of the expert be discoverable?

Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and address of any person the other party reasonably expects to call as an expert at trial and shall disclose in reasonable detail the qualifications of each expert witness. (New draft -- adapted from NY CPRL 3101(d)(i))

4. Should the expert be required to reveal anything other than identity and qualifications?

... stating in reasonable detail the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. (Both Bar committee and OADC drafts -- taken from federal rules)

5. What time limits should be used for any discovery allowed?

A. Time limited by date of request

1. The statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial. (OADC draft)

2. The party upon whom a request has been shall deliver the statement within 30 days after service of the request. (Bar committee draft)

B. Exception for late determination or request

1. ... unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial. (OADC draft)

2. When a party for good cause shown retains an expert an insufficient period of time before the commencement of trial

to provide a statement within the time required by this rule, the party shall not be precluded from introducing evidence through the expert solely on the grounds of non-compliance with this rule. In such case, upon motion or on its own initiative, the court may make whatever order may be just, at or prior to trial. (Bar committee draft)

3. If the identity of the person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, the statement shall be delivered immediately upon such determination. If the request is made less than 30 days before trial, the statement shall be delivered within ten days. If the request is made less than ten days before trial, the statement shall be delivered before the commencement of trial. (New draft)

C. Time to respond limited by filing date

... provided however that no statement is required to be delivered before the expiration of 120 (45) days from the date of filing of the complaint or other initial pleading in the case. (OADC draft -- federal rule provides 45 days)

D. Time to respond tied to trial

1. The statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial. (OADC draft)

2. The statement shall be delivered not less than 3 (5) days before trial. (New draft)

E. Court discretion to change time limits

1. Upon motion for good cause shown, the court may lengthen or shorten any of the time requirements specified in this rule. (Bar committee draft)

2. The court may allow a shorter or longer time. (New draft)

3. The court may not change any of the time requirements specified in this subsection. (New draft)

6. Should expert discovery be limited in medical malpractice cases?

A. In an action for medical, dental or podiatric malpractice, a party, in responding to a request for a statement, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph. (NY CPLR

3101(d)(1) -- general rule requires revealing name, qualifications, subject matter, substance of facts and opinions, and a summary of ground for opinion)

B. Except as otherwise provided in these rules, there shall be no discovery of facts known and opinions held by persons to be called as expert witnesses in any action for medical, dental or podiatric malpractice. (New draft)

7. <u>Should there be a duty to supplement responses</u>?

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

B. A party is under a duty reasonably to:

(i) Supplement a statement when new or additional information within the scope of this rule is identified by the party;

(ii) Amend a prior statement if the party obtains information upon the basis of which (a) the party knows that the statement was incorrect when made, or (b) knows that the statement though correct when made is no longer accurate and the circumstances are such that a failure to amend the statement is in substance a knowing concealment. (Bar committee draft -- based upon FRCP 26(e))

8. <u>Should additional discovery beyond the written statement be available</u>?

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

B. No other or further discovery of experts ... shall be permitted except upon stipulation between or among disclosing parties, or except as may otherwise be provided in these rules. (Bar committee draft)

C. Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. (NY CPLR 3101(d)(iii))

D. Upon motion, the court may order further discovery by

other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate. (FRCP 26(b)(4))

9. Should expert witnesses be defined?

A. As used in this rule, the term "expert witness" includes any person who is expected to testify at trial in an expert capacity, regardless of whether the witness is also a party, an employee, an agent or a representative of the party or has been specifically retained or employed. (OADC draft)

B. As used in this rule, the term "expert witness" means any person testifying in accordance with ORS 40.410. (New draft)

10. What sanctions should be provided for failure to comply with the request for statement?

A. Any party who has requested a statement under this rule may move to determine the sufficiency of the statement delivered. The provisions of ORCP 46 A(4) apply to the award of expenses incurred in relation to the motion. (Bar committee draft)

B. If a party fails to comply with the duty to furnish or supplement a statement as provided by this rule, the court may exclude the expert's testimony if offered at trial. (OADC draft)

C. If a party fails to serve a statement in response to a request under this rule or fails to provide the information required by this rule for any expert which the party expects to call as a witness at trial, the court in which the action is pending may take any action authorized under ORCP 46 D. If a statement is served, however, failure to provide the information required by this rule shall not cause the court to exclude testimony of an expert witness if offered at trial. (New draft)

11. Should there be a provision for payment of expert witness fees if expert discovery is allowed?

Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert witness a reasonable fee for time spent in responding to discovery under this rule. (New draft -- adapted from FRCP 26 (b)(4)(C))

12. If expert discovery is allowed, should notice pleading be adopted?

Amend ORCP 18 A to conform to FRCP 8(a).

ORS 40.410 and NY CPLR 3101(d) attached.

40.410 Rule 702. Testimony by experts. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. [1981 c.892 §58]

NY CPLR 3101

(d) Trial preparation. 1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

(ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial. Notwithstanding the provisions of section one hundred forty-eight-a of the judiciary law and the rules of the appellate divisions adopted pursuant to subdivision one of such section which authorize or otherwise require the matter to be heard before a medical malpractice panel, the offer may be conditioned upon all parties agreeing to waive the hearing of the matter before the panel. No other condition may be attached to the offer by any party. Within twenty days of service of the offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule thirty-one hundred seven of this chapter and if the offer was conditioned upon waiver of the hearing of the matter before the panel, the panel shall not be utilized. If any party, having made or accepted the offer, fails to make that party's expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action.

(iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

August 31, 1990

MEMORANDUM

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: **EXPERT DISCOVERY SUBCOMMITTEE**

RE: Expert Discovery Rule

The subcommittee agrees on some issues relating to expert discovery and has been unable to agree on others. The purpose of this memorandum is to identify areas of agreement and suggest a draft for a rule and to identify areas of disagreement and spell out alternatives. For areas where the subcommittee agrees, suggested language for an expert discovery rule is given. For areas where there is no agreement, draft language reflecting different positions is given.

A. ISSUES WHERE THERE IS AGREEMENT

1. The subcommittee believes that the Council should take up the area of discovery of facts known and opinions held by expert witnesses.

2. The subcommittee believes that the rule relating to expert discovery should be codified and included in the ORCP so there is uniform treatment of the issue in all courts in the state.

As indicated below, the subcommittee could not agree that there should be expert discovery, but if discovery were to be allowed the subcommittee agreed the following would be a desirable form of the expert discovery rule.

3. If there is to be expert discovery, at least the identity of the expert should be discoverable.

> **Upon request of any party made more than 30 days before trial, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and business address of any person the other party reasonably expects to call as an expert at trial.**

4. Although the committee could not agree whether anything other than the identity of the expert witness should be discoverable, they did agree that if discovery is allowed beyond identity, it should be limited to the subject matter and the substance of the facts and opinions to which the expert is to testify and should

not include a summary of the grounds for each opinion.

> **... stating in reasonable detail the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify.**

5. The general rule for discovery of experts should apply to medical malpractice cases. The subcommittee rejected the New York approach of limiting expert discovery in medical malpractice cases.

6. The subcommittee agreed that discovery should be limited to that provided specifically in the ORCP.

> **Except as may be otherwise provided by these rules, by law, or by statute, no other or further discovery of the opinions of expert witnesses shall be permitted except upon stipulation between or among disclosing parties.**

7. No attempt should be made to define "expert" or "expert witnesses" within the rule. The subcommittee felt this was a matter covered by the law of evidence.

8. If a party is required to provide a statement relating to identity or testimony of an expert witness, penalties for noncompliance should be included with other discovery sanctions under Rule 46. Failure to respond at all should be included in ORCP 46 D. Failure to respond adequately should be grounds for a motion to comply under ORCP 46 A(2). Failure to comply with a court order to furnish a statement should be included under ORCP 46 B.

B. ISSUES WHERE THE SUBCOMMITTEE DID NOT AGREE

1. Should there be any discovery at all from expert witnesses?

> Alt. a: Language in section A above.
>
> Alt. b: **Except as otherwise provided in these rules, there shall be no discovery of facts known and opinions held by persons to be called as expert witnesses except upon stipulation between or among disclosing parties.**

2. Should the qualifications of the expert witness be discoverable?

> Alt. a: Language in A(3) above.
>
> Alt. b: **Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and address of any**

person the other party reasonably expects to call as an expert at trial and shall disclose in reasonable detail the qualifications of each expert ...

3. When should discovery be required and is supplementation of any statement furnished required?

Alt. a: **The statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial. The court may allow a shorter or longer time. The statement may be amended without leave of court any time up to 30 days before trial. Otherwise, a party may amend the statement only by leave of court or by written consent of the adverse party. Leave of court shall be freely given whenever justice so requires.**

Alt. b: **The statement shall be delivered not less than 30 days prior to the commencement of trial. A party who has furnished a statement in response to this rule and who decides to call additional expert witnesses at trial not included in such statement is under a duty to supplement the statement by immediately providing the information required by this rule for such additional expert witnesses.**

4. Should there be a provision for payment of expert witness fees if expert discovery is allowed?

Alt. a: **Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert witness a reasonable fee for time spent in responding to discovery under this rule.**

Alt. b: No reference to expenses.

