

NEIL R. BRYANT
DESCHUTES, JEFFERSON, WASCO & KLAMATH COUNTIES
DISTRICT 27



OREGON STATE SENATE
SALEM, OREGON
97310

REPLY TO ADDRESS
INDICATED:

Senate Chamber
Salem, OR 97310

P.O. Box 1151
Bend, OR 97709
(503) 382-4331

RECEIVED

DEC 30 1994

DUNN, CARNEY

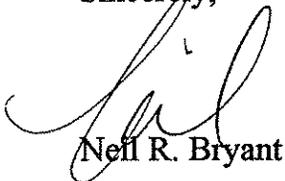
December 28, 1994

Thomas H. Tongue
Oregon Association of Defense Counsel
Suite 1500
851 S.W. Sixth Avenue
Portland, OR 97204

Dear Tom:

I enclose some proposed legislation dealing with tort reform. I would appreciate your written comments.

Sincerely,



Neil R. Bryant

NRB:kas
Enclosure
oadc.001/nrb/politics

From the legislative arena

OMA prepares a full legislative package

"We're not ready to drop the whole load in the press at this time."

The Oregon Medical Association is preparing legislation on a wide variety of subjects, "a bit more than we typically do," said Scott Gallant, government affairs director. Having John Kitzhaber, MD, in the governor's chair isn't the reason, he said, "We've had three or four legislative committee meetings this year and have met with various representatives from different groups, specialty and county societies."

Gallant would not reveal the legislative proposals, "We're not ready to drop the whole load in the press at this point."

However, *Oregon Health Forum* obtained a copy of OMA's draft legislation. It was prepared by the its legal counsel, Cooney & Crew.

Here are the major pieces of that draft package:

- Limit civil liability for malpractice to gross negligence for a physician, podiatrist or surgeon.
- Establish a comparative negligence standard that includes all participants in an event, not just the affected parties.
- Abolish tort causes of action for pregnancy or birth and prohibit claims for consequential damages.
- Give physicians access to Board of Medical Examiners investigatory materials prior to board or subcommittee appearances.
- Give hospitals the discretion to deny admitting privileges to nurse practitioners, but not necessarily on the same basis they deny privileges to other medical providers.
- Allow voluntary purchasing alliances for groups with 25 or more members.
- Give antitrust immunity to two or more physicians who form a cooperative and allow them to set prices for health care services, refuse to deal with competitors, acquire and maintain a monopoly in health care services and receive the full benefit of immunity under federal antitrust laws.
- Prohibit the Board of Direct Entry Midwifery from prescribing, administering medications, ordering lab tests and require two midwives on site for all out-of-hospital births.
- Abolish a requirement that medical associations offer continued education on workers' compensation.
- Make peer review activities and information confidential and inadmissible in court except for proceedings initiated by physicians to contest adverse actions by a health plan. ☞

Phillips urges counties to protect their money

Sen. Paul Phillips (R-Tigard) told the Association of Oregon Counties on Nov. 17 he doesn't expect to see substantive changes during the 1995 session. "The intellectual power isn't there," said Phillips, who will chair the Senate Government Finance and Tax Policy Committee. He also warned county officials that revenue sharing money is in danger, "Get out there and protect it." There'll also be a restriction on agencies to increase their fees, Phillips said. "That bill will come through very quickly." ☞

Pharmacists fight for access

Pharmacists never give up. Since 1987, they've tried enacting legislation giving patients freedom of access. Their chances look even dimmer this time because of a highly organized campaign led by the big HMOs. "We aren't giving up," said Chuck Gress, executive director, Oregon State Pharmacists Assn. "If our members can agree to the same terms and conditions as other pharmacies, people should have freedom of access." ☞

AOI won't be going first

"There's potential in purchasing coops for small businesses."

The state's largest business group, AOI, isn't eager to take the first step to create voluntary purchasing alliances and will not seek legislation. Instead, AOI is waiting to see what state officials come up with, said Kevin Earls, health care lobbyist. Under current law, employers cannot band together solely to purchase insurance, but they can form Multiple Employer Welfare Arrangements known as MEWAs.

The Department of Consumer and Business Services (DCBS), in concert with Vickie Gates, health plan administrator, is spearheading an effort to change the law. The only question left unanswered is how many alliances should there be. Gates apparently favors a large statewide group that includes state employees (SEBB and BUBB), while DCBS officials lean toward smaller alliances.

"There's potential in purchasing coops for small businesses," said Gates. "The experiences in California and Florida indicate they can make a difference by offering administrative advantages to employers, giving more choice to employees and producing cost savings. Besides, it's one more way to strengthen the voluntary market." ☞

COUNCIL ON COURT PROCEDURES
 APPEAL PROCESS ADJUSTMENTS TO 1995-97 ANALYST RECOMMENDED BUDGET

	General Fund	Lottery Funds	Other Funds Incl. Lottery	Federal Funds	Total Funds	Positions	FTE
AGENCY REQUEST BUDGET	92,568	0	8,000	0	100,568	2	0.71
Analyst Changes	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0.00</u>
ANALYST RECOMMENDED BUDGET	<u>92,568</u>	<u>0</u>	<u>8,000</u>	<u>0</u>	<u>100,568</u>	<u>2</u>	<u>0.71</u>
APPEALS ADJUSTMENTS (BY PROGRAM UNIT)							
No Appeal Adjustments							
PERS ADJUSTMENTS:							
Program Unit 100: Administration Base:	<u>(3,208)</u>				<u>(3,208)</u>		
TOTAL PERS ADJUSTMENTS	<u>(3,208)</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>(3,208)</u>	<u>0</u>	<u>0.00</u>
GOVERNOR'S RECOMMENDED BUDGET	89,360	0	8,000	0	97,360	2	0.71

OUTSTANDING ISSUES: None.

JOINT STATEMENT

DATE: January 19, 1995

TO: Oregon State Bar
Board of Governors
Public Affairs Committee

The OTLA and the OADC, through their members, represent opposite sides in civil disputes. Both agree that the present Oregon system for dispute resolution based on civil jury trials works well and should not be fundamentally changed. The much publicized problems of courts in other states do not exist in Oregon. Oregon dockets are kept current by the combined efforts of trial lawyers and the judiciary. This cooperative effort is reflected in the Council on Court Procedures which reviews, comments on and makes recommended changes in the Rules of Civil Procedure. Both the OTLA and the OADC support processing all proposed rule changes through the Council. Procedural rules interrelate and a balanced workable set of procedural rules is necessary for the efficient resolution of disputes.

Both the OTLA and the OADC are in favor of constructive dialogue on ways to improve the present system, as long as any changes do not impair the right of all citizens to have their civil disputes brought before a jury for resolution in a fair and efficient manner.

Chair
Senator Neal Bryant
Vice Chair
Senator Randy Miller

Staff
Bill Taylor,
M. Max Williams, II,
Co-Counsel
Diane Dussler
Dunika Snyder
Dar Woodrum



Members
Senator Ken Baker
Senator Jannet Hanby
Senator Peter Sorenson
Senator Dick Springer
Senator Shirley Stull

SENATE JUDICIARY COMMITTEE

5401 State Capitol
Salem Oregon 97310
(503) 986-1640

January 25, 1995

Mr. John E. Hart
Hoffman, Hart and Wagner
Suite 2000
1000 SW Broadway
Portland, Oregon 97205

VIA UPS

Mr. Thomas Tongue
Dunn, Carney, Allen, Higgins & Tongue
Suite 1500
851 SW 6th Avenue
Portland, Oregon 97204

VIA UPS

Gentlemen:

Thank you for the promptness with which the OADC responded with comments on the early concept statements relating to tort reform issues that will likely be before the Senate Committee on Judiciary this legislative session.

I am enclosing for your immediate review the latest Legislative Counsel draft of two bills relating to tort reform. These bills were "dropped" today. The first deals with a number of changes to statutory attorney fees provisions and would amend several of the Oregon Rules of Civil Procedure. The second bill abolishes the private right of action for civil RICO claims.

We anticipate that the first public hearing before the committee on these bills will be on Thursday, February 2, 1995 at 3:30 PM. There will be a subsequent hearing on February 9, 1995 and additional work sessions following those hearings where the committee will hear testimony by invitation. Although we are aware that the Council on Court Procedures may not have sufficient time to review these proposed changes pursuant to its usual procedures, Senator Bryant is very anxious and committed to receiving any comments from the Council, even in an informal manner. After you have an opportunity to review these drafts, if you feel it would be worthwhile to meet informally and discuss the proposed changes, please call and I will arrange a meeting with Senator Bryant. We would be glad to meet with you before the date of the first hearing. To accommodate your schedule we would be willing to come to Portland and meet with you in the evening.

Please call me if you have any questions, or if I can be of further assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "M. Max Williams, II".

M. Max Williams, II
Co-Counsel

Draft

MEMORANDUM

TO : Procedure and Practice Committee
FROM : RJN
DATE : January 31, 1995
SUBJECT : Meeting of the Tort Legislation Sub-Committee of
the Procedure and Practice Committee on January 30,
1995

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Persons present were Dan Harris (by telephone), Richard Lane, Robert Neuberger, Denise Stern, Vicki Hopman Yates. Excused: Mark Clarke. Also attending: Robert Udziela, Oregon State Bar Board of Governors.

Bob Udziela informed us that the OSB Board of Governors was interested in thorough input from all relevant committees and sections of the Bar. That is, the Board would like to hear from the Practice and Procedure Committee in detail regarding legislative proposals even where other committees may have concurrent jurisdiction. The Board, however, is not looking for input from our committee with regard to the judicial selection proposed revisions. Only two bills out of a package that will ultimately include six or eight bills have been introduced. Bob encouraged the committee to advise the Board regarding the proposals in the December 6, 1994 draft of the Oregon Litigation Reform Proposals even though the proponents may make changes before the bills are actually introduced.

The sub-committee reviewed SB 385 regarding attorneys fees and sanctions. With regard to SB 386 (LC 1892) regarding ORICO, the committee proposed that the full committee appoint a sub-committee

of persons knowledgeable about RICO to study the proposals regarding RICO. The sub-committee members did not feel comfortable with their knowledge and experience regarding ORICO to comment on the proposals. If the full committee lacks sufficient members knowledgeable in RICO to study the proposals, we should ask for input from other members of the Bar. One name mentioned was John McGrory at Davis Wright Tremaine. We also discussed our member Scott Elliott who is knowledgeable about RICO.

Regarding the totality of the proposals expected to be introduced in the 1995 session, the sub-committee concluded that the Oregon Civil Justice System functions extraordinarily well. Trial dockets in most counties are current with less than a year from the time of filing to disposition. The Oregon Rules of Civil Procedure and the statutes governing the conductive cases and trials work well, efficiently and with reasonable cost to the litigants. Through the hard work of the trial bar, the Judiciary, and the Council on Court Procedures, the Oregon State Bar, previous sessions of the Legislature, this system has been improved. Some of the highly publicized anecdotal problems elsewhere either do not exist in Oregon or have previously been remedied.

Accordingly, the sub-committee does not believe that major changes are necessary or wise. The sub-committee does favor some of the proposals (especially if they can be amended) that would make clear that frivolous cases, defenses, and motions are not welcome. The sub-committee agreed that litigants and their lawyers should be accountable and reasonable for their conduct litigation. However, accountability and responsibility extend to society in

general and people who owe debts or have committed wrongs should not escape accountability and responsibility.