5. If expert discovery is allowed, should notice pleading be abolished?

Alt. a: No change to existing rule.

Alt. b: Amend ORCP 18 A to conform to FRCP 8(a).

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURE

FROM: MIKE STARR, Member of Subcommittee on Discovery of Experts

I am against any discovery of expert witnesses. As a member of the Council and as a practicing civil trial lawyer for 28 years, I find no convincing evidence that the status quo should be changed. Each Council member has been presented with written materials both pro and con on this subject, including a proposed discovery of experts rule studied by the Committee on Procedure and Practice and copies of recent articles in the Oregon State Bar Bulletin by Procedure and Practice Committee members David Brewer and Charlie Burt. These materials summarize the positions on both sides and the following reasons have been identified in opposition to discovery of expert witnesses. It should be noted that the Committee on Procedure and Practice, which is made up of a fairly even number from both the plaintiff and defense bars, could not reach a concensus on the subject and refrained from voting on a motion either for or against discovery of experts.

The current ORCP rules on discovery should be retained, including non-disclosure of expert witnesses for the following reasons:

1. Discovery of experts will add to the already existing "paper chase." (To "boilerplate" requests for production we have now added "boilerplate" requests for disclosure of expert witnesses.)

2. It will increase the cost of litigation. (Additional billable hours will now be generated in civil suits for time spent requesting disclosure, preparing statements of expert witnesses opinions, testing the sufficiency of experts statements, requesting and opposing sanctions, etc., not to mention the additional time impositions on the trial court to referee disputes that will arise over disclosure or lack of it.)

3. It will result in delay and increase the time necessary for resolving litigation. (Non-disclosure, late disclosure or inadequate disclosure may cause the trial court to postpone a trial date.)

4. Disclosure will result in some experts being harassed, intimidated or coerced, especially in medical malpractice claims. (Disclosure will make it even more difficult to obtain medical, dental, legal, etc. experts in professional liability claims.)

5. Disclosure will result in increased claims with the PLF and the potential for increased malpractice premiums. (The attorney preparing a summary of his experts testimony is at risk that the trial judge will find the statement inadequate and exclude the expert witness from testifying, thereby subjecting the attorney to a claim for professional negligence.)

6. Disclosure favors institutions over individuals. (The individual plaintiff or defendant does not have the financial resources of the individual party represented by an insurance company or the corporate plaintiff or defendant.)

7. Under our current practice, disclosure of expert witnesses is the rule rather than the exception. (In almost all cases disclosure occurs during settlement negotiations--where is the empirical data showing there is a large number of civil cases where disclosure does not occur.)

Our Council is composed of experienced trial attorneys and judges, most of whom have practiced both in federal and state court. I suggest that each of you call on your personal experiences and compare state v. federal discovery procedures. I believe that you will conclude that the state system of discovery is less time consuming and more cost effective. We must be concerned with the increasing costs of litigation. In a letter to the Procedure and Practice Committee, Assistant Attorney General James E. Griffin summarized this issue very well when he said, "There is no free lunch, and every time we change legal procedure we foster more litigation between opposing counsel over its meaning and intent, additional CLE activities aimed at arriving at a determination thereof, and greatly increased hours "necessarily" billed to any given case. Society pays for our fiddling, whether it wanted to dance or not." If we don't keep our litigation costs down the public will demand far greater changes in civil procedure than disclosure of expert witnesses. Our current discovery tools are adequate. There is no need for change. The gain is simply not worth the pain.

MEMORANDUM

To: Council on Court Procedures

From: Judge Lee Johnson

Subj: Pretrial Discovery Expert Testimony.

Introduction

John Hart, Mike Starr and I were appointed as a subcommittee to study and report back to the Council our recommendations relating to pretrial discovery of expert testimony. Fred Merrill has prepared for you a report wherein the subcommittee has identified the major issues and the points upon which we were in agreement. We were not able to reach agreement on a proposal. Rather, we each agreed to submit a separate memorandum stating our position.

My Position

At a reasonable time prior to trial parties should be required to provide a statement identifying the experts expected to testify at trial and summarizing their opinion. Existing discovery rules regarding treating health care providers and independent medical examiners should be retained. Any other discovery of expert testimony should expressly be prohibited. Depositions or written verbatim statements of direct testimony of experts as used in the Federal Courts should be prohibited except by agreement of all parties.

Discovery of expert testimony in the manner proposed should also be accompanied by rule changes permitting notice pleading and abolishing most pretrial pleading motions.

Discussion

It would seem self-evident that both sides should know before trial the identity and what the other side's expert is going to say. The opponents of this position argue that change in ORCP is not needed because in most cases the parties do in fact have this knowledge. This is in part because under present practice a party often may acquire such information by persistent pleading motions, motions for summary judgment and investigation. This is burdensome and leads to abuse of procedural devices devised for another purpose.

Another reason that parties have this knowledge is because many lawyers have come to the view that in spite of present rules, mutual discovery benefits both sides. These are reasons for changing the rules, not for retaining the status quo.

The year is 1990, a time for Oregon to join the twentieth century and the rest of the nation is permitting limited discovery of experts.

The error of the status quo argument is that it ignores the untenable position left to the litigant in those cases where he is truly in the dark as to the substance of and identity of expert testimony. In cases such as malpractice or products liability, the opponent can only speculate as to the basis of liability. Cross examination in the face of such ignorance is dangerous if not impossible.

Opponents also contend that pre-trial discovery of experts will result in peer pressure and coercion of expert witnesses. Considering the experience in Federal courts and the forty-eight other states that permit expert testimony discovery and the multitude of malpractice actions that are filed and prosecuted, it is questionable if discovery deters experts from testifying against their fellow professionals. If this is a genuine concern, then shorten the time before trial that the identity of the expert must be revealed.

The longstanding debate in Oregon over discovery of expert testimony usually focuses on the pros and cons of that issue and ignores the debilitating impact that the present rules have on the efficiency and integrity of civil procedure generally. Motions for summary judgment are commonly filed not to dispose of issues but as a poorly disguised attempt to discover the content and identity of expert testimony.

As a result the Plaintiffs' bar became so frustrated that legislation was introduced to abolish summary judgment in tort cases. ORCP 47E, providing for the summary by counsel of expert testimony, was adopted to meet this complaint. Summary judgment is a viable device for pre-trial identification and disposition of non-fact issues. Abuse of summary judgment as a discovery device cannot be avoided if lawyers are otherwise foreclosed from discovery of the opponent's position.

Like summary judgment, pleading motions to dismiss, to strike and make more definite and certain are commonly employed to discover the substance of the opponent's expert testimony. In my own jurisdiction, the judges have adopted the "Crookham rule" which is that motions to ascertain the opponent's position are denied as a matter of course if the information can be gained by deposition. However, parties will be required to plead with specificity those matters which require expert testimony. The rationale for the rule is that if discovery is available, it is the more efficient and effective method of ascertaining an opponent's position. However, pleading specific facts is necessary where discovery is not available.

To bring Oregon into the twentieth century, we need not only limited discovery of experts but also abandonment of the ancient concepts of "code pleading" and adoption of notice pleading. The two go hand in hand. With discovery of experts, there is no rational justification for fact pleading. It is unreasonable to expect either party to know and be able to state all the material facts at the commencement of a lawsuit. The technical rules for pleading such things as fraud and statute of limitations are merely grease for the pettifogger.

With the reforms suggested, we would have a procedural scheme whereby a litigant could with minimum expense and little fuss initiate his or her claim. The complaint would be a general statement of the claim. Defendant would file an answer to acknowledge that he intends to defend but would not be put to the task of pleading every conceivable defense. Both parties would then proceed by means of deposition, statements of experts and admissions to determine the other's position. Pre-trial disposition of the case or issues, could be accomplished through summary judgment.

Adopting the reforms suggested not only conforms with contemporary judicial thought but would also avoid many of the abuses that have occurred in both the Federal and more liberal state systems. Wide open discovery of experts and the use of lengthy verbatim written statements of direct testimony would be avoided. The system does not permit the abuses and costs associated with interrogatories. The cost and expense of preparing pre-trial orders would be avoided except in special complex cases.

M E M O R A N D U M

TO: RLM

FROM: DJH DJH

DATE: 9/6/90

RE: Council on Court Procedures Meeting on Proposed Amendments to the Oregon Rules of Civil Procedure

FILE NO.:

****

I agreed to provide you with some background material on the reasons why I was opposed to the proposed changes to ORCP 18B(3), calling for the elimination of that rule. Originally, I had hoped to have time to do some research for you on how this is handled in other jurisdictions. The only thing I have been able to do in the time since I spoke to you is to find the corresponding rule in Washington's Rules of Civil Procedure and some cases interpreting that statute. The rule in Washington is contained in the statutes RCW 4.28.360. I have attached a copy of that statute and some cases interpreting it for your review. I have also attached a copy of a letter from Win Calkins, a fellow Board member of OADC, to Fred Merrill regarding ORCP 18 and the proposed change.