Many of the proposals of SB 385 are in the form of amendments to the Oregon Rules of Civil Procedure. The sub-committee opposes any amendment to these rules without matters previously being considered by the Council on Court Procedures. Bob Udziela, however, informed us that it was not likely that the Legislature would defer to the Council this session. Accordingly, the committee went on to consider the proposals of SB 385.

Offers of Compromise.

Section 1 of the bill would amend ORCP 54 in two ways. First, it would amend Rule 54D to provide that where a previously filed action was dismissed with prejudice and then refiled, the court must award attorneys fees incurred by the defendant in the action previously dismissed. The sub-committee did not feel this amendment is needed. Sufficient protections are currently exist and would be added in other amendments regarding frivolous filings and offers of compromise. However, the committee was not unalterably opposed to this proposal as long as it is not amended to cover actions dismissed without prejudice. However, it does need to be made reciprocal so that it would apply to both plaintiffs and defendants.

The bill would next amend Rule 54E to allow thirty days to respond to an offer of compromise. The response time could be extended by court order only for thirty days and only upon a showing that the adverse party had unreasonably resisted discovery during their initial thirty day period. A plaintiff who did not do

better than the offer of compromise would be responsible for attorneys fees and expert witness fees and other costs from the date of the offer of compromise.

The sub-committee was in favor of improving the effective use of offers of compromise but believes that amendments are necessary:

1) The proposal needs to be made reciprocal. A plaintiff should be able to make an offer of compromise making a defendant responsible for attorneys fees, costs and the like if the defendant does not do better at trial than the offer of compromise;

2) The restrictions upon the court granting extensions of time and the grounds for which the court can grant extensions should be deleted. The court should be able to exercise its discretion in determining the amount of time and the reasons for granting an extension;

3) Neither party should be responsible for expert witness fees; and

4) A cut off date for offers of compromise should be included. The sub-committee noted that the full committee has previously recommended to the Council on Court Procedures that the time for responding to an offer of compromise be fifteen days. At that time, some members of the committee were concerned that offers of compromise should not be made so close to trial as to prevent their effective use (i.e., offers should be made sufficiently before trial to allow for settlement before fees and expenses associated with immediate pre-trial preparation are incurred).

The bill would also add a new section to Rule 54 empowering the court to order settlement conferences. The sub-committee

supports this proposal but questions whether the amendment goes far enough. The proposal not make settlement conferences mandatory nor does it specifically authorize the court to compel representatives of parties or lienholders to attend settlement conferences.

Sanctions and Attorneys Fees.

Section 2 of the bill would amend ORS 20.105 to make an award of reasonable attorneys fees mandatory rather than discretionary. The sub-committee did not specifically consider this proposal. The full committee may wish to oppose the portion of the bill that would strike the existing language that allows the court to tailor the amount of the reasonable fees to be "appropriate in the circumstances."

Section 3 of the bill would amend ORS 20.125. The current statute gives the court the discretion to award costs against an attorney whose deliberate misconduct causes a mistrial. The amendments would require the court to assess not only costs and disbursements, but also reasonable attorneys fees. While the sub-committee did not feel that the deliberate or intentional cause of mistrials is a problem, the sub-committee does not oppose the proposed.

Section 4 would amend Rule 17 regarding sanctions. The proposal does not specifically track FRCP 11 but it sponsors claim that it is based upon the Federal Rule. The sub-committee approves of changes to the current sanctions rule, but believes that amendments are in order. Denise Stern, is studying the sanctions proposal for the Litigation Section's sub-committee and will report further to the Procedure and Practice Committee.

The sub-committee believed that the following amendments to the proposal are necessary:

1) The committee supports the proposed language requiring an attorney to exercise reasonable care in making inquiries to insure that the filing of any pleading or motion is justified. The committee opposes the language that the attorney certify that his or her determination was "based upon the persons best knowledge, information and belief. . . ." (emphasis added). A reasonableness standard should apply;

2) The sub-committee is concerned about sub-section C(4) which would allow an attorney or party to file a pleading but not certify that it was supported by evidence. This is a loop hole that could result in all filings not being certified as being supported by evidence based upon reasonable inquiry;

3) Sub-section D(1) contains a joint liability clause making all partners of a law firm jointly liable for the acts of any partners, associate, or employee. The sub-committee is not opposed to joint liability, but does not believe that lawyers should be subjected to a special standard joint liability. This is especially true in view of the fact that the proponents will be introducing amendments to the joint and several liability statute; and

4) Sub-section D(3) of the proposal gives a party twenty-one days after notice by the adverse party to amend or withdraw the pleading or motion. The sub-committee agrees with the mechanism but also believes that provisions such as contained in ORS 30.895(2) should be considered. That statute provides an exception to

liability for misuse of civil proceedings where a lawyer is required to file a lawsuit close to the statute of limitations. The statute allows a lawyer 120 days to investigate the case.

Summary Judgments.

Section 5 of the bill would make an award of attorneys fees, expert witness fees, and all cost contributable to discovery available for a prevailing a party who filed and won a summary judgment motion.

The sub-committee recommends that the entire proposal regarding summary judgments should be stricken. Alternatively, the provision should be made reciprocal so that a party who loses a summary judgment is responsible for the other side's attorneys fees and costs. References to an award for "expert witness fees" should be deleted. The sub-committee also favors deleting an award of "all costs attributable to discovery."

The committee was particularly concerned, as was the sub-committee of the Litigation Section, that the proposal would encourage the unnecessary filing of summary judgment motions.

Attorney Fee Awards in Small Actions.

Section 6 would provide an English Rule or loser pays rule for claims of \$20,000 or less. The sub-committee opposes this provision. Smaller claims should not be discriminated against. The proposal poses a particular threat of depriving ordinary citizens and businesses of access to justice. The sub-committee also believes that the proposed (and to be revised) amendments to Rule 54 regarding offers of compromise and to Rule 17 regarding sanctions will adequately protect parties.

The sub-committee opposes the repeal of 20.080 which allows for an award of attorneys fees and actions of less than \$4000, including counter claims (which is not included in the proposed rule). The sub-committee also opposed the repeal of ORS 20.098 which allows an award of attorneys fees in breach of warranty actions where the amount of controversy in \$2,500 or less.

Reciprocity of Attorney Fee Awards.

The bill contains 130 pages of amendments to 131 current statutes that provide for attorneys fees to a prevailing plaintiff. Tom Howser is studying the individual proposals for the Litigation Section Board. Dan Harris will collaborate with Tom on behalf of our sub-committee.

In general, the sub-committee was concerned about making remedial attorney fee statutes reciprocal on a wholesale fashion. The goals of this proposal are achieved with amendments to Rules 17 and 54.

Conclusion.

While the sub-committee feels that some of the proposals contained in SB 385 are meritorious, the sub-committee also believes that many of the proposals paint with too broad a brush. More precision is needed to prevent a host of adverse consequences. The lack of opportunity for deliberative consideration by the Council on Court Procedures is of concern. Much of SB 385 threatens to close the courthouse to middle class citizens and small businesses. The punishments and sanctions proposed by the bill are not in proportion to the limited and infrequent problems that concern the bill's proponents.

Denise L. Stern
Attorney-at-law
7430 S.E. Milwaukie Ave.
P.O. Box 82244
Portland, OR 97282-0244

February 1, 1995

Gregory R. Mowe
Stoel Rives Boley Jones & Grey
900 S.W. 5th Avenue
Portland, OR 97204-1268

RE: Revisions to ORCP 17

Dear Greg:

I have compared the proposed changes to ORCP 17 with FRCP 11 and Washington Civil Rule 11 (CR 11). In general, the proposed changes to ORCP 17 track the Federal Rule. However, there is at least one instance in which the proposed rule increases the burden of proof for the potential violator.

In the proposed rule, as well as under the current version, a party makes certain certifications to the court. The crux of the rule is contained in subsection C., the Certification provisions. In many respects, subsection C simply repeats the current standards. However, Subsection C also incorporates language from FRCP 11 and CR 11.

The current rule only applies to 'every pleading, motion and other paper...' The proposed rule would also apply to an attorney or party who submits an argument, i.e., the proposed rule would apply to oral assertions. This tracks FRCP 11 and CR 11.

Under the current rule, the attorney or party makes certain certificates based on 'the best of the knowledge, information and belief of the person'. The proposed rule is based on the person's 'best knowledge'. I do not have a clear idea what 'best knowledge' is and I would certainly not like to litigate that issue. The 'best knowledge' concept is unique to the proposed rule and would seem to impart a higher burden of proof. Also, under the proposed rule, the required investigation is an inquiry that is 'reasonable under the circumstances' as opposed to the current 'reasonable

inquiry'. I do not see a substantive difference in the phrases. The new terminology tracks FRCP 11 and CR 11.

Subsection C(2) of the proposed rule is identical to the present rule.

Subsection C(3) is based on FRCP 11 and specifically adds that 'claims, defenses, and other legal positions' are covered by the rule. It also changes the burden of certification from certifying that a position is warranted by a 'good faith' argument for the extension... of existing law to certifying that a position is warranted by a 'nonfrivolous' argument for the extension... of existing law. Both of these changes track FRCP 11. The difference between a burden of proof for a 'good faith' argument as opposed to a 'nonfrivolous argument' is confusing but seems negligible at best.

Subsection C(4) adds that factual allegations and other factual assertions must be supported by evidence. This is based on FRCP 11. The remainder of C(4) and (5) is very loosely based on FRCP 11. These subsections generally provide that a party or attorney can specifically identify allegation or assertions, or denials of factual assertions, that the attorney does not wish to certify. In effect, these provisions gut ORCP 17 by allowing an attorney to file a non-certified pleading.

The sanction provisions in the proposed rule are significantly different from the current rule. The proposed rule tracks FRCP 11. Under the proposed rule, the motion for sanctions must be served on the opposing party 21 days prior to the impositions of sanctions. During the 21 day period the opposing party may amend, withdraw or correct the pleading. If sanctions are awarded, the law firm is jointly liable for any sanction imposed unless joint liability would be unjust. A sanction may be awarded for attorneys fees and expenses incurred and to deter future conduct.

As we discussed in subcommittee, a reciprocal attorney fee provision may discourage a proliferation of unwarranted ORCP 17 motions.

If you have any questions, please do not hesitate to contact me.

Yours truly,

Denise L. Stern

cc: Robert Neuberger

TESTIMONY OF JOHN DILORENZO, JR.

before the

Z. Hagan, Dye et al (Portland Law Firm)

Joint Senate / House Subcommittees on Civil Process

in Support of Senate Bill 385

February 2, 1995

Co-chair Bryant, Co-chair Parks, and members of the joint subcommittees, for the record, my name is John DiLorenzo. I am a Portland attorney and am appearing here today on behalf of the Oregon Litigation Reform Coalition in support of Senate Bill 385. The Oregon Litigation Reform Coalition was formed for the purpose of assembling separate coalitions from the private sector in support of various proposals which will be coming before you during this session of the legislature. As you will surely note, the coalition has assembled a broad and significant array of businesses and individuals who are supportive of the concepts contained within Senate Bill 385. Those individuals and organizations are scheduled to testify today and next Thursday in support of the bill.

Because they will have much to contribute by way of personal examples and their evaluation of the impact of the present litigation climate in Oregon upon their lives and businesses, I will focus my presentation on a description of the bill and will do my best to outline the rationale which underlies the major statutory changes proposed by Senate Bill 385. In addition, I hope my testimony will be useful as an overview to assist you in spotting particular issues which you may care to address in further hearings.

WHAT THE BILL DOES

Senate Bill 385 consists of a number of parts each of which have headings in bold print for ease of identification. The bill addresses offers of compromise and settlement beginning at page 1, sanctions for false or frivolous pleadings and other misconduct beginning at page 3, it provides for attorney fee awards in small actions (an access to justice provision) beginning at page 7, and addresses reciprocity of attorney fee awards or, what has been called a modified loser pay rule beginning at page 7.

In total, Senate Bill 385 is designed to streamline litigation, to encourage settlements of disputes at stages prior to trial and is further designed to enact a modified loser pay rule by providing an incentive for the prosecution of small claims which have merit and to address the extremely unfair and coercive impacts of Oregon's one way fee shifting statutes. One way fee shifting refers to the practice of allowing only those who have brought lawsuits an award of their attorney's fees if they prevail but not allowing an award of attorney's fees to defendants who successfully defend their claims.

OFFERS OF COMPROMISE, SETTLEMENT AND PREVIOUSLY

DISMISSED ACTIONS

The first portion of the bill concerns offers of compromise, settlement and previously dismissed actions. One of the purposes of this part is to discourage the initiation of claims which were previously dismissed on their merits. Some businesses and individuals have experienced situations where the very same claim

which was previously dismissed is filed by the same plaintiff upon retaining new counsel. Should a plaintiff refile a case which has already been dismissed, the court is directed to enter an order compensating the defendant for the attorney's fees which were incurred in the previous case.

This part also encourages early settlement of civil cases by allowing a defendant to make an offer of judgment prior to trial. If a plaintiff rejects the defendant's offer of judgment and does not improve his or her position at trial, any entitlement to attorney's fees which the plaintiff may have by way of contract or statute is cut off as of the date of the rejected offer and the defendant's entitlement to attorney's fees begins from the date of the rejected offer through trial. The purpose of this provision is twofold: (1) It encourages defendants to make real offers of settlement (there is no tactical advantage to make a low-ball offer), and (2) It encourages plaintiffs to focus upon their cases at earlier stages prior to trial and to take a hard look at the offers which are so made. The provision which is at page 3 beginning at line 6 of the printed bill is strikingly similar to Alaska Civil Rule 68. This rule which is attached at tab 2 of your materials was adopted in Alaska in 1959.

This concept is not new or radical. In fact, it was included in the report submitted in July of 1986 by Governor Goldschmidt's task force on liability. You will find in your materials at tab 3 excerpts from that report suggesting a very similar format for encouraging offers of compromise.

SANCTIONS FOR FALSE OR FRIVOLOUS PLEADINGS

In 1987, the legislature made some effort to curb the filing of frivolous lawsuits by allowing courts in their discretion to impose sanctions. However, the provisions are rarely utilized by the trial courts. Any practicing Oregon defense lawyer will likely tell you that the chances of gaining sanctions against parties who file frivolous lawsuits are close to nil under the current Oregon Rules of Civil Procedure.

Senate Bill 385 therefore proposes a modified form of the rule which controls frivolous cases filed in the federal court, Federal Rule of Civil Procedure 11. Beginning at page 4 of the bill, attorneys and parties who file or submit papers in court must make certain certifications that the allegations were made upon the person's best knowledge formed after making all inquiries that are reasonable under the circumstances. This means that depending upon the circumstances an attorney and party must first conduct some investigation prior to making allegations in a lawsuit. This provision parallels that in Federal Rule 11.

*FACP 11
amended to
include
discretion*

The bill also permits the award of sanctions against parties or counsel who have made false certifications. Once again, this section begins with the federal rule, changes some discretionary language, and also provides as a measure of sanctions not only a sufficient amount to discourage repetition of the offending conduct but, in addition, a compensatory element, an award of the moving party's reasonable attorney's fees. Sanctions may not be imposed if within 21 days after the motion is served, the party or attorney

amends or otherwise withdraws the material which thereupon corrects the false certification.

I have provided in your materials at tab 4, a copy of Federal Rule 11, and at tab 11, a compendium of recently decided federal cases showing how Federal Rule 11 can effectively discourage frivolous lawsuits. In particular, the *Business Guides v. Chromatic* case stands for the proposition that the reasonableness of a counsel's inquiry is gauged by an objective standard. The *Danik* case shows how Rule 11 will compel sanctions where a plaintiff conducts no reasonable factual inquiry prior to filing the case. The other cases illustrate the way in which Rule 11 protects parties from allegations that their adversaries are totally unprepared to prove.

**ASSESSMENT OF ATTORNEY'S FEES UPON ENTRY OF
SUMMARY JUDGMENT**

The next portion of the bill beginning at page 6 provides for an assessment of attorney's fees upon entry of summary judgment. A successful motion for summary judgment which resolves all the claims and defenses of another party allows the moving party an award of attorney fees. The award of the fees can be avoided by the other party by withdrawing, amending or voluntarily dismissing the claims or defenses that are challenged in the motion for summary judgment within twenty days before the scheduled hearing on the motion. This provision encourages parties to resolve such matters privately.

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MODIFIED LOSER PAY

The final portions of the bill beginning at page 7 provide for a modified user pay system. The concept consists of two sections: First, a section allowing attorney fee awards in small actions or what we have referred to as an access to justice rule; and secondly, a section providing for reciprocity of attorney fees awards where one party only is entitled to the awards under Oregon statutes.

The concept is referred to as "modified loser pay" because it does not impact the typical personal injury case where the amount at issue is over \$20,000; it does not affect a contract case where the amount at issue is in excess of \$20,000 and where the contract between the parties provides the mechanism for such an award. Some of the examples which have been discussed recently in the press, the *Pinto* case, and other typical negligence cases are just not impacted under this bill one way or the other.

The modified loser pay rule is designed to do two things: First, it is designed to encourage the filing of meritorious claims; second, it is designed to discourage the filing of non-meritorious claims; third, it recognizes that defendants as well as plaintiffs seek to vindicate important legal rights through the litigation of their claims. For every claim of right by a plaintiff there is a reciprocal and equivalent claim of right by a defendant. If all are truly equal under the law, a defendant should therefore have just as much of a right to be left unscathed following the successful completion of a case as should a

plaintiff.

The access to justice rule allows attorney's fees to the prevailing party in any common law contract or tort action where the amount pled as damages does not exceed \$20,000. There are many occasions when, a client will approach a lawyer with a contract claim in the \$12-20,000 range. Unless there is a contractual entitlement to an award of attorney fees, these claims are just not worth pursuing. That is because even though the plaintiff is in the right, a significant portion of her recovery will be eaten up by his attorney's fees. The other side of course knows this and so inequities occur in this range. Senate Bill 385 will correct these inequities by allowing the plaintiff with a small claim as much access to the court system as a plaintiff with a large claim.

The final portion of the bill provides for reciprocity of attorney fee awards where only one party is entitled under Oregon law to an attorney fee award. These types of laws are known as one way fee shifting laws. They allow the prevailing plaintiff to recover attorney's fees but do not allow the defendant to recover fees even if the defendant completely vindicates himself at trial.

Attached to your materials at tab 6 is a listing of those one way fee shifting laws currently on the books which are impacted by this bill.

It is important to note that the bill does not affect all one way fee shifting laws. For instance, this bill does not address the workers' compensation statutes. The bill does not address many provisions relied upon by the Bureau of Labor and Industries to

resolve wage claims. Where fee shifting statutes exist between units of government, the bill does not alter those provisions. The bill does, however, affect many other one way fee shifting statutes. These statutes can be divided roughly in thirds.

The first third relate to actions by the government against individuals and businesses. There is no reason why the government, upon prevailing, should be entitled to an award of its attorney's fees and yet a defendant who successfully defends a case against the government should be entitled to nothing. Changing these one way fee shifting statutes to two way statutes will eliminate the coercive effect a government plaintiff can have upon the private sector.

The next third pertain to statutes which relate to transactions of a commercial character. For instance, one statute allows the prevailing party attorney's fees where the defendant transports more than five coniferous trees without a permit. Another statute allows only a prevailing plaintiff/shareholder attorney's fees to enforce the right to examine certain books and records of a corporation. Another allows only the prevailing plaintiff attorney's fees in an action involving the sale of a horse that is drugged or tranquilized. There is no reason why defendants who vindicate their rights should not be as entitled to an award of attorney's fees in these circumstances as plaintiffs who vindicate theirs.

The final third consists of consumer legislation which involve one way fee provisions. Although one way fee shifting has been

justified in the past as a mechanism to encourage consumers to file claims, those who testify will tell you that the pendulum has shifted way too far. Because the prevailing defendant (who need not be a multi-national corporation, but, rather, be a barbershop or a florist shop owner) is entitled to no award upon prevailing, cases which are filed by plaintiffs have an inherent settlement value notwithstanding their merits. This is because the best defendant can ever do in such a case is to pay his or her counsel to defend the claim.

The two way fee shifting proposal contained within Senate Bill 385 is not dissimilar to Alaska's fee shifting model. Included in your materials at tab 7 is a copy of Alaska Civil Rule 82. The Alaska system of fee shifting provides that prevailing plaintiffs are entitled to attorney's fees generally as a percentage of the amount of their judgment. In addition, prevailing defendants may recover thirty percent of their actual attorney's fees after trial or twenty percent of their actual attorney's fees if there is no trial. The court in Alaska has discretion to increase the amounts under certain circumstances.

You should adopt the two way fee shifting proposal contained in Senate Bill 385 for a number of reasons. These reasons are not my invention; they are generally recognized and validated among a community of nationwide legal scholars.

ARGUMENTS IN FAVOR OF TWO-WAY FEE SHIFTING

1. Two-way fee shifting is fairer than one-way fee shifting

///

Two-way fee shifting is fairer than one-way fee shifting because two-way fee shifting recognizes that defendants, as well as plaintiffs, are seeking to vindicate important legal rights through litigation of claims. See Mark S. Stein, *Is One-Way Fee Shifting Fairer Than Two-Fee Shifting?*, 141 F.R.D. 351, 354-359 (1992). Stein argues litigation provides a forum for "the resolution of conflicting claims of entitlement or right." Id. at 355. He writes: "For every claim of right by a plaintiff there is a reciprocal and equivalent claim of right by a defendant." Id.