Moving to some of the other proposed changes, I will start with ORCP 7. As I read the proposed changes, it appears that the intent is to make it clear that the plaintiff must make some attempt at actual personal service on the defendant before he may use the alternative method of service on the Department of Motor Vehicles. In fact, the proposed change to ORCP 7D(4)(a)(i) provides that the DMV service can be used for a defendant **who cannot be served with summons by <u>any</u> method specified in §7D(3) of this rule.**

The proposed changes also add ORCP 7D(7) which defines "when a defendant cannot be served" as only including a defendant who cannot be served with summons by <u>any</u> method specified in ORCP 7D(3). It requires the plaintiff to attempt service by <u>all</u> of the methods specified in §D(3). The default provisions of 7D(4)(c)(iii) also provide that the affidavit submitted by the plaintiff in support of a motion for order of default must state that service of summons could not be had by <u>any</u> method specified in §7D(3) of ORCP.

I am concerned about some potential confusion that the comment, as proposed, may create. If we are looking at the proposed comment as published in the Advance Sheets on page 4, the last sentence of the comment reads:

> "A new subsection, ORCP 7D(7), makes clear that the plaintiff is only required to show a reasonable attempt to use any method available under ORCP 7D(3), similar to the showing required for use of 7D(6), and not the extensive search for defendant required in cases interpreting earlier statutory language such as Ter Har v. Backus, 259 Or. 478 (1971)."

The comment makes it seem that the plaintiff need only attempt service by any one method of the ones specified in ORCP 7D(3), contrary to the clear language of ORCP 7D(7), which requires that the plaintiff attempt service by all methods specified.

I have had enough experience litigating DMV service under the requirements of Ter Har v. Backus and the rules prior to ORCP 7, to know that plaintiffs will latch on to this uncertainty in an attempt to undermine what it appears the Council on Court Procedures is attempting to accomplish here.

The laxity of the current rules that requires the Council's attention to this section, can be evidenced by my experience with Tom Howes in a recent case scheduled for trial next week. Tom, rather than attempting personal service at the address given by the defendant at the scene of the accident and given to DMV, simply served through DMV. The defendant had lived at her address, which she left at the scene of the accident and with DMV, for in excess of 15 years. She did not move between the time of the accident and the time of DMV service of the summons and complaint. Further, because of the injury she sustained in the accident, she did not leave her home during the 6-7 months prior to DMV service by plaintiff. She was at home, readily available for personal service of the summons and complaint. It would seem to be an unnecessary relaxation of due process requirements for Oregon not to require personal service in a situation such as I have outlined above. I believe the language of your proposed change to ORCP 7 is excellent. I think the last sentence of the comment should be addressed to avoid the ambiguity I am concerned about.

I am in favor of your proposed changes to ORCP 43. I had to litigate this for Martin in the now infamous Blaze Construction cases. Judge Tiktin was reluctant to and ultimately refused to exercise any jurisdiction over a non-party to the litigation to produce documents, whether subpoenaed and noticed for deposition, or otherwise. It is likely he would have been reluctant to have exercised any jurisdiction in "a separately filed action for discovery." With the language of ORCP 43D as you have proposed the

changes to it, and the comments in ORCP 55 relative to subpoenas to non-parties, our problem would have been solved in Blaze Construction, at least in a jurisdictional sense.

Your proposed changes to ORCP 55H refer to a definition of "health care facility" in ORS 442.014. There is no ORS 442.014. I think you are most likely referring to 442.015(13)(a) through (d).

With respect to the Council's proposed changes to ORCP 68, the only question I have is whether it is now time to consider making ORCP 68 clearly the applicable procedure for claims for attorney's fees as damages, as opposed to claims for attorney's fees which are authorized by statute or by contract to be recovered as costs and disbursements. As an example, I am litigating a case in which the plaintiff entered a settlement agreement with the defendant. In breach of that settlement agreement and release of all claims, the plaintiff filed a lawsuit. We were successful on summary judgment in getting the plaintiff's claim dismissed. We were also successful on summary judgment in establishing that the plaintiff had breached her contract of settlement with us and that the reasonably foreseeable damages which flowed from the breach were our attorney's fees in defending the tort action. The Court was convinced that ORCP 68 was not the procedure to be used to determine the amount of attorney's fees as damages, but rather that was a question for a jury to decide. There is certainly no difference in the issues to be determined as to the reasonableness of an attorney fee in the case I described from one in which attorney's fees are recovered as costs and disbursements under ORCP 68. I am wondering if the Council would prefer to see all such disputes resolved by the procedure outlined in ORCP 68. I can see no reason not to resolve them all that way.

Lastly, you and I have discussed on several occasions the pros and cons of the discovery of the identity of an opponent's experts and to some extent their opinions and conclusions. Suffice it to say that my position has not changed. I remain in favor of that form of discovery. Every time I have had occasion to employ it, either in Washington state court or in Federal Court in Oregon, it has without question aided in the resolution of the cases by way of settlement.

I also am in complete agreement with Fred Merrill's decision that the Procedure and Practice Committee's recommendation to change ORCP 54 to allow for pre-judgment interest on a settlement demand which is rejected is substantive and not something that should be undertaken in a rule of civil procedure, particularly since the legislature has had before it in each of the last five sessions a bill for pre-judgment interest which has been defeated. I know that the legislature was presented with evidence in the last session from an insurance company representative who handled several states, including Oregon. Each of the other states had pre-judgment interest. Their statistics showed clearly that pre-judgment interest did nothing to speed the resolution of cases and

did nothing to change the amount awarded in cases as actual damages. All it did was increase the cost of litigation by adding something to the awards in the cases. As such, it is hard to argue that pre-judgment interest on unliquidated damage claims is anything but a revenue enhancer for the plaintiff's bar.

I hope these ideas have been helpful to you. Please let me know what happens in your September 8, 1990 meeting.

DJH:skc
Attachment

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August 3, 1990

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Gentlemen:

Enclosed is a copy of the latest issue of the Litigation Journal published by the Oregon State Bar, Litigation Section. I enclose this issue because it contains the results of a survey conducted by the Journal concerning the procedural issues of expert discovery, interrogatories, single case assignment, and videotape reporting. I would be happy to answer any questions about the survey results. I would also be pleased to publish any comments (in the form of a short article or letter to the Editor) which you may have in connection with these issues. The next deadline is September 10.

Very truly yours,

Michael R. Seidl
Journal Editor

Enclosure
MRS:wlc
cc: Jeff Batchelor
Larry Riff (Assistant Editors)

Litigation Journal

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VOLUME 10 • NUMBER 2

WHAT'S INSIDE

SURVEY RESULTS INSIDE

The results of the survey published in the last issue are located on pages 8-11.

Survey Results

Limited Expert Discovery, Single Case Assignment Favored

By Cynthia Hull

In the last issue of the Litigation Journal a survey was published to explore the views of Section members on proposed changes to the Oregon Rules of Civil Procedure. The changes would allow limited discovery of experts and introduced written interrogatories as a discovery tool in Oregon. The survey also probes Section members' views on the single case vs. master docket system and on the use of videotape reporting of trials rather than stenographic reporting.

One hundred and fifty-two attorneys responded, representing over 12 percent of the Section. Of those respondents, 78% had their primary office in Portland. Willamette Valley practitioners represented another 12%. The remaining 10% comprised of 5% from Southern Oregon, 2% from the Oregon Coast and 2% from Eastern Oregon. Willamette Valley and Portland practitioners tended to have the most experience with federal court practice. This is significant because federal practice permits expert discover and the use of written interrogatories.

Lawyers at all experience levels responded to our survey. New lawyers (0-5 years in practice) and more experienced lawyers (over 21 years in practice) each comprised 16% of respondents. Lawyers practicing 6-10 years made up 24% of those responding and lawyers with 11-20 years experience made up the remainder.

Lawyers in all practice areas were fairly equally represented among respondents. Personal injury plaintiff practitioners, commercial law defense practitioners and general practitioners each comprised approximately 21% of respondents. Commercial law plaintiff lawyers made up 9% of those answering the survey. Personal injury defense practitioners made up the largest group of respondents (27%) with those practicing other types of law comprising 1.3% of those responding.

DISCOVERY OF EXPERTS

The proposed amendments to ORCP 36

(please continue on page 6)

Council Studies Proposals from Committee

By Jack F. Olson

The Procedure and Practice Committee debated the questions of discovery of experts and written interrogatories over a period of three years. Opinions within the committee were deeply divided. In order to get beyond general discussions of discovery in the abstract, subcommittees were directed to draft proposals which provided for interrogatories and discovery of experts but reflected the concerns that had been voiced by committee members.

After specific proposals were completed, opinions on the committee remained divided. The Procedure and Practice Committee then sought input from the bar at large. The Oregon State Bar Bulletin provided the forum. The specific proposals and pro and con articles appeared in the December issue. Response from the bar was relatively light and divided. Finally, the Procedure and Practice Committee decided to transmit its work product to the Council on Court Procedures without recommendation. That has been done.

The work by the Litigation Section provides an important contribution to the

(please continue on page 12)

Survey Results, *continued from page 1*

would permit limited discovery of expert witnesses. The text of the proposed new rule was published in the December, 1989 Bar Bulletin. This proposal constitutes a major departure from the current version of the rule which does not permit any sort of discovery of experts. Proposed ORCP 36B (4) would require a "written statement" prepared by counsel stating the identity of each expert expected to be called as a witness and the subject matter about which each expert would testify. The written statement must state the substance of the testimony including the facts and opinions and the grounds for the expert's opinions. No other discovery of experts would be permitted. The proposed rule would not apply to non-testifying experts.

Proponents of permitting discovery of experts argue that in a system dependent on the well-informed trier of fact, discovery of experts is necessary to conduct a well-planned cross-examination of the experts; they maintain that cross-examination of an expert often leads to the most telling expert testimony of all.[1] Further, proponents assert that enhanced discovery of experts promotes settlement. They also point out that Oregon is the only forum which does not permit the routine discovery of experts, and therefore permitting discovery of experts would eliminate one reason for forum shopping between Oregon's state and federal courts.[2]

Opponents assert that permitting discovery of experts will add to the cost of litigation by expanding the scope of discovery and is usually unnecessary in most cases because the experts are known.[3] Because of peer pressure which discourages doctors from testifying against one another, opponents fear that permitting expert discovery will favor wealthy clients over clients with limited resources as wealthy clients can always look outside the local community for experts.[4] Finally, opponents argue that expert discovery simply invites additional pre-trial motions; for example, motions to determine the sufficiency of information produced pursuant to an ORCP 36B (4) request.

SURVEY RESULTS

Adoption of a rule permitting discovery of experts is favored by over two-thirds of those responding. Sixty-eight percent answered that they favor some form of expert discovery. Newer bar members, those practicing five years or less, supported a change to allow expert discovery by a greater proportion than any other group, with 87% supporting a change. Those attorneys practicing the longest, more than 21 years, did not favor expanded discovery with 57% answering that they opposed any change.

Response by practice area offered no surprises. Plaintiff personal injury practitioners overwhelmingly opposed the change. Sixty-nine percent of the personal injury plaintiff practitioners answered that they did not favor permitting discovery of experts. The remaining practice groups all favored discovery of experts with commercial law defense practitioners supporting the change by the greatest proportion: 94% favored discovery of experts.

Support for proposed ORCP 36B(4) is less than that for the general proposition of permitting discovery of experts. Only 58% supported adoption of the rule in its current form. The most often suggested modification to the rule was to allow full discovery including depositions of experts. Others wanted greater limitations and proposed that the rule be changed to prohibit any direct contact between one party's expert and opposing counsel. Another suggested change would prohibit demands for discovery of experts within 30 days before trial. Several respondents suggested that opposing parties be given 14 days to find rebuttal experts to counter newly disclosed experts.

Two-thirds of lawyers responding felt that proposed rule ORCP 36B(4) would not add significantly to the cost of litigation. The personal injury plaintiff practitioners felt differently with 69% answering that the proposed rule would increase litigation costs. Most lawyers believed that discovery of experts would promote settlement of cases. Defense practitioners, both personal injury defense and commercial law defense, believed most strongly that adoption of the rule would promote settlement (71% and 77% respectively). Plaintiff practitioners were less convinced; only 26% of personal injury plaintiff practitioners and 45% of commercial law practitioners stated that the rule would promote settlement.

USE OF INTERROGATORIES

Proposed ORCP 42 would add written interrogatories as a discovery device in Oregon. The rule is modeled after Fed. R. Civ. Pro. 33. The purpose of proposed ORCP 42 is "to obtain factual information which is within the knowledge of the party to whom it is directed. . . ." Interrogatories would be limited to factual information and could not be used to discover information discovered by counsel, the identity or opinions of retained expert witnesses, factual contentions or legal theories. The rule would limit interrogatories to 20, including subparts.

Proponents of written interrogatories believe that adding written interrogatories as a discovery device could provide a more cost-effective discovery system in Oregon.[5] The use of written interrogatories would reduce reliance on more expensive means to discovery factual information such as requests for production of documents, depositions and requests for admissions.[6] Further, written interrogatories would reduce the number and length of depositions and as a result, proponents believe that the judicious use of interrogatories would reduce the overall costs of discovery.[7]

Opponents disagree with the contention that adding written interrogatories to Oregon's discovery system would reduce the cost of discovery.[8] They believe that there is no need to add a new level of discovery to an already complete and effective system. Written interrogatories, opponents contend, will result in additional time and money spent on the discovery process.[9] Further, opponents argue that written interrogatories would merely add another layer of paper to pretrial discovery and would not obviate the need for other forms of discovery.[10]

SURVEY RESULTS

Survey respondents narrowly agreed with opponents of written interrogatories: 52% opposed any form of written interrogatories. Comparing responses by geographic region, Portland and Oregon Coast practitioners were the only groups to favor written interrogatories. The only practice area to support written interrogatories were commercial law defense practitioners with 68% favoring interrogatories. Personal injury plaintiff practitioners opposed written interrogatories by 66%. Respondents opposed

(Please continue on next page)

adoption of proposed rule ORCP 42 by a greater degree than the general proposition of using written interrogatories. Sixty-five percent opposed adopting ORCP 42 in its current form, but strongly supported a limit of 20 on the number of interrogatories that could be served on any party.

The most common objections to the use of interrogatories echoed the arguments made by opponents of the proposed rule. Respondents stated that interrogatories were a waste of time and were simply "makework." Respondents also objected to the addition of written interrogatories because "Oregon's method works" and "adequate discovery methods already exist." Finally, respondents cited additional costs and the potential for abuse as objections to adding written interrogatories to the discovery process.

Fifty-seven percent of respondents believed that the use of written interrogatories would increase the cost of litigation. By practice area only commercial law defense practitioners believed otherwise. In examining responses by years of experience, those attorneys practicing five years or less were the only group that believed written interrogatories would result in a decrease in the cost of litigation. Further, respondents overwhelmingly believed that written interrogatories would not promote settlement of cases. Only a third of respondents felt that written interrogatories would promote settlement. Commercial law defense practitioners felt otherwise, 86% answered that they believed written interrogatories would promote settlement.

SINGLE CASE ASSIGNMENT

Recently, courts have been exploring the merits of a single case assignment as an alternative to the master docket system. In a master docket system, cases are not usually assigned to a trial judge until the day before trial. Preliminary matters and motions are decided by a presiding judge or assigned to another judge, not necessarily the trial judge, for resolution. In a single case assignment system, a case is assigned to a judge as soon as the case is filed and that judge handles all preliminary matters and motions as well as the trial itself. Marion County has been conducting a pilot program using the single case assignment system.

SURVEY RESULTS

Survey respondents gave inconsistent responses on the single case assignment vs. master docket question. Forty-nine percent said they favored the present master docket system. While the inconsistency in responses could be viewed as undermining survey results on this issue, respondents clearly preferred having a case assigned to a single judge throughout the case. Additional evidence of the bar's dissatisfaction with the master docket system could be found in Multnomah County practitioners' responses to questions probing their satisfaction with the present use of pro-tem judges for most summary judgement motions: 57% responded that they were unsatisfied with the current system. Whether those respondents would prefer a single case assignment remains unclear.

VIDEOTAPE RECORDING OF A TRIAL

It is clear that Oregon practitioners do not favor abandoning stenographic reporting in favor of videotape reporting of trials. Videotape reporting of trial substitutes video equipment for the ever-present court reporter. The videotape equipment records both words and actions on videotape. Preservation of a visual record of a trial has obvious benefits: reviewing courts have a true record of the trial; words and actions, witness actions, reactions, facial expressions and other nuances are available for review by the jury and/or the reviewing court. Despite these benefits, Oregon lawyers do not support using videotape reporting.

SURVEY RESULTS

Only 12% favored using videotape reporting of trials instead of stenographic reporting. No classification of practitioners stood out from others as supporting videotape reporting. One thing respondents did favor was retaining stenographic reporting. Eighty-nine percent of respondents favored retaining stenographic reporting of trials. Only 20% of those responding had ever practiced in a court which used videotape reporting. The survey results may perhaps be explained by the respondents' unfamiliarity with the new technology.

CONCLUSION

Perhaps the only people who will be comforted by the results of this survey are stenographic reporters who can rest assured that Oregon lawyers strongly oppose replacing them with videotape recorders. The Oregon bar, or at least its litigation section members, remain divided on the remaining areas explored in this survey.

The adoption of a rule allowing the discovery of experts was generally supported; the degree to which discovery should be allowed remains a question. Many suggested that the proposed rule be expanded to allow for complete discovery of experts including depositions. Most respondents believed that permitting discovery of experts would not add significantly to the cost of litigation and would promote settlement. Respondents did not support adoption of a rule allowing written interrogatories and believed that written interrogatories would add to litigation costs while not promoting settlement. The question of single case assignment remains a question as the survey results are internally inconsistent. Perhaps a report on Marion County's pilot program will assist in a more informed discussion of this issue at a later date.