2. Two-way fee shifting reduces the tendency of attorney's fees to thwart the substantive goals of contract and tort law

The goal of contract and tort law should be to compensate genuine victims without charging innocent parties. See Gregory E. Maggs & Michael D. Weiss, *Progress on Attorneys Fees: Expanding the 'Loser Pays' Rule in Texas*, Hous. L. Rev. 1915, 1925 (1994). When a loser is not required to pay the winner's attorney's fees, the legal system thwarts this goal. Under the American Rule, a successful plaintiff sees his judgment substantially reduced by the amount he has to pay his lawyer. Similarly, a successful defendant's victory is only partial, having spent a large amount of money to defend himself against what ultimately was a meritless claim. As Maggs and Weiss write:

The English Rule, by contrast [to the American Rule], compensates genuine victims without charging innocent parties. If the loser of a private civil case paid the winner's fees, a prevailing plaintiff would keep the entire amount of any judgment won, and thus receive full compensation. Similarly, a defendant would not pay anything after successfully defending a lawsuit; the plaintiff bringing a meritless suit would have to pay all

of the legal cost and the defendant would walk away unscathed. Consequently, the English Rule does not distort the principles of contract and tort law like the American Rule.

3. No fee shifting encourages meritless litigation

No fee shifting encourages meritless litigation because, unlike two-way fee shifting, it does not increase the cost of losing. See Gregory E. Maggs & Michael D. Weiss, Progress on Attorneys Fees: Expanding the 'Loser Pays' Rule in Texas, Hous. L. Rev. 1915, 1926 (1994) (contrasting incentives and disincentives of British and American Rules); Steven Shavall, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for Allocation of Legal Cost, 11 J. Legal Stud. 55, 58-62 (1992) (demonstrating greater economic incentives to bring suits under the American Rule than British Rule). Two-way fee shifting thus gives plaintiffs cause to think twice before bringing a meritless lawsuit. For plaintiffs with contingent fee arrangements, the prospects of paying the other sides attorney's fees may be the only disincentive to bringing a meritless claim. Likewise, the possibility of having to pay the plaintiff's attorney's fees will dissuade many defendants from mounting meritless defenses.

4. One-way fee shifting encourages frivolous lawsuits by plaintiffs

Whereas no fee shifting does not provide disincentives to either plaintiffs or defendants, one-way fee shifting only incentivizes plaintiffs to bring meritless claims. See Gregory E. Maggs & Michael D. Weiss, Progress on Attorneys Fees: Expanding the 'Loser Pays' Rule in Texas, Hous. L. Rev. 1915, 1926-1227

(1994) (contrasting incentives and disincentives provided by two-way and one-way fee shifting); Steven Shavall, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for Allocation of Legal Cost, 11 J. Legal Stud. 55, 58-62 (1992) (demonstrating that prevailing plaintiff rules have higher economic incentives to bring suits than either the American Rule or the British Rule).

5. Two-way fee shifting encourages the litigation of meritorious claims, especially small ones

Two-way fee shifting encourages the litigation of meritorious claims generally because plaintiffs who believe in their claims have an added incentive to pursue them--they get to keep all they recover. Likewise, an innocent defendant is more likely to maintain his defense in spite of his legal costs, knowing such costs are recoverable from the plaintiff. See Gregory E. Maggs & Michael D. Weiss, Progress on Attorneys Fees: Expanding the 'Loser Pays' Rule in Texas, Hous. L. Rev. 1915, 1926-1227 (1994) (discussing incentives of two-way fee shifting).

Moreover, two-way fee shifting benefits plaintiffs whose claims are small. In noncontingent fee arrangements, generally a greater proportion of smaller claim as compared to a larger claim will be consumed by attorney's fees. Also, two-way fee shifting provides no disincentive to those who can least afford to pay for an attorney. Id.

6. Two-way fee shifting will encourage the use of alternative methods of financing legal costs

In countries that have adopted two-way fee shifting, alternative methods of financing legal costs have developed: employer supplied legal insurance; privately purchased legal insurance; and prepaid legal service plans. Although there is some use of these alternatives in the United States, adoption of two-way shifting should increase their availability here, which would be of great benefit to less wealthy individuals. This has been the experience in Great Britain and Europe. Id

CONCLUSION

You will hear much testimony over the next several weeks concerning this bill. The proposal presents a host of issues for you to resolve, many of which, in the final analysis, will have to be determined by your own views of fairness and basic philosophy. I hope Senate Bill 385 embraces those views. I urge your favorable consideration of Senate Bill 385.

STOEL RIVES BOLEY JONES & GREY

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February 2, 1995

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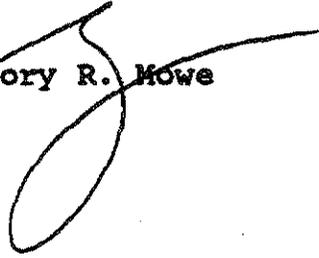
BY FAX

Re: Legislative Subcommittee

Dear Tim:

As promised in my January 27 letter, I enclose draft comments of individual subcommittee members on aspects of SB 385. Tom Howser has been ill, and I have not yet received his input. I will attempt to incorporate the enclosures, together with subcommittee feedback and any other constructive comments, into a single memorandum for Bob Oleson's use not later than the middle of next week.

Very truly yours,


Gregory R. Mowe

GRM/dlc
Enclosure
cc w/enc.:

- Thomas Howser
- Jane Aiken
- Angel Lopez
- Denise Stern
- Bob Weaver
- Dennis Rawlinson
- Barrie Herbold
- Bob Udziela
- Bob Oleson
- Renee Rothauge
- David Wu

Denise L. Stern
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Portland, OR 97282-0244

February 1, 1995

Gregory R. Mowe
Stoel Rives Roley Jones & Grey
900 S.W. 5th Avenue.
Portland, OR 97204-1268

RE: Revisions to ORCP 17

Dear Greg:

I have compared the proposed changes to ORCP 17 with FRCP 11 and Washington Civil Rule 11 (CR 11). In general, the proposed changes to ORCP 17 track the Federal Rule. However, there is at least one instance in which the proposed rule increases the burden of proof for the potential violator.

In the proposed rule, as well as under the current version, a party makes certain certifications to the court. The crux of the rule is contained in subsection C., the Certification provisions. In many respects, subsection C simply repeats the current standards. However, Subsection C also incorporates language from FRCP 11 and CR 11.

The current rule only applies to 'every pleading, motion and other paper...' The proposed rule would also apply to an attorney or party who submits an argument, i.e., the proposed rule would apply to oral assertions. This tracks FRCP 11 and CR 11.

Under the current rule, the attorney or party makes certain certificates based on 'the best of the knowledge, information and belief of the person'. The proposed rule is based on the person's 'best knowledge'. I do not have a clear idea what 'best knowledge' is and I would certainly not like to litigate that issue. The 'best knowledge' concept is unique to the proposed rule and would seem to impart a higher burden of proof. Also, under the proposed rule, the required investigation is an inquiry that is 'reasonable under the circumstances' as opposed to the current 'reasonable

inquiry'. I do not see a substantive difference in the phrases. The new terminology tracks FRCP 11 and CR 11.

Subsection C(2) of the proposed rule is identical to the present rule.

Subsection C(3) is based on FRCP 11 and specifically adds that 'claims, defenses, and other legal positions' are covered by the rule. It also changes the burden of certification from certifying that a position is warranted by a 'good faith' argument for the extension... of existing law to certifying that a position is warranted by a 'nonfrivolous' argument for the extension... of existing law. Both of these changes track FRCP 11. The difference between a burden of proof for a 'good faith' argument as opposed to a 'nonfrivolous argument' is confusing but seems negligible at best.

Subsection C(4) adds that factual allegations and other factual assertions must be supported by evidence. This is based on FRCP 11. The remainder of C(4) and (5) is very loosely based on FRCP 11. These subsections generally provide that a party or attorney can specifically identify allegation or assertions, or denials of factual assertions, that the attorney does not wish to certify. In effect, these provisions gut ORCP 17 by allowing an attorney to file a non-certified pleading.

The sanction provisions in the proposed rule are significantly different from the current rule. The proposed rule tracks FRCP 11. Under the proposed rule, the motion for sanctions must be served on the opposing party 21 days prior to the impositions of sanctions. During the 21 day period the opposing party may amend, withdraw or correct the pleading. If sanctions are awarded, the law firm is jointly liable for any sanction imposed unless joint liability would be unjust. A sanction may be awarded for attorneys fees and expenses incurred and to deter future conduct.

As we discussed in subcommittee, a reciprocal attorney fee provision may discourage a proliferation of unwarranted ORCP 17 motions.

If you have any questions, please do not hesitate to contact me.

Yours truly,

Denise L. Stern

cc: Robert Neuberger

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PLEASE REPLY TO PORTLAND OFFICE

Voice Mail Extension 3129

February 1, 1995

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Portland, Oregon 97204

VIA FACSIMILE
(503) 220-2480

Re: Judicial Administration

Dear Greg:

Attached is a draft policy statement relating to the proposed amendment of ORCP 47 to be considered by the Judicial Administration Committee. If I can be of assistance, do not hesitate to call.

Very truly yours,

GARVEY, SCHUBERT & BARER

By 
Renée E. Rothauge

RER/abd
Enclosure

To:

From: Judicial Administration Committee's Legislative Subcommittee

Re: Analysis of Proposed Legislation Relating to Summary Judgment Motions and Settlement Conferences

Section 5 of Senate Bill 385¹ would amend ORCP 47 to allow the court to award costs and fees to a party who successfully prevails on a summary judgment motion. Specifically, "the court shall enter judgment against the party who did not prevail for reasonable attorney fees, expert witness fees and all costs attributable to discovery in the action". A party prevails under the proposed legislation if "the summary judgment adjudicates all claims and defenses of the party in favor of the party."

The underlying rationale of the sweeping changes proposed in the Lawyer Litigant Accountability Act is to truncate "frivolous law suits". The proposed changes to ORCP 47 will not address the filing of frivolous lawsuits because there is no root connection between frivolous lawsuits and the summary judgment process. There are numerous reasons a summary judgment motion may be granted and a successful summary judgment motion does not necessarily mean that a party's case or claims were frivolous.

More troubling than the fact that this amendment does not really address the problem at issue, is that there may be unintended adverse effects upon the judicial system and costs to litigants as a result of the amendment. This amendment will probably encourage the filing of summary judgment motions. There is no down side for a party who files a summary judgment motion. If the party prevails, it obtains attorney fees and recovery for items that may not have been otherwise recoverable including expert witness fees and costs incurred during discovery. If the party who files a summary judgment motion loses, it is not penalized for trying.

This amendment would be more consistent with the spirit of this legislative reform, if costs were taxed to the moving party who does not prevail. In this way, the practice of filing frivolous summary judgment motions, in order to recover the costs of discovery and attorney fees, would be inhibited.

Also, this amendment could have the effect of increasing litigation costs for litigants since it could become a regular practice for all parties to a suit to file for summary judgment in light of the real economic benefit to be gained if one prevails.

Finally, this amendment poses an access to justice issue. The group of litigants with the most to lose under the amendment would be individuals who file suits against large corporations. Corporations have the resources to wage expensive legal battles and do so. If a

¹ Senate Bill 385 is one portion of the comprehensive legislative package being introduced to the Legislature commonly known as the Lawyer Litigant Accountability Act.

corporations prevails on a summary judgment motion against an individual, the individual risks losing more than his or her claims. A corporation's bill for experts, discovery and its attorneys fees could financially cripple the average wage earning citizen. For that reason, this amendment is bad policy. The judicial system must remain accessible to all and should not unfairly punish a citizen for seeking resolution for his or her problem within the court system.

Mandatory Settlement Conferences

We are in favor of the provisions in Senate Bill 385 for mandatory settlement conferences. We hope and expect they will have some impact in encouraging settlement at appropriate times and in appropriate cases.