Cynthia Hull is an associate with the Portland office of Preston, Thorgrimson, Ellis & Holman. She practices in the area of commercial litigation and natural resources law.

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1. Brewer, *An Overdue Change,* Oregon State Bar Bulletin, Dec. 1989.
2. *Id.*
3. Burt, *An Unnecessary Burden,* Oregon State Bar Bulletin, Dec. 1989.
4. *Id.*
5. Olson, *A Cost Effective Alternative,* Oregon State Bar Bulletin, Dec. 1989.
6. *Id.*
7. *Id.*
8. Hytowitz, *An Unnecessary Proposal,* Oregon State Bar Bulletin, Dec. 1989.
9. *Id.*
10. *Id.*

Oregon State Bar
Section on Litigation
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Lake Oswego, OR 97035-0889

Speaker at Annual Meeting to Present *"The Trial of Frank James"*

October 3-6, 1990

The Litigation Section will again sponsor a featured speaker at the Oregon State Bar Annual Meeting in Portland October 3-6, 1990. This year the Section's featured speaker will be James W. Jeans, Professor of Law at the University of Missouri-Kansas City. Professor Jeans teaches trial advocacy and is a regular speaker and instructor at continuing legal education courses. He has spoken to bar organizations in more than forty states, England, and Canada.

Jeans is on the Executive Committee of the National Board of Trial Advocacy, and the faculty of the National Institute for Trial Advocacy. He is the author of the two-volume treatise, *Litigation* (Michie, 1986) and *Trial Advocacy* (West, 1975).

Professor Jeans will present the entertaining and enlightening story of "The Trial of Frank James" (Jesse James' brother). Lawyers and spouses alike will enjoy this program.

Procedure & Practice,

continued from page 1

ongoing concern about discovery in Oregon. The information developed through a well designed questionnaire is far more useful than the general responses the Procedure & Practice Committee elicited. Interestingly, in general, the survey responses are consistent with those the Procedure and Practice Committee received.

The use of interrogatories, it appears, is of little interest in Oregon and is probably a dead issue at this time. Discovery of experts, on the other hand, does appear to have general support but faces vigorous opposition from some quarters. There is an indication that the Council on Court Procedures is going to proceed with its own work on the issue of discovery of experts. The results of this survey should be of value to the Council on Court Procedures.

***Jack F. Olson** is a partner in the Portland firm of Olson and Marmaduke. He is the Chairman of the Practice and Procedure Committee of the Oregon State Bar. He practices in the areas of commercial litigation and plaintiff's personal injury.*

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LITIGATION SURVEY SUMMARY

Total responses: 152

GENERAL INFORMATION

Question 1:

Where is your primary office located?

Office	#	%
Port.	119	78.3
S. Or	7	4.7
E. Or	5	3.3
W.V.	18	11.8
Or. C.	3	1.9

Question 2:

How many years have you been practicing in Oregon?

Yrs.	#	%
0-5	25	16.4
6-10	37	24.4
11-20	65	42.8
21-?	25	16.4

Question 3:

What is the primary area of your litigation practice?

Area	#	%
PI pl.	32	21
PI d	41	27
CL pl.	13	8.5
CL d	31	20.3
Gen.	33	21.7
Other	2	1.3

Question 4:

Have you practiced in another state which permits discovery of experts?

	Yes		No	
	#	%	#	%
Total	54	35	98	65
Port	46	38	74	62
S. Or	4	50	4	50
E. Or	1	20	4	80
W. V.	3	19	13	81
Or. C	0	0	3	100
0-5	13	52	12	48
6-10	9	24	29	76
11-20	24	34	46	66
21-?	8	40	12	60
PI pl.	14	40	21	60
PI d	15	40	27	60
CL pl.	6	50	6	50
CL d	12	48	13	52
Gen.	6	17	29	83
Other	1	25	3	75

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Question 5:

Have you practiced in another state which permits the use of interogatories?

	Yes		No	
	#	%	#	%
Total	60	40	90	60
Port	50	43	65	57
S. Or	4	50	4	50
E. Or	1	20	4	80
W.V.	5	26	14	74
Or. C	0	0	3	100
0-5	13	54	11	46
6-10	13	36	23	64
11-20	27	41	39	60
21-?	5	38	8	62
PI pl.	14	40	21	60
PI d	16	40	24	60
CL pl.	4	34	8	66
CL d	15	58	11	42
Gen.	9	34	18	66
Other	1	50	1	50

Question 6:

Do you have significant experience with the use of expert discovery and interrogatories in Federal Court?

	Yes		No	
	#	%	#	%
Total	89	59	61	41
Port	71	63	42	37
S. Or	3	38	5	62
E. Or	1	20	4	80
W.V.	12	57	9	43
Or. C	2	66	1	34
0-5	12	48	13	52
6-10	24	62	14	39
11-20	45	62	28	38
21-?	8	57	6	43
PI pl.	24	68	11	32
PI d	25	61	16	39
CL pl.	8	66	4	34
CL d	25	83	5	17
Gen.	6	18	28	82
Other	0	0	2	100

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DISCOVERY OF EXPERTS

Question 7:

Do you favor discovery of experts?

	Yes		No	
	#	%	#	%
Total	102	68	48	32
Port	88	72	35	28
S. Or	3	37	5	63
E. Or	4	80	1	20
W.V.	12	70	5	30
Or. C	2	66	2	34
0-5	21	87	3	13
6-10	29	74	10	26
11-20	46	65	25	35
21-?	6	43	8	57
PI pl.	11	31	24	69
PI d	32	76	9	34
CL pl.	9	75	3	25
CL d	28	94	2	16
Gen.	21	72	8	28
Other	1	50	1	50

Question 8:

If you favor some form of expert discovery, would you favor adoption of proposed rule ORCP 36B(4) as described above?

	Yes		No	
	#	%	#	%
Total	73	58	52	42
Port	56	58	41	42
S. Or.	1	34	2	66
E. Or	4	80	0	20
W. V.	10	59	7	41
Or. C	2	50	2	50
0-5	12	48	13	52
6-10	21	64	12	46
11-20	34	61	22	39
21-?	6	54	5	46
PI pl	8	28	20	72
PI d	21	64	12	46
CL pl	10	91	1	9
CL d	20	69	9	31
Gen	14	56	9	44
Other	1	50	1	50

Question 9:

Would you favor adoption of proposed rule ORCP 36B(4) if some modifications were made to the Rule?

	Yes		No	
	#	%	#	%
Total	64	59	44	41
Port	52	64	29	36
S. Or	3	37	5	63
E. Or	0	0	2	100
W. V.	9	56	7	44
Or. C.	0	0	1	100
0-5	19	76	6	24
6-10	17	74	6	26
11-20	27	47	30	53
21-?	2	22	7	88
PI pl	8	27	22	73
PI d	22	76	7	24
CL pl	4	57	3	43
CL d	20	69	2	31
Gen	11	55	9	45
Other	0	0	1	100

Question 10:

If you would like to see some modifications, please briefly desribe them.

- permit full discovery including depositions
- shorten time within which demand can be made, i.e. no later than 30 days before trial.
- If identity and opinions of expert are not disclosed 30 days before the trial, expert cannot be used at trial.
- Allow opponent 14 days to find rebuttal expert to counter testimony of newly disclosed expert
- prohibit direct contact between expert and opposing counsel

Question 11:

Do you feel strongly that proposed rule ORCP 36B(4) would add significantly to the cost of litigation?

	Yes		No	
	#	%	#	%
Total	51	34	98	66
Port	37	32	77	68
S. Or	5	63	3	37
E. Or	1	20	4	80
W. V.	7	37	12	63
Or. C	1	34	2	66
0-5	6	24	19	76
6-10	11	28	28	72
11-20	24	34	47	66
21-?	9	60	6	40
PI pl	24	69	11	31
PI d	8	20	32	80
CL pl	3	25	9	75
CL d	3	9	29	91
Gen	10	37	17	63
Other	1	34	2	66

Question 12:

Do you feel strongly that proposed rule ORCP 36B(4) would promote settlement of cases?

	Yes		No	
	#	%	#	%
Total	77	54	65	46
Port.	64	58	47	42
S. Or	2	25	6	75
E. Or	3	60	2	40
W. V.	9	47	10	53
Or. C	2	100	0	0
0-5	17	74	6	26
6-10	20	53	18	47
11-20	38	54	32	46
21-?	4	27	11	73
PI pl	9	26	26	74
PI d	27	71	11	29
CL pl	5	45	6	55
CL d	24	77	7	23
Gen	14	48	15	52
Other	1	100	0	0

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USE OF INTERROGATORIES

Question 13:

Do you favor any form of written interogatories?

	Yes		No	
	#	%	#	%
Total	71	48	77	52
Port	62	53	54	47
S. Or	1	14	6	86
E. Or	2	44	4	67
W. V.	4	25	12	75
Or. C	2	66	1	34
0-5	15	63	9	37
6-10	17	48	19	52
11-20	33	49	34	51
21-?	6	29	15	71
PI pl	11	34	22	66
PI d	18	46	21	54
CL pl	7	54	6	46
CL d	21	68	10	32
Gen	15	49	16	51
Other	0	0	2	100

Question 14:

If you oppose any use of written interrogatories, what is your main objection?

- waste of time
- cost
- potential for abuse
- interrogatories are simply "makework"
- adequate discovery methods already exists
- Oregon's method works

Question 15:

Would you favor adoption of proposed ORCP 42 as described above?

	Yes		No	
	#	%	#	%
Total	60	45	72	65
Port	52	40	61	60
S. Or	2	25	6	75
E. Or	1	20	4	80
W. V.	4	26	11	74
Or. C.	2	66	1	34
0-5	14	58	10	42
5-10	12	34	23	66
11-20	31	47	35	53
21-?	5	24	16	76
PI pl	11	34	22	66
PI d	15	39	23	61
CL pl	5	42	7	58
CL d	18	58	13	42
Gen	12	50	12	50
Other	1	50	1	50

Question 16:

Do you favor the proposed limitation on interrogatories to 20, including subparts?

	Yes		No	
	#	%	#	%
Total	94	70	40	30
Port	75	71	30	29
S. Or	4	57	3	43
E. Or	3	75	1	25
W. V.	10	66	5	34
Or. C.	2	66	1	34
0-5	15	53	13	47
5-10	24	71	10	29
11-20	44	75	15	25
21-?	10	59	7	41
PI pl	17	56	13	44
PI d	33	92	3	8
CL pl	7	64	4	36
CL d	20	71	8	29
Gen	15	58	11	42
Other	1	50	1	50

Question 17:

If you do not favor this limitation, but you believe some limit should exist, what number of interrogatories do you feel should be allowed?

- less than 20
- 30

Question 18:

Do you feel strongly that the use of written interrogatories would significantly increase the cost of litigation?

	Yes		No	
	#	%	#	%
Total	81	57	62	43
Port	57	51	54	49
S. Or	7	87	1	13
E. Or	4	80	1	20
W. V.	11	68	5	32
Or. C	2	66	1	34
0-5	9	37	15	63
6-10	22	59	15	41
11-20	35	54	30	46
21-?	15	71	6	29
PI pl	22	65	12	35
PI d	22	59	15	41
CL pl	8	61	5	39
CL d	11	35	20	65
Gen	17	56	13	44
Other	1	50	1	50

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Question 19:

Do you believe the use of written interrogatories would promote settlement of cases?

	Yes		No	
	#	%	#	%
Total	48	33	97	67
Port	41	36	72	64
S. Or	1	12	7	88
E. Or	1	25	4	75
W. V.	4	25	12	75
Or. C	1	33	2	67
0-5	12	52	11	48
6-10	10	27	26	73
11-20	21	32	44	68
21-?	5	24	16	76
PI pl	7	30	23	70
PI d	10	27	26	73
CL pl	4	33	8	67
CL d	18	86	13	82
Gen	8	27	21	92
Other	1	50	1	50

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SINGLE CASE ASSIGNMENT

Question 20:

Do you favor the present practice of having pretrial motions and other pretrial matters decided by the presiding judge, or a motions panel?

	Yes		No	
	#	%	#	%
Total	65	49	68	51
Port	54	49	55	51
S. Or	2	40	3	60
E. Or	1	25	3	75
W. V.	8	53	7	47
Or. C	0		0	
0-5	3	15	17	85
6-10	22	59	15	41
11-20	33	54	28	46
21-?	12	60	8	40
PI pl	20	59	14	41
PI d	24	68	11	32
CL pl	7	58	5	42
CL d	9	31	20	69
Gen	10	43	13	57
Other	0		0	

Question 21:

Would you favor a single case assignment system whereby a case would be assigned to a specific judge from the commencement of the action through the trial?

	Yes		No	
	#	%	#	%
Total	92	66	48	34
Port	70	67	43	33
S. Or	6	86	1	14
E. Or	3	75	1	25
W. V.	11	78	3	22
Or. C	2	100	0	0
0-5	20	91	2	9
6-10	21	58	15	42
11-20	38	63	22	37
21-?	12	60	8	40
PI pl	21	60	11	40
PI d	19	55	15	45
CL pl	8	61	5	39
CL d	24	77	7	23
Gen	19	65	10	45
Other				

Question 22:

If you practice often in Multnomah County, are you satisfied with the present use of pro tem judges for most summary judgment motions?

	Yes		No	
	#	%	#	%
Total	54	43	65	57
Port	49	44	61	56
S. Or	0		1	100
E. Or	0		1	100
W. V.	5	71	2	29
Or. C	0		0	
0-5	5	29	12	71
6-10	20	55	16	45
11-20	23	43	30	57
21-?	6	67	7	33
PI pl	20	65	11	35
PI d	14	45	17	55
CL pl	4	44	5	56
CL d	8	27	21	73
Gen	7	39	11	61
Other	1	100		

VIDEOTAPE RECORDING OF TRIALS

Question 25:

Have you appeared in a court proceeding in which video equipment was used to record the proceeding instead of a stenographic reporter?

	Yes		No	
	#	%	#	%
Total	28	20	110	80
Port	22	19	94	81
S. Or	2	25	6	75
E. Or	0		5	
W. V.	4	25	12	75
Or. C	0		3	
0-5	2	8	21	92
6-10	9	23	30	77
11-20	12	18	52	82
21-?	5	24	16	76
PI pl	8	20	31	80
PI d	8	22	28	78
CL pl	1	7	12	93
CL d	7	23	23	77
Gen	2	7	27	93
Other	2	100	0	0

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Question 26:

Do you favor the use of vidoetape equipment to record trials instead of stenographic reporters?

	Yes		No	
	#	%	#	%
Total	16	12	117	88
Port	10	10	92	90
S. Or	2	25	6	75
E. Or	0	0	5	0
W. V.	4	25	12	75
Or. C	0	0	2	100
0-5	4	21	15	79
6-10	5	15	28	85
11-20	5	8	55	92
21-?	2	10	17	90
PI pl	6	17	29	83
PI d	3	8	31	92
CL pl	0	0	12	100
CL d	3	14	19	86
Gen	3	11	24	89
Other	1	50	1	50

Question 27:

Do you favor retaining the use of stenographic reporters to record trials?

	Yes		No	
	#	%	#	%
Total	127	89	15	11
Port	101	83	10	17
S. Or	7	87	1	13
E. Or	4	80	1	20
W. V.	13	81	3	19
Or. C	2	100	0	0
0-5	18	90	2	10
6-10	33	89	4	11
11-20	66	90	6	10
21-?	19	90	2	10
PI pl	32	82	7	18
PI d	35	97	1	3
CL pl	11	92	1	8
CL d	23	97	2	3
Gen	26	89	3	11
Other	1	50	1	50

COMMENTARY REGARDING PROPOSED AMENDMENTS TO ORCP:

Rule 7 Letter from Attorney Craig D. West dated August 8, 1990

Rule 18 Letter from Attorney Lauren M. Underwood dated August 13, 1990

Rule 55 Letters from Attorneys Nathan B. McClintock and P. Conover Mickiewicz dated August 2, 1990 and August 16, respectively

Rule 68 Jerry Sliger of the Department of Justice called and wanted to bring to the Council's attention the second sentence of 68 C(4)(b), i.e.:

> "The objections shall be served within 14 days after service in accordance with Rule 9 B of a copy of the statement **on the objecting party.**"

He wondered whether the Council meant to say, " The objections shall be served ... **on the attorney claiming fees or costs and disbursements**," rather than **"on the objecting party."**

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August 8, 1990

Mr. Fredric R. Merill
Executive Director
Counsel on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

RE: Proposed Amendments to
Oregon Rules of Civil Procedure

Dear Mr. Merill:

The August 4, 1990 Oregon Appellate Courts Advance Sheets contained proposed amendments to ORCP 7. I routinely am required to make service through the Motor Vehicles Division as provided in ORCP 7D(4) and would like to make the following comments from my experience.

(1) Required Attempted Service at all Addresses The proposed changes appear to require a plaintiff to attempt service at all of the addresses known to plaintiff. Proposed ORCP D(7) provides that a "defendant who cannot be served" if the "plaintiff attempted service of summons by all of the methods specified in subsection 7D(3) and was unable to successfully complete service." I interpret this to require plaintiff to send a process server to all addresses known by plaintiff to attempt service of summons. This is an unreasonable and expensive requirement.

I routinely have insurance subrogation automobile accident claims in which I have 4, 5 or more addresses developed for defendants. I confirm by various reliable sources that several, if not all, are out of date. It seems an unreasonable expense and delay to require a plaintiff to have a process server attempt service at each confirmed invalid and out of date residences.

I interpreted the old rule (ORCP D(4)(c)) to allow a plaintiff to show by affidavit that the defendant could not be found at the relevant addresses and this could be done by competent means other than attempts of personal service at each address. If the proposed ORCP 7D(7) is enacted we will be sending sheriffs and private process servers to known invalid addresses to attempt service. I would suggest retention of the original wording or a limitation on the attempts required.