STOEL RIVES BOLEY JONES & GREY

M E M O R A N D U M

January 31, 1995

TO: FILE

FROM: GREGORY R. MOWE

CLIENT: Professional Activities

MATTER: OSB Litigation Section Executive Committee

RE: Analysis of Section 1 of Senate Bill 385

Section 1 of SB 385 proposes several amendments to ORCP 54. The first proposed amendment adds a new Section ORCP 54D(2), which provides as follows:

"If a plaintiff who previously filed an action that was dismissed with prejudice subsequently commences an action based upon or including the same claim against the same defendant, the court shall enter an order requiring the payment of all attorneys fees incurred by the defendant in the action previously dismissed."

Since a dismissal with prejudice operates as a bar to a further action on the same claim, the intended operation of this amendment is not clear. In any event, the proposed amendment imposes a substantive liability for attorneys fees which might not otherwise exist (i.e., if the prior action did not entitle the prevailing party to attorneys fees). Since not all dismissals are the result of dilatory conduct on the part of the plaintiff, we recommend some room for trial court discretion. Thus, the proposed amendment might be modified to read

"If a plaintiff who previously filed an action that was involuntarily dismissed subsequently commences an action based upon or including the same claim against the same defendant, the court shall enter an order requiring payment of all attorneys

fees incurred by the defendant in the action previously dismissed, unless the court finds exceptional circumstances mitigating against such an award."

A second major proposed change to ORCP 54 is in the offer of compromise language contained in ORCP 54E. Initially, the proposed language moves up the latest date of an offer of compromise from 10 days prior to trial to 30 days prior to trial. We have no substantive objection to the earlier deadline (ORS 35.346(2)(a) currently provides for a 30 day pretrial offer in condemnation actions). However, the amendment will have the effect of reducing a defendant's flexibility in timing of offers.

The proposed amendment to ORCP 54E allows the offer to be accepted within 30 days after it is made. This change may create an internal inconsistency in the rule, which currently requires that an offer be accepted and filed in court within three days of service. Allowing an offer to remain open for 30 days may be contrary to a goal of reducing litigation expense. An intermediate period of 10 or 15 days might be a reasonable compromise.

The most significant substantive amendment to ORCP 54E is a provision granting a defendant recovery for reasonable attorneys fees and reasonable expert witness fees incurred after the date of the offer if the claimant does not recover a judgment more favorable than the offer. The proposed change with respect to attorneys fees should be clarified as to whether or not attorneys fees may be recovered by a defendant in a case in which a plaintiff would not be entitled to attorneys fees. The provision for expert witness fees is problematic, as it would appear to be nonreciprocal (i.e., allowing expert witness fees only to a defendant and not to plaintiffs), and because recoverable costs are traditionally dealt with on a systematic and consistent basis by the Council on Court Procedures.

If the intent of the proposed legislation is to shift a defendant's attorneys fees onto a nonsettling plaintiff in a case in which attorneys fees would not otherwise be awarded, we suggest that the rule be made reciprocal (and neutral as between plaintiffs and defendants) by allowing a claimant to make an offer of compromise by way of a pretrial demand, with the same potential consequences for a defendant if the offer is not bettered at trial.

The final proposed change to ORCP 54 is a new Section F providing for settlement conferences at any time at

the request of any party or on the court's motion. We support this proposed amendment.

GRM/dlc

STOEL RIVES BOLEY JONES & GREY

MEMORANDUM

February 2, 1995

TO: FILE

FROM: GREGORY R. MOWE

CLIENT: Professional Activities

MATTER: OSB Litigation Section Executive Committee

RE: SB 385, Attorney Fee Reciprocity

Sections 6-138 of draft SB 385 all modify statutory attorneys fee award provisions. The major modification is to adopt a "loser pays" rule on attorneys fees, with certain exceptions.

A number of the proposed changes are unobjectionable. However, in many cases the proposed amendments provide reciprocal attorneys fees under statutes now providing remedies and attorneys fees to plaintiffs otherwise subject to economic or social disadvantage. An archetypal example is ORS 346.630 (Act § 65), which currently allows a blind person to recover compensatory damages or \$200, plus attorneys fees, from a landlord who refuses to rent a dwelling unit on the basis of possession of a guide dog.

Other examples of varying inequality in economic bargaining position include consumer breach of warranty claims for less than \$2,500 (ORS 20.098, proposed to be repealed under § 7 of Act), persons subject to unlawful discrimination (§§ 11 and 15 of proposed Act), purchasers of securities (§§ 24-25), corporate shareholders (§§ 32-35), purchasers of consumer goods which are wrongfully repossessed (§ 38), borrowers impacted by lender's violation of escrow requirements (§ 41), residential tenants (§ 49), persons whose communications have been unlawfully intercepted (§ 55), financial institution customer whose records are wrongfully disclosed (§ 57), low income tenant (§ 60), physically impaired person whose assistance animal is stolen or attacked (§ 66), physically impaired tenant (§ 67), consumer suing automobile manufacturer under Oregon's "lemon law" (§ 94), consumer suing for unlawful trade practices (§ 96), consumer suing for unlawful collection practice (§ 97),

consumer suing for discrimination by creditor (§ 103), consumer suing automobile dealer for nondisclosure of prior sale (§ 104), franchisee suing franchisor for statutory fraud (§ 106), employee suing for unpaid wages (§ 109-111), insured suing insurer (§ 129-131), party injured by gross negligence or willful misconduct of public utility, railroad, air carrier, or motor carrier (§ 132), telephone customers damaged by various statutory violations (§ 133-34), and purchaser of vehicle subject to odometer tampering (§ 137-38).

While distinctions can be drawn among the above classes of plaintiffs, it is also clear that the legislative purpose in most instances was to promote remedies for consumers, employees, handicapped persons, and others through potential recovery of attorneys fees. In many cases, the statutes also provide treble damages or minimum statutory penalties, which provides additional evidence of legislative intent to deter or vindicate abuses of such individuals.

If applied broadly to the extent proposed in SB 385, the "loser pays" principal will operate to deter access to the judicial system. The same inequality in resources and bargaining power which initially influenced the legislature to adopt a statutory attorneys fee provision will now operate to place disparate economic risk upon consumers, employees and the other purported beneficiaries of statutory protection.

GRM/dlc

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February 6, 1995

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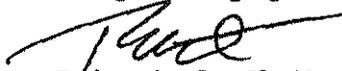
Dear Friends:

We are now scheduled to meet with Senator Bryant and Max Williams on Tuesday, February 7, 1995 beginning at 5:30p.m. at the Senate Republican Caucus lobby area by the elevators on the second floor of the Senate Wing.

Bob Oleson is checking with Chip Lazenby to see about moving our meeting with Chip. Bob is also trying to see if he can have Chip appear at our next regularly scheduled meeting on February 18, 1995. If we are able to meet with Chip tomorrow, I will send another fax.

However, I ask that everyone be in the Republican Caucus lobby area no later than 5:00p.m. tomorrow so that we will have time to discuss our presentation to Senator Bryant.

Very truly yours,



Robert J. Neuberger

RJN:ds

cc: Greg Mowe 220-2480
Susan Grabe 684-1366
Bob Oleson (503) 371-9540
Carl Myers (503) 399-9780
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OADC

Oregon Association
of Defense Counsel

February 9, 1995

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Senator Neil Bryant, Chairman
Senate Judiciary Committee
S401 State Capitol
Salem, Oregon 97310

Dear Senator Bryant:

On behalf of the OADC, this letter is sent to you as a representative of the committee hearing Senate Bill 385. Attached is a description of the OADC and a general statement adopted by the OADC Board which addresses issues contained in Senate Bill 385. It is the position of the OADC Board that matters pertaining to changes in the Oregon Rules of Civil Procedure (ORCP) should, pursuant to existing Oregon statute, ORS 1.725 through 1.750, be processed through the Council on Court Procedures. SB 385 proposes changes in the ORCP and as a matter of policy the OADC opposes legislative action on ORCP changes without prior review and recommendation by the Council.

Addressing SB 385 on the merits, the OADC expresses concerns with the following provisions of the first draft:

1. Offers of Compromise.

The OADC Board is supportive of the stated purpose to encourage defendants to make offers of settlement and to encourage plaintiffs to evaluate their cases prior to trial. The Board believes, however, that the proposal would not achieve the stated purposes, and may discourage settlement of cases. All trial lawyers know that the facts on which claims or defenses are made can and do change while an action is pending. For instance, a plaintiff's general back pain may be first diagnosed as a herniated disc after a lawsuit is filed. Likewise, a condition thought to be serious may be re-evaluated to a less serious condition as time progresses. The proposal does not allow for changes in circumstances after an offer is made.

Senator Neil Bryant, Chairman
February 9, 1995
Page 2

Under the proposal, as written, defendants would be motivated to make nominal offers of compromise immediately after every suit is filed. Defendants then would be disinclined to settle, believing that they may be able to recover attorney fees if the plaintiff does not prevail. In other words, cases may well be tried for issues related to attorney fees rather than the merits.

Oregon trial procedure does not incorporate a number of the time-consuming and expensive provisions contained in the Federal Rules of Civil Procedure, in particular, interrogatories. Nor does Oregon permit, as Washington does, depositions of expert witnesses prior to trial. As a result, Oregon's system does not require full disclosure prior to trial by either party of all of their evidence. The OADC would expect plaintiffs who receive such an offer of compromise to then send a letter in return asking the defendant to identify all witnesses, exhibits, etc. so that the offer can be evaluated. There would be no corresponding duty on the part of the plaintiff to make a similar disclosure. The courts could justifiably hold that a defendant had "unreasonably resisted efforts to obtain discovery" if a defendant did not fully respond to a plaintiff lawyer's request for all evidence so as to evaluate a settlement offer.

The OADC is concerned that while the statute as drafted benefits defendants only, that in later legislative sessions, substantial efforts will be made to make the statute reciprocal. The OADC believes that rights to attorney fees has a likelihood of discouraging settlements, or at least making cases more difficult to settle. At present, 95% of civil cases are resolved short of trial. If that percentage were to drop materially, the burden on the court system would be dramatically increased with delays and costs.

2. Mandatory Settlement Conferences.

The OADC Board supports the concept of mandatory settlement conferences, but believes that this concept has been implemented as far as practical in the circuit courts of the state at present. Those judicial districts that do not have

Senator Neil Bryant, Chairman
February 9, 1995
Page 3

mandatory settlement conferences do not because they do not have the judicial resources to conduct the conferences. Mandating judicial settlement conferences would strain already scarce judicial resources. Presently, between 95% and 98% of civil cases are disposed of short of trial. Mandatory settlement conferences, if requested by one side, may result in some additional settlements, but there is a concern by the OADC that it may come at a high price in judicial resources unless additional resources are made available through the judicial budget. Parties presently have available private mediation services at no cost to taxpayers.

3. False or Frivolous Pleadings.

ORS 20.105 now provides that courts may award reasonable attorney fees for frivolous claims or defenses. In the experience of the OADC Board members, this statute has been very seldom exercised because the problem does not exist. The OADC challenges the proponents to provide examples of situations where a court refused to exercise its discretion to award attorney fees under this statute. The proposed change seems to imply that the judiciary is not doing its job. The OADC Board believes that the judiciary has done its job and that the reason that there are few, if any, instances of awards under the statute is that there is little basis for asserting that frivolous claims or defenses are a problem in this jurisdiction.