(2) The Misconception that Certified Mailings Provide Notice I have found the registered or certified mail, return receipt requirement to be a very ineffective means of notification to defendants. My routine practice is to mail an uncertified letter to the last best address for defendant and it often is received where certified is not. I have found in about 90% of the mailings that the certified mailing is rarely signed by the defendant, is often received by a parent or other occupant or is returned "unclaimed" or undelivered. In fact, I recall no claim where a defendant signed for the mailing --- if he was there he would have been served personally. In my experience regular mailing is a better means of giving notice then the certified mailing because the former gets through where the latter is ignored or avoided.

(3) Notice to Insurer for Defendant I have no real objection to the fourteen day requirement of giving defendant's insurance carrier notice, but why not simply require it to be given at the same time the Notice of DMV Service is sent?

I have seen DMV service procedures change over the years. With each change comes new questions and potential ambiguities or pitfalls for practitioners. I question whether the new changes add anything to the existing procedures. I bring these matters to your attention so that you know this practitioner's experiences and views for the record. I trust that you will find them helpful and if I can be of any further assistance please do not hesitate to contact me.

Very truly,

FERGUSON, HAWKES & WEST

Craig O. West

COW:kly

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*MEMBER OF OREGON AND WASHINGTON BARS

August 13, 1990

Mr. Fredric R. Merrill
Executive Director
Council on Court Procedures
University of Oregon
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Eugene, Oregon 97403

RE: Proposed Amendment to ORCP

Dear Mr. Merrill:

I have reviewed the proposed revisions of the ORCP and my only area of concern applies to Rule 18. My feeling is the "statement of the amount claimed for economic damages" should remain and it should be binding on the plaintiff, that is the plaintiff could not recover more for "noneconomic damages" than the amount claimed in the statement. However, one or more amended "statements of claim" should also be allowed upon reasonable notice.

My reasons for suggesting this are practical, and based on my experience as an "insurance defense" attorney. The effect of not requiring a statement of damages (or requiring only a "nonbinding" statement of damages) is that in every instance where a plaintiff is seeking "noneconomic" damages a defendant/insured can never be satisfied that a potential recovery might not exceed his or her insurance coverage. Therefore, insurers must inform their insureds of the possibility (albeit sometimes only a theoretical possibility) that the claim for noneconomic damages could exceed their insured's coverage. This often makes the insured more nervous

than ever. As an attorney retained by an insurer to represent the insured I often get calls from very nervous or anxious people wondering if they have to run out and immediately hire an attorney at their own expense. While that may be justified in some cases, in the smaller claims it certainly is not.

While I suppose removing Paragraph B(3) in its entirety, as suggested in the proposed rule change, is one way to resolve the question of whether the statement is binding, I think a better way to resolve it is to simply provide in the rule itself that the statement is binding (although amendable). This really does no practical harm to claimants, and at the same time can at least resolve some of the anxiety of a person being sued. This anxiety is very real, particularly in elderly individuals, and I think deserves some consideration.

I would be happy to discuss this with you or other members of the Council by telephone or otherwise.

Very truly yours,

ACKER, UNDERWOOD, NORWOOD & HIEFIELD

Lauren M. Underwood

LMU:kss

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August 2, 1990

Professor Frederick Merrill
University of Oregon School of Law
Eugene, Oregon 97403

Dear Professor Merrill:

I had originally called as I had some question about the procedure by which the Oregon Rules of Civil Procedure permits production of hospital records. As we called each other and were unable to connect up, I thought it might be best to simply write a letter and ask for your thoughts.

Some discussion has occurred within our office as to whether we are required to provider ten (10) days prior written notice to the adverse attorney that we intend to serve a subpoena and notice the deposition of the custodian of records of a hospital. While Rule 55 does not seem to contain a requirement that any type of "prior" notice be given, other than the usual requirement of reasonable notice as it relates to all discovery requests, the comment by the Council on Court Procedures states, "The requirement of ten days notice to the plaintiff before seeking access to hospital records was retained."

We would certainly appreciate any clarification or guidance that you could give with respect to what appears to be a difference between the substance of Rule 55, and the Council's comment. I look forward to hearing from you.

Very truly yours,

COSGRAVE, VERGEER & KESTER

Nathan B. Mc Clintock

NBM:lh
14110.7.2

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August 16, 1990

Frederic R. Merrill
Executive Director
Council on Court Procedures
University of Oregon Law School
Eugene, OR 97403

RE: Proposed Amendments to ORCP

Dear Professor Merrill:

I have a concern regarding the proposed amendment to ORCP 55 which permits a party to subpoena documents without a scheduled deposition. I agree with it in principle, as we often subpoena with a notation "In lieu of appearance, you may provide certified true copies to the undersigned attorney x days prior to the scheduled deposition." The method I have just described requires advance notification to other parties, as the deposition is noticed before the subpoena is served, thus the other party has an opportunity to obtain the same documents. (I am not sure all attorneys comply with the procedure of noticing a deposition before a subpoena is served. It can be argued that the rule is unclear in this regard, requiring noticing only when a clerk is to issue the subpoena.)

The proposed amendment requires service of the subpoena 14 days before the time for production. This should, generally, be sufficient, but why not require it within 3 days of service of the subpoena, or even in advance of service of the subpoena? I think it may even be a good idea to require the serving party to make the documents available to other parties for inspection and copying. (The alternative is for each party to subpoena the non-party, which seems wasteful, and might lead to unequal access to the documents.)

I congratulate the Council on its well-considered proposals.

Very truly yours,

P. Conover Mickiewicz

P. Conover Mickiewicz

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August 3, 1990

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Dear Ron:

Enclosed is a copy of a June 19, 1990, New York Times article regarding procedural rules eliminating or lessening secrecy in settling cases. I have been carrying this around in my pocket for some time. However, I wonder if this is something the Council on Court Procedures might want to look at in terms of ORCP. A brief check of ORCP and UTCR reveals no rules on sealing the records or secrecy in settling cases that I could find. I do not know that secrecy in settlement is a problem in Oregon, and I do note that Rule 36C permits the court to seal documents produced in the course of discovery.

In any event, I thought I would bring this to the attention of the Council to see whether anyone feels it is worth consideration or discussion.

Yours very truly,

Bernard Jolles

BJ:wh

Enclosure(s)

cc: Fred R. Merrill

New York's Top Judge Urges Less Secrecy in Settling Cases

By ELIZABETH KOLBERT
Special to The New York Times

ALBANY, June 19 — New York's highest ranking judge is pressing the court system he heads to give the public greater access to civil court settlements where there is evidence of dangers from consumer products, environmental contamination or other hazards.

Under current practice, defendants in these suits often make secrecy a condition of the settlement, arguing that it is necessary to protect trade secrets.

In seeking less secrecy in settlements, the Chief Judge of New York, Sol Wachtler, is not alone.

Similar Rule in Texas and Florida

The practice of sealing court records in cases where public hazards may be involved is coming increasingly under attack in the nation as an abuse of the public court system. Recently Texas and Florida adopted rules aimed at reducing the number of court settlements that are sealed.

In New York such rules are under consideration by the court's administrative board, made up of Judge Wachtler and the presiding justices of the state's four judicial departments. If the board agrees to the change in rules, the matter goes to the seven-member Court of Appeals, presided over by Judge Wachtler.

Judge Wachtler and other advocates of greater openness, including most plaintiff lawyers, argue that the public's right to know often outweighs the defendant's right to privacy.

"I think that when you have the courts being used for redressing a wrong, it is the public that is providing and paying for the court procedure and making it available for private litigants," Judge Wachtler said in a recent interview. "These litigants should not then say to the public, 'It's none of your business.'"

Safety Issues Suggested

When the record of a settlement is sealed, the Chief Judge continued, "No one knows whether we can really eat the fish out of the Hudson or buy G.E. toasters.

"Closing the record has become the routine, and I think it's high time that

Continued on Page A13, Column 1

New York Judge Asks Less Secrecy in Civil Cases

Continued From Page 1

we consider whether there should be a presumption of openness."

Noting that new rules were still only in the drafting stage, Judge Wachtler stopped short of advocating specific changes. But in recent letters and in interviews, he has indicated that he will press for rules that make it more difficult for civil court records to be sealed in cases that could have important implications for the public.

Before new rules can be adopted, they must first be recommended by the state's five-member Administrative Board of the Courts. If the board so acts, public hearings are then held. The final decision on the rules rests with the seven members of the state's highest court, the Court of Appeals.

No reliable statistics exist on how many civil court settlements in New York State are ordered sealed by courts each year. But experts say it could run well into the thousands. Of the 58,135 civil cases set to go to trial last year, more than 35,000 were settled before a trial was completed.

It is not uncommon for court records to be sealed simply because both parties to the settlement agree to secrecy, many lawyers and judicial officials say. The state's civil court dockets are so clogged, they say, that judges do not want to encourage more trials by rejecting the terms of settlements.