Section 4 of SB 385 would expand upon the present Rule 11 of the Federal Rules of Civil Procedure regarding the effect of signing pleadings, motions or other papers and representations to the court. The OADC Board challenges the proponents to show material instances of abuses that are not adequately addressed under present Oregon law. The Oregon law in this area is ORCP 17. The OADC Board supports retention of the existing Oregon rule.

Claims for sanctions take judicial time and cost the litigants legal expense. Such claims lengthen the time to resolve cases and make cases harder to settle. The OADC believes that abuses in

Senator Neil Bryant, Chairman
February 9, 1995
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other jurisdictions are not present in Oregon and that the present Oregon system works and should be maintained.

4. Attorney Fees to Prevailing Party in Summary Judgment Actions.

The OADC Board supports summary judgment as an efficient means of resolving bona fide disputes. Many times disputes are solely questions of law and are submitted to the court on cross-motions for summary judgment. This is a recognized and effective way of getting a decision in areas where the law is in dispute. To provide attorney fees to the prevailing party who happens to resolve an action by summary judgment as opposed to trial, does not make sense. Presently, it is hard to get Oregon judges to grant motions for summary judgment. Defense attorneys believe that judges would be more reluctant to grant them if an attorney fee award was added to the consequences of a motion being allowed. If such a motion was not opposed or if what was done in opposition was frivolous, there is presently means to address that concern through ORS 20.105.

5. Award Attorney Fees to Prevailing Parties in all Contract and Tort Cases Seeking Less Than \$20,000.

This concept, on the surface, is attractive. Experience shows, however, that small cases can be just as expensive to process as larger cases. Small cases are now processed in many counties through court annexed arbitration to speedy, efficient results. To add attorney fees in these cases will incline the litigants to want to try the cases rather than settle them and would discourage settlement. Few small cases are now tried. If more were tried, there would be a heavy increase in the court workload and the entire docket would be affected. The availability of attorney fees would promote the filing of more small cases and increase case filings. The OADC opposes the proposal.

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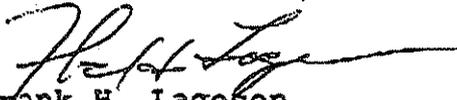
6. Modified Loser-Pay Rule.

It would be helpful if the proponents of this measure would explain why it is that claims against insurance companies are not included within the Bill. If the concept is truly to make the loser pay, then claimants against insurance companies who can presently recover attorney fees under 742.061 should have attorney fees awarded against them if they lose. The OADC Board inquires as to why that and other provisions presently providing for attorney fees to one party and not the other have been omitted.

In general, the OADC Board is against the adoption of the so-called English Rule for the reasons set forth in the article by Professor Herbert Kritzer in the November, 1992 American Bar Association Journal. A copy of that article is attached for your reference.

In summary, the OADC Board is in favor of maintaining access to justice and the present system of resolving civil disputes, utilizing jury trials. The OADC does not believe that adoption of a "loser pays" system is in the best interest of the public as a whole.

Respectfully submitted,


Frank H. Lagesen,
President

OADC

The Oregon Association of Defense Counsel ("OADC") is a voluntary group of approximately 500 lawyers throughout the State of Oregon, who primarily defend civil damage lawsuits brought against private citizens of Oregon, private businesses, professionals, and public bodies, some of whom are self-insured, while others are insured by private insurance companies.

This involvement of OADC in the legislative process results from a long-standing commitment of the OADC and its members to support or oppose legislation affecting the judicial system. Our objective has and continues to be that no legislation should be passed unless it will generally improve the judicial process, and not unreasonably increase the economic burden our citizens have to bear.

Neither the OADC, nor its members who will appear on our behalf, are paid by any client, insurance company, or otherwise to present information and testify before the legislature. In a number of instances, the OADC has and will continue to oppose ill-conceived legislation, even if it would generate additional lawsuits and therefore additional business for OADC members.

The OADC believes that legislation, especially that dealing with the judicial system, should be balanced and not benefiting a particular interest group to the detriment of the general welfare.

OADC members believe that the legislative process, especially as it relates to the judicial system, should not be a political one, nor one which is influenced by which group can spend the most money or make the most noise. Rather, it should be influenced by common sense, reasonable analysis, and the effect such decisions have upon all the citizens of Oregon.

OADC STATEMENT

DATE: February 9, 1995

TO: Joint Judiciary Committee Members

The OADC, through its members, represents defendants in civil disputes. The OADC believes that the present Oregon system for dispute resolution based on civil jury trials works well and should not be fundamentally changed. The much publicized problems of courts in other states do not exist in Oregon. Oregon dockets are kept current by the combined efforts of trial lawyers and the judiciary. This cooperative effort is reflected in the Council on Court Procedures which reviews, comments on and makes recommended changes in the Oregon Rules of Civil Procedure. The OADC supports processing all proposed rule changes through the Council. Procedural rules interrelate and a balanced workable set of procedural rules is necessary for the efficient resolution of disputes.

The OADC is in favor of constructive dialogue on ways to improve the present system, as long as any changes do not impair the right of all citizens to have their civil disputes resolved in a fair and efficient manner.

L E G A L F E E S

by herbert m. kritzer

Vice President Dan Quayle is not the first critic of the American legal system to look to England in search of reforms.

A cornerstone of the package of proposals to change the U.S. legal system being espoused by the President's Council on Competitiveness, which Quayle chairs, is adoption of the principle that fees and costs of litigation should be shifted to the loser—known as the English rule.

With his proposal, Quayle joins the line of critics who periodically have advocated a more "English" approach as a means of reining in the litigation excesses they perceive under the American rule, which requires each side to cover its own legal fees and costs.

Some proponents of the English rule—technically termed "cost-(or fee-) shifting" or "indemnity for costs"—justify their support on grounds of fairness, while others view it as a vehicle for discouraging frivolous or questionable litigation.

Opponents charge that the English rule would inhibit individuals with meritorious claims from seeking compensation.

Surprisingly, however, neither side in the American debate over the English rule has bothered to consider how cost-shifting functions in jurisdictions that embrace it.

Even a minimal investigation into the working of the rule in the English legal system (which serves England and Wales; Scotland and Northern Ireland have separate legal systems) would reveal that many litigants are shielded from either the costs or the benefits, or both, that the cost-shifting principle theoretically creates.

These realities of the English rule raise key issues that must be considered in debates over whether the rule should be imported to the American civil justice system.

The theory of the English rule is uncomplicated: Whichever side prevails in a legal action is entitled to recover its reasonable litigation expense—court costs, legal fees and other expenses, such as expert witness fees—from the losing side.

In England, the loser pays the winner's legal costs even in settlements, regardless of whether a formal action was filed; the typical settlement agreement includes a statement as to what costs will be paid.

The application of the cost-shifting principle is much more complicated than the simple phrase "loser pays" implies. While most defendants, who tend to be institutional (either as named defendants or as insurers of defendants), are genuinely

at risk to pay costs if they lose, this is not true for plaintiffs, especially individuals.

The variation in applying the rule is closely linked to the mechanisms English plaintiffs use to finance litigation. One result is that, in many situations, a successful defendant will not be able to recover its litigation costs.

Only a fraction of plaintiffs in England actually confront a straight-forward cost-shifting situation. Those plaintiffs who are "privately funded" must pay their own solicitors (often on account, as actions progress) and are at risk for having to pay their opponents' solicitors if actions are unsuccessful. If the litigation is successful, privately funded plaintiffs are entitled to recover most of their costs from the losing sides.

When barristers are used in cases, the cost-shifting rule applies to their fees, as well. While contingent (or percentage) fees are not formalized in England, there is an informal quasi-contingent fee system under which an unsuccessful plaintiff's solicitor does not seek a fee from his or her own client, although the client still must expect to pay the winner's costs.

It is generally accepted that the English rule discourages privately funded parties from bringing meritorious claims. Patrick Devlin, a distinguished English judge, has observed, "Everyone knows, every lawyer particularly knows, that for the ordinary citizen unqualified for Legal Aid a lawsuit is quite out of the question."

(The leading civil procedure text for practice in Ontario, the Canadian province with a cost-shifting regime most similar to England's, asserts, "Our costs system means that in litigation the 'downside risk' [the costs of losing] is always substantial and its undoubted effect is to discourage much litigation including some that should go forward.")

In fact, at least in court actions involving personal injury, only about 40 percent of English plaintiffs are subject to the downside risk of the English rule, according to a 1986 study conducted for the Lord Chancellor's Department, the management arm of the English judiciary. The majority of plaintiffs avoid that risk through one of three means:

First, persons whose incomes and assets fall within the appropriate guidelines are eligible to have their legal costs paid by Legal Aid, a program funded by the government and administered by a board appointed by the Lord Chancellor's Department. Some Legal Aid participants are required to

SEARCHING FOR WINNERS IN A LOSER PAYS SYSTEM



The English rule appeals to its supporters as a mechanism for dealing with what some have described as an overly litigious American society.

pay part of their costs, but most pay little or nothing. An estimated 28 percent of personal injury plaintiffs receive legal aid.

Litigants who receive legal aid are not subject, except in rare cases, to the risks of the English rule. Outside of matrimonial cases, most litigants receiving civil legal aid are plaintiffs confronting institutional defendants, which cannot recover legal expenses even if they prevail (the justification is that these parties are better able to bear the costs than is the Legal Aid fund).

Second, other litigants avoid the downside of the English rule through their trade unions. Generally, unions provide both legal representation for their members and absorb litigation costs. Typically, unions limit funding to litigation

related to accident claims by their members. Most often, those claims are work-related, although many unions provide funding for injuries occurring outside the work setting.

About 29 percent of accident cases in England are pursued by solicitors retained by unions. If a claim is unsuccessful, the union pays both sides' legal costs; if the claim is successful, the claimant's union-retained solicitor is paid by the defendant.

Solicitors retained by the unions are generally regarded as extremely effective, in no small part because they do not have to worry about skittish clients who fear paying out substantial sums if their cases are unsuccessful.

The third method of avoiding the risks of the English rule is legal expense insurance. At present, only about 2 percent of all cases are pursued by persons with such insurance. Nonetheless, insurance makes a significant difference in how solicitors handle cases, primarily because clients need not be concerned about costs.

The division of the English legal profession into solicitors and barristers helps to explain how plaintiffs react to being at actual risk for litigation costs.

In England, solicitors are responsible for most of the pretrial preparation of cases, while barristers are responsible for trying cases. Barristers typically do not become involved in cases until trial dates are approaching.

Although some 40 percent of personal injury litigants are privately funded, it is the perception of barristers that they rarely deal with privately funded plaintiffs. This can only mean that either these types of litigants are more likely to reach settlements earlier or that they are more likely to abandon their cases if settlements are not reached.

While early settlements may be the result of generous offers, it is more likely that plaintiffs are inclined to accept whatever is offered to avoid the risk of cost-shifting.

To quote Judge Devlin again, the unassisted litigant "must take what is offered to him and be glad that he has got something."

Research on negotiation and settlement in England supports Devlin. Repeat player defendants take advantage of the risk aversion of privately funded, one shot plaintiffs by engaging in hard bargaining; defendants either refuse to make offers or make offers considerably

under the likely value of the case.

Further support for this conclusion is provided by a mid-1990s study of settlement negotiations in 220 High Court cases by Timothy Swanson of the economics department at University College in London. In only 53 percent of the cases studied in which plaintiffs were privately funded did defendants make settlement offers, compared to 6 percent of the cases with Legal Aid plaintiffs and 90 percent of the cases financed by unions.

These findings suggest that defendants use plaintiff concerns about costs as a strategic bargaining tool.

(A second study, unpublished, by Paul Fenn of the Centre for Socio-Legal Studies at Wolfson College of Oxford University, suggests that the tendency may be stronger in cases that already have evolved into litigation. Fenn's study indicates that the likelihood of an offer being made to privately funded claimants not yet in litigation was only slightly lower than for financial assisted claimants.)

Transplanting the English rule to the United States raises a number of important issues closely related to underlying differences between the two legal systems.

► Would an Americanized English rule include provisions to mitigate the loser-pays principle for some segments of the population?

England's extensive Legal Aid system provides a shield for one segment of its population, trade union funding covers another segment, and private legal expense insurance offers at least the potential of a shield for other segments.

In the United States, however, legal assistance is not generally available from either government or private sources for contingent fee cases to which a cost-shifting rule would apply.

Moreover, the hardship imposed on American plaintiffs by the English rule would be compounded by the fact that the United States lacks the comprehensive social insurance system that provides English victims of injuries with extensive compensation outside the tort system.

► Are the disincentives of the English rule really so great if a potential plaintiff has a strong case? Vice President Quayle has argued that a loser-pays rule actually would enable persons to pursue strong claims that are not financially viable under the usual American contingent fee arrangement.

To evaluate that contention, im-

line a person of moderate means who has suffered a loss of \$1,000. You, as his attorney, advise him that his case is very strong, virtually a sure winner at trial.

Under the English rule, you would explain that if your client wins, the defendant would have to pay your client's legal costs. You also would inform your client that, in the unlikely (perhaps one chance in 10) event that the other side won the case, your client would have to pay the other side's legal costs amounting to, say, \$5,000.

It is hard to imagine a typical risk-averse, one-shot plaintiff willing to risk \$5,000 to recover a \$1,000 loss, even at highly favorable odds. If the amount at stake were \$10,000 or \$25,000, most middle-income individuals still would be reluctant to put \$5,000 to \$10,000 on the line to pursue even a strong case.

► How would the English rule apply to cases decided prior to trial?

Under the rule, costs follow the event; that is, at any point at which some aspect of a case is decided, the costs associated with that particular decision are assessed to the loser. Quayle's proposal would apply this principle to discovery motions. Should the rule also apply to other pre-trial maneuvers typically made by defendants, such as demurrers, motions to dismiss or motions for summary judgment (which are largely unsuccessful)?

► Would the English rule extend to all reasonable costs incurred in prosecuting or defending a suit, including expenses for such items as expert witness fees, day-in-the-life videos and accident reconstruction models?

Under the American rule, only court fees are generally considered costs, while jurisdictions following the English rule typically include all three elements.

A striking characteristic of the American bar is its entrepreneurial spirit. There is nothing comparable in the English legal profession, which historically has been reluctant to seek out or develop new areas of practice or causes of action.

Particularly for routine cases with smaller damage amounts at issue, in which liability could be assessed with a degree of certainty, one might expect the American plaintiff bar to develop some type of mutual insurance system that would protect litigants from the downside risk associated with a case.

Under a reasonably pure fee-shifting system such as England's, the costs of legal expense insurance for individuals are generally quite modest because insurance is provided only against the costs of losing. These insurance systems employ case-screening procedures that effectively remove the doubtful cases.

If the English rule were adopted in the United States, similar schemes might be developed, perhaps including post-incident plans based on some percentage of the recovery.

► But what if it were the contingent fee lawyer, not his or her plaintiff client, who was at risk for costs? This could occur either through statutory requirements or by simply incorporating the risk for the other side's costs into standard contingent fee retainer agreements.

While the President's Council on Competitiveness has not floated such a proposal, it has been suggested in other quarters.

This type of cost-shifting arrangement probably would discourage speculative litigation that advances unique legal theories or new causes of action, thus dampening the entrepreneurial tendencies of the plaintiff bar. At the other extreme, the impact on more routine cases would depend on whether lawyers screened out weak cases.

If a significant proportion of cases filed are "frivolous," then putting the lawyers bringing them at risk for the other side's legal costs should reduce the frequency of such cases, because defendants who strongly believe they would win at trial would be less inclined to settle, and plaintiff lawyers would be reluctant to risk pursuing cases to trial.

On the other hand, the ability to recover costs as well as damages from defendants should encourage plaintiff lawyers to take on the kinds of smaller cases that are not as attractive under the contingent fee system.

Since routine cases far outnumber the more speculative cases, this type of modified English rule would almost certainly increase the amount of litigation.

A ctually, this type of modified English rule potentially could work to the financial benefit of plaintiff lawyers.

Under this system, lawyers could distinguish between the commission, (the percentage of the recovery they receive from their clients), which would cover the risks and costs of handling cases, and an hourly fee



To opponents,
the rule is a
nightmare that
threatens to
deny many victims
their rightful
compensation
and put many
lawyers into
financial
crisis.

they would receive from losing parties in the cases.

There should not necessarily be a reduction in the commission paid out of a client's recovery simply because the defendant is required to pay the winning lawyer a reasonable hourly fee. The combination of the commission and the fee could cover an extended package of services provided by the lawyer to the plaintiff, including paying the defendant's costs on behalf of the plaintiff in a losing case and absorbing the plaintiff's expenses.

Critics might argue that this would constitute a windfall for plaintiff lawyers, but that would occur only rarely, particularly if cost-shifting were simply a part of the negotiated settlement in cases that do not go to trial.

Since going to trial is a money-losing proposition in most contingent-fee cases, combining some level of fee-shifting with a percentage commission probably would represent a fair fee in most tried cases. The potential for excessive fees would exist only for the small segment of very large cases, in which fee amounts are already considerable.

Assuming that contingent fee lawyers would act in a risk-neutral fashion, this Americanized English rule would favor smaller, routine causes of action that are not currently economically viable for most plaintiff lawyers at the expense of more speculative cases, in which the amounts at risk are large and the probability of success much harder to predict.

One of the most complex issues arising from the possible implementation of a form of the English rule in this country involves the process of setting amounts of legal costs to be paid by losing parties.

While legal fees and costs are now determined privately between lawyers and their clients, greater consideration would have to be given under a cost-shifting principle to the underlying reasonableness of those

fee arrangements.

Should there be a single fee rate for particular types of legal services, or should rates vary depending on the experience and skills of lawyers, or the nature of the cases?

In its proposal, President Bush's Council on Competitiveness seeks to finesse one aspect of the costs equation by making one side's liability equal to its own expenditure of time. In other words, if party A lost the case, its liability to party B would be limited to the amount of time that party A spent on the case, multiplied at some hourly rate.

This seemingly simple solution is fraught with difficulties: What constitutes the time spent on the case? Should it include time spent in settlement negotiations? How should time spent by support staff be calculated (and what if a lawyer did work that could have been done by a paralegal)?

Significant litigation over fee-shifting standards would be inevitable to resolve these issues.

Another question: Who would hear disputes over fees to be shifted?

Judges in England do not handle routine disputes over fees; rather, they are handled by taxing masters or registrars (roughly equivalent to magistrates or court commissioners

in the United States).

However, American courts are generally not structured to include that type of intermediary process. As a result, judges would likely experience a significant impact from tackling the extensive litigation that would arise over setting even routine legal fees and costs.

Establishing standards for legal work in litigation, and for the fees that can be charged, may have potential benefits, even in the absence of a fee-shifting system. However, such standards cannot exist without substantial costs, both to the system and to litigants themselves.

Viewed from afar, the English rule appeals to its supporters as a mechanism for dealing with what some have described as an overly litigious American society. To its opponents, the rule is a nightmare that threatens to deny many victims their rightful compensation and put many lawyers into financial crisis.

The truth is that these hopes and fears about the English rule have some validity.

Supporters and opponents of the rule must look beyond simple images and analyses as they grapple with the complexities that such a fundamental change would bring to the American justice system.



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Lawyers from Australia will be convening with North American colleagues next January (10-17) at the Chateau Whistler Resort, Canada. The conference is on **PROFESSIONAL & BUSINESS DEVELOPMENT STRATEGIES FOR LAWYERS** and will be addressed by speakers from the USA, Canada and Australia.

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M E M O R A N D U M

TO : SPECIAL JOINT SUBCOMMITTEE OF THE SENATE AND HOUSE
JUDICIARY COMMITTEES

FROM : OREGON STATE BAR PROCEDURE & PRACTICE COMMITTEE

RE : TORT LEGISLATION - SB 385

DATE : February 19, 1995

The Procedure and Practice Committee is a committee of the Oregon State Bar that has been charged with the responsibility of studying and making recommendations regarding procedures governing civil cases in Oregon. Under the guidance of the Bar's Board of Governors Public Affairs Committee, this committee is responsible for appearing before legislative committees regarding recommended statutory changes that affect procedural rights, statutes that affect the evidence code, uniform trial court rules, and local court rules. The Chair of the Senate Judiciary Committee has specifically requested that the Procedure and Practice Committee study and report on the legislative proposals pending before the Special Joint Subcommittee of the Senate and House Judiciary Committees on Civil Process.

The Procedure and Practice Committee is composed of lawyers from diverse areas of practice, geographic location, gender, and length of practice. We appreciate the special invitation extended by the Joint Subcommittee and the opportunity to report our findings.

SB 385

We oppose SB 385 as being unnecessary and detrimental to the civil rules and procedures presently in place. However, as requested by the Subcommittee, IF SB 385 is to be passed, we offer the following analysis, in hopes that any rules that are enacted operate properly and avoid unintended consequences. Our committee's purpose is not to criticize the proponents or drafters of the SB 385. We hope that the Joint Subcommittee and the proponents of SB 385 will accept our analysis in the spirit in which they are offered.

Notwithstanding our overall opposition to SB 385, we support the concept of strengthening the sanctions regarding frivolous suits, defenses, motions, and appeals; and the enactment of a rule regarding settlement conferences. We are opposed to the remaining provisions of SB 385 for the reasons stated below.

Oregon has an enviable record in successfully dealing with, and discouraging, frivolous filings. Many of the publicized problems found in other states do not exist in Oregon. Nonetheless, the Procedure and Practice Committee believes that the proposed amendments to Rule 17 (SB 385, Section 4) would make it clearer to lawyers and litigants alike, that frivolous lawsuits, defenses, motions and appeals are unwelcome and will not be tolerated in Oregon.

We believe that these issues should first be considered by the Council on Court Procedures who have the benefit of expertise of a cross section of the state judiciary, as well as members from

private business and legal practitioners. Because of the diverse backgrounds represented, the Council is well equipped to deal with these complicated procedural issues. Referral to, and thorough consideration by the Council is particularly important to preventing unintended consequences.