"The judges in New York are underpaid and understaffed," said Bert Bauman, president-elect of the New York State Trial Lawyers Association, who has been pressing for adoption of new rules. "It's expedient to move their cases as fast as they can. If two parties come in and say they want to seal the record, they're not going to look twice."

Associated Press

Chief Judge Sol Wachtler

A case that is frequently used to illustrate the potential hazards of sealing court records is a 1988 settlement between the Xerox Corporation and a Rochester family that contended it had been made sick by pollution from the company's plant there. Xerox agreed to a settlement with the family, with the stipulation that the court record be kept secret, a condition that both the family and the judge accepted.

Questioning whether other families in the area might also have been harmed by the pollution, the Health Departments of Monroe County and New York State later sued to have the record reopened. In his decision to reopen the file, Judge Joseph Fritsch of State Supreme Court in Rochester wrote that "the court has the inherent power to amend its order in the interest of justice, and in this case, in the interest of the public welfare and good."

Debate Among Lawyers

The prospect of new rules that would make it harder to seal court records has ignited a debate among lawyers. Defense lawyer groups have opposed new rules, while plaintiff lawyer groups have lobbied in favor of them.

"I have never had an issue come before my committee that has generated so much debate," said George Carpinello, chairman of the Advisory Committee on Civil Practice, which is to make a recommendation on new rules to the court system's administrative board within the next few weeks.

Defense lawyers argue that sealing the record is often the only way to protect proprietary information. The practice, they say, encourages settlements and cuts the backlog in the state's civil courts.

"I think confidentiality is extremely important in the litigation process, because it encourages settlements," said Blair Fensterstock, chairman of the product liability committee of the the City Bar Asspciation.

But members of the plaintiffs' bar argue that the public is being denied access to information that could be of vital interest.

"There should be no settlement in exchange for a promise of confidentiality in cases where there are hazards," said Mr. Bauman of the New York State Trial Lawyers Association. "The press and the people have a right to be involved."

UNIVERSITY OF OREGON

August 31, 1990

M E M O R A N D U M

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: **Fred Merrill**

Enclosed are the following additional comment letters for discussion under Agenda Item No. 5 at our September 8 meeting:

Rule 18 Letter from Win Calkins (on behalf of the OADC) dated August 29, 1990

Rule 68 Memo from Charles Burt to Procedure & Practice Committee members dated July 26, 1990

FRM:gh

Encs.

SCHOOL OF LAW • EUGENE, OREGON 97403-1221 • TELEPHONE (503) 686-3837

OADC Oregon Association of Defense Counsel

August 29, 1990

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Fredric R. Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Dear Fred:

Subsection B of Rule 18 was enacted in the 1987 Legislative Assembly as part of Tort Reform. The rationale for the change was that large allegations of money damages would no longer be published in the local newspaper, but the defendant could still be apprised of the full amount of the claim for purposes of defending and for purposes of determining insurance coverage and excess exposure. There was also the expressed concern that publishing prayers in the newspaper encouraged "run-away" verdicts and increased insurance premiums in the state of Oregon.

The Council's proposed amendment deleting only subsection B(3) would continue the concept of reduced newspaper reporting, but would do away with the right of damage defendants and their insurers to determine the amount of the claim. If this change is made individual defendants will be greatly prejudiced in their ability to know whether they are covered and in their ability to get their cases settled. Knowing the limits of the policy in relation to the amount of personal exposure is often the key in getting cases settled.

OADC strongly opposes this proposed change because it would take away the defendant's right to establish the amount of the claim and establish whether the claim is fully covered. It is our belief that those whom the original rule change was supposed to benefit will also strongly oppose this change. We think they would rather revert to the old rule and risk media reporting rather than give up their right to determine how much money is being claimed.

If a purpose of the 1987 change was to avoid "run-away" verdicts and high insurance premiums, then

the new proposal would defeat that goal as well. The proposed change would allow a verdict to become truly "run-away" because there would no longer be a statement of damages to establish any limit.

As you know, there is no remittitur in Oregon courts as there is in the federal courts and most other states. Or. Const. Art. VII§3. The deletion of the statement of damages would therefore have a much more detrimental impact in Oregon than in these other jurisdictions.

We urge the rejection of this proposed change in Rule 18.

Very truly yours,

Win Calkins

Win:rr

566-5411

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RECEIVED
JUL 27 1990

MEMORANDUM

TO: All Procedure & Practice Committee Members

FROM: Charles Burt

DATE: July 26, 1990

RE: ORCP 68

I have read the proposed changes in ORCP 68 which was forwarded to me by David Brewer. It seems to me that what you are attempting to do is to streamline the proceeding and make it uniform and consistent. The only thing that I have any question about is the process of waiting ten days following the entry of judgment to petition for fees as per your section C(4)(a)(i) under Rule 9B, which appears on pages two and three of your outline. It would seem to me that some notice of the question of attorney fees should be raised prior to the entry of any judgment, either in the pleading or in a motion form. Filing the notice of hearing within ten days of the judgment does not bother me, but I would think that it would be good practice to have some notice prior to judgment of the claim of the prevailing party to have fees.

The rest of the document seems to be all right, although I note on page six, C(5)(b) provides for supplemental judgment. The fees are not determined prior to the entry of judgment pursuant to Rule 67. I am concerned that the parties, prior to the hearing on the original judgment, have notice of the claim for attorney fees and it would seem to me that we should encourage the solution of that issue, i.e. the fees, to be made prior to the entry of judgment under Rule 67 so far as we can possibly do so. Under the new code, where judgments are recorded in a very peculiar way, I would wonder if we might not lose some of the supplemental judgments on attorney fees, or at least not show them as a matter of record if we followed C(5)(b). I am not sure that I can suggest anything to make it better, but I certainly would like to have some sort of requirement that the attorney fees be settled before the judgment is entered, if at all possible.

With regard to the same thing, in C(5)(c)(i) the statement of attorney fees or costs has been served on a party in default, the party may file objections as provided in C(4)(b), it does not make sense to me that a party who is defaulted should be able to object to attorney fees. If the attorney fees are in the initial pleading, they should file an answer and object to them at that point, rather than waiting until default. C(5)(c)(ii) in fact gives them fourteen days after the statement has been filed to object to fees, even though they may have defaulted on the initial pleading. This does not seem to make much sense to me. They should either fish or cut bait on the original pleading, providing a notice of fees is in that pleading. If you combine it then with C(5)(c)(iii), they then have an additional fourteen days to hold up the signing of the judgment order while they talk about fees, even though they have defaulted on the original claim.

Somehow, this seems to be a built-in area for delay of entry of judgment by a party who does not otherwise wish to appear. I am not sure what the solution for it is, but that is the area that worries me.

cc: David Brewer
Ron Marceau

Clanly

UNIVERSITY OF OREGON

September 7, 1990

M E M O R A N D U M

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Fred Merrill, Executive Director

Enclosed is the following additional comment letter for discussion under Agenda Item No. 5 at our September 8 meeting:

Rule 68 Letter from Richard L. Weil dated August 27, 1990

Enc.

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August 27, 1990

Fredric R. Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Re: Proposed Amendments to Oregon Rules of Civil Procedure

Dear Mr. Merrill:

I have just reviewed the Council on Court Procedures proposed ORCP amendments as set forth in the August 10, 1990 advance sheets of West's Oregon Cases. I have some concern about the proposed amendment to ORCP 68C in that it requires a supplemental judgment for attorney fees and costs in most contested cases. By creating multiple judgments between the same parties in the same case, the rule greatly increases the complexity of and the possibility for error with regard to, among other things, the collection of such judgments, the filing satisfactions, and the clearing of title to real property.

By way of example, suppose a contested case in District Court results in such a supplemental judgment as set forth in the proposed amendment to ORCP 68C. The judgment creditor must then either abandon one of the judgments or be prepared to arrange and pay for the transcription of both judgments to Circuit court, other counties and states, a normal practice when voluntary payment is not made. In then preparing an execution or garnishment, the judgment creditor each time would have to prepare multiple executions or garnishments or risk missing property otherwise available to satisfy the judgments. Upon payment of the judgments, the judgment creditor would have to prepare twice as many satisfactions of judgments as is presently required.

I appreciate the Council's goal in trying to clarify procedures with regard to the determination of attorney fees and costs in contested cases. However, providing for a separate supplemental judgment in such cases, apart from the practical post-judgment problems, increases the likelihood of attorney error. As the Council's Comment points out, such multiple judgments would not be the usual case. They would, however, not be rare. An attorney is quite likely to overlook their existence, leading to harmful problems for both the attorney and the attorney's client.

In the best of all possible worlds, smiling insurance companies step forward at the end of trial with check in hand. In reality, considerable effort must be devoted to post-judgment

collection. Rather than create separate supplemental judgments, I believe a better solution to the situation would be to have one judgment, a portion of which (with a different date of entry) would concern attorney fees and costs and be separately appealable.

Very truly yours,

CHASE & WEIL

Richard L. Weil

RLW:ww