FRIVOLOUS PLEADINGS

The Procedure and Practice Committee supports the philosophy and intent of the amendments to ORCP 17C: tough sanctions for frivolous lawsuits, defenses, motions, and appeals (SB 385, Section 4). Our committee, however, offers the following suggestions and amendments:

1. Subsection C(1) of the amendment (i.e. SB 385, §4 C(1); "Certifications to Court") currently provides that: "certifications are based on the person's best knowledge, information, and belief, formed after making all inquiries that are reasonable under the circumstances." It is our concern that the modifier "best" in the amendment will present problems of enforcement and interpretation. It appears to create strict liability. The proposed Subsection C(1) goes on to use the standard of "reasonable under the circumstances" test, which is found throughout the law. The committee recommends that the word "best" be stricken from SB 385, §4 C(1), page four, line 33 and be replaced by the phrase "reasonable knowledge, information and belief, formed after making a reasonable inquiry under the circumstances". This standard will allow the parties, the lawyers, and the court to

use the benefit of well-developed case law and experience regarding "reasonableness";

2. As drafted, SB 385, §4, Subsection C(4) creates a dangerous loophole to the general requirement that a lawyer or party certify that a pleading is properly grounded in fact and law. As currently proposed, the subsection would permit a party or attorney to state that they are not willing to certify that a particular assertion is supported by evidence, but that the assertion will ultimately be supported by evidence after further investigation and discovery. We are concerned that this subsection could lead to an abuse, in the form of regular use and overuse of subsection C(4). That is, the loophole will swallow the rule. Accordingly, the subsection should be deleted. One possible solution is to incorporate the language of ORS 30.895(2). That statute provides an exemption to liability for misuse of civil proceedings where a party is required to file a pleading because of time limitations. This statute gives a party and lawyer 120 days to investigate and then either re-plead or withdraw the pleading without incurring sanctions;
3. SB 385, §4 Subsection D(1) ("Sanctions") contains a joint liability clause. While the Procedure and Practice Committee is not opposed to joint liability, lawyers should not be subjected to a special standard. The Joint Subcommittee is considering other legislation regarding vicarious liability and joint and several liability. Whatever standard the

legislature adopts for society in general, should apply in Rule 17 (SB 385 §4);

4. One of the great concerns regarding stiffer standards and penalties for frivolous pleadings, historically, has been the fear that such laws would lead to unnecessary and frivolous motions for sanctions. Such filings would clog the dockets of the courts, resulting in less time for litigants with meritorious cases and slow the resolution of all cases. A reciprocal attorney fee amendment may discourage the proliferation of unwarranted Rule 17 motions.
5. Currently, before ORCP Rule 21, 23 and 36 through 46 motions are filed, the moving party is required to meet and confer with the other party in hopes that the issues can be solved without court intervention. (UTCR 5.010) We suggest that along with the meet and confer requirement, ORCP 17 D (3 or 5) be amended to require service upon the opposing attorney, of a statement of particular facts and specific points and authorities in support of any future sanction motion. If a sanction motion is later filed with the court, the moving party may not raise new issues or facts which were not addressed in the statement of particular facts and specific points and authorities.

OFFERS OF COMPROMISE

We are unanimously opposed to the attorney fee provisions of SB 385. However, it is our belief that IF changes are made to enact the right to attorney fees in all or most civil matters, the

place to make such changes is in ORCP 54 E. The reason for this belief is that attorney fees should only be awarded after ALL parties have had an opportunity to conduct discovery on the issues presented in the lawsuit. Generally, personal injury suits are not filed until close to the running of the statute of limitations, two years after the injury occurred. In contract cases, the law allows the filing of a lawsuit anytime within six years after the breach. If the loser pay statutes are enacted, the attorney fees incurred by the Plaintiff for up to six years before an action has been filed against the Defendant will be considered recoverable under the loser pay provisions. It is our belief that §1 of SB 385 will not promote early settlements. In contrast, it will promote the early and continued expenditure of attorney's fees by one or more of the parties.

IF the legislature intends to enact an attorney fee provision to ORCP 54 E, the following amendments are necessary to prevent unwanted consequences. Some of the amendments are consistent with statements made by SB 385 proponents on February 2, 1995. Other amendments are intended to give the courts adequate room to tailor application of amended Rule 54 to the parties and their conduct. These amendments reflect a distinction between frivolous and meritorious cases. Rule 17 will deal harshly with, and impose severe sanctions against litigants and lawyers who file frivolous court papers. Such harshness is not appropriate when dealing with meritorious cases. The amendments proposed below are intended to

assure that the remedies imposed are appropriate to the circumstances:

1. The proposal (SB 385, §1, E) should be made reciprocal. Where a plaintiff makes an offer of compromise, a defendant rejects the offer, and the plaintiff obtains a judgment more favorable than the offer, defendant should be liable to the plaintiff in the same manner that a plaintiff who does not do better than a defendant's offer of compromise;
2. The restrictions upon the court granting extensions of time, and the grounds for which the court can grant extensions, should be deleted. The court should be able to exercise its reasonable discretion in determining the amount of time and the reasons for granting an extension for a party to respond to an offer of compromise;
3. No party should be responsible for a prevailing party's reasonable expert witness fees. To enact such a rule would promote the early involvement of experts which will not necessarily promote settlement, but will increase litigation costs and delay;
4. Any offer of compromise that has fee shifting implications should be allowed only after both sides have adequate information to make a reasonable evaluation of the case;
5. A cut-off date for offers of compromise should be included to prevent last-minute offers of compromise falling on the eve of trial. That is, an offer of compromise should be made sufficiently before trial to allow for settlement before fees

and expenses associated with immediate pretrial preparation are incurred. We, therefore, recommend that an offer of compromise not be allowed to be made later than that which would prevent the opposing party from making a timely response, well in advance of trial. Accordingly, we suggest that no offer of compromise shall be made within 30 days before trial and the time to respond to an offer of compromise be shortened to 14 days. We agree that the three day response time in the current ORCP 54 E is too short. However, 14 days rather than the proposed 30 days, is sufficient to afford a party the opportunity to evaluate and respond to the offer;

6. The proponents of SB 385 testified that they model their proposal upon Alaskan law. They also testified that they did not oppose caps on attorney fees. Accordingly, IF the legislature is going to amend the ORCP 54 E to allow for recovery of attorney fees, we recommend amendments to SB 385 based upon Alaska Rule 82(a) and (b) regarding caps on attorney fees as well as factors that the court should consider in determining the amount of attorney fees. In addition, we recommend that additional factors be added to those listed in the Alaska Rule of Civil Procedure, 82(b)(3). The factors listed in Alaska Rule 82(b)(3) are as follows:

- "(A) the complexity of the litigation;
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorney's efforts to minimize fees;
- (F) the reasonableness of the claims and defenses pursued by each side;

- (G) vexatious or bad faith conduct;
- (H) the relationship between the amount of work performed and the significance of the matters at stake;
- (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
- (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and
- (K) other equitable factors deemed relevant."

Our suggested additional factors are as follows:

- a. The factors contained in the statement for attorney fees in the Oregon Uniform Trial Court Rules;
- b. The parties' conduct that gave rise to the subject of the litigation. In other words, the court should be able to consider that a party committed a crime or similar bad act in fixing the amount of the attorney fees (e.g., drunk drivers and defendants who sexually molested their victims should not be entitled to the same attorney fees as a typical prevailing defendant); and
- c. The conduct of the parties with respect to the litigation, both before and after suit was filed. That is, the court should consider whether the non-prevailing party was cooperative, acted professionally, and acted reasonably. For example, the court should be able to consider whether a non-

prevailing party unnecessarily prolonged the trial or conducted vexatious discovery. The court should also be able to consider whether the party negotiated in good faith. That is, a party that was willing to settle consistent with the settlement judge's recommendations should not face as heavy an award, if any, of attorney fees as a party that did not.

Notwithstanding these guidelines, we do not believe that an award of attorney fees, is appropriate in every case. Nor do we believe that an attorney fee cap on attorney fees will solve the effect of the current bill in every case;

7. As currently drafted, the offer of compromise proposals apply to all civil cases. The legislature should expressly exempt family law and class action cases from the attorney fee amendments of ORCP 54 E; and
8. We also recommend the deletion of the last sentence added to Rule 54 E. (SB 385, Section 1 E). We agree that the amount of attorney fees should not be considered in determining whether a party received a judgment more favorable than their offer of compromise. However, this is already the law in Oregon. In fact, Oregon law currently allows a party making an offer of compromise to state whether or not the amount offered includes costs, disbursements, and attorney fees. We recommend that this useful feature of Oregon law not be affected. This is

best accomplished by deleting the last sentence that the proponents would add to Rule 54 E.

SETTLEMENT CONFERENCES

The committee supports the adoption of ORCP 54 regarding settlement conferences. We are concerned, however, that the proposal does not go far enough. The proposal could be improved by giving the court authority to order that institutional or corporate parties, have the person or persons actually available who are responsible for deciding settlement issues. It would also be helpful to give the court authority to compel attendance at the settlement conferences, of lienholders such as workers' compensation carriers and health insurers, at the parties' request.

ENGLISH RULE - LOSER PAYS

We understand the frustrations of people who feel that they are the victims of a frivolous claim or defense. However, historically the English Rule (ie. loser pays) creates many problems and fails to solve the problems its proponents intend. In 1980, the Florida Medical Association convinced its state legislature to adopt the English Rule by arguing that it would discourage the filing of cases and that it was fair to require the losing party to make the winner whole. Five years later, the Florida Medical Association returned to the state legislature asking that the statute be repealed because the English Rule had been so detrimental. Litigation costs had risen. The Florida Legislature complied with the request and repealed the English Rule statute in 1985.

Even England is unhappy with the rule. Respected conservative and pro-business commentators have urged repeal in Britain because the rule is a drain on public assistance programs and perpetuates big government programs such as legal aid and the welfare state. In England, families with annual income of \$45,000 qualify for legal aid and are thus protected from personal liability under the English Rule. In the United States, legal aid is not available in personal injury claims. Individuals with annual incomes of over \$7,200 and families with incomes over \$14,500 are not eligible for legal aid.

We have been unable to find any evidence to support the view that the adoption of the English Rule would fare any better in Oregon regardless of whether it is limited to small cases or adopted as a part of ORCP 54.

Section 6 of SB 385 is particularly unnecessary in cases under \$20,000. In most Oregon counties, such claims are diverted into mandatory arbitration programs. Further, some counties are utilizing court annexed mediation to resolve these small cases without the need for either arbitration or trial. Thus, the courts are making great strides in achieving the goals that the proponents seek. In addition, the litigants with the assistance of their attorneys are increasingly using voluntary private mediators for claim resolution, both before and after the claim has been filed. Private mediations are particularly effective, in part, because the parties have a vested interest in reaching a resolution, as they are incurring a shared cost of the mediator.

In conclusion, Sections 6 and 7 of SB 385 regarding attorney-fee awards in small actions are not necessary. The amendments to Rule 17 will adequately serve the intended purpose of Sections 6 and 7. In addition, small cases already contain the greatest built-in incentives to settle. That is, the amount in controversy is small and the risk of incurring significant attorney fees and litigation expenses on each party's behalf, is great. Thus, the parties already have a significant incentive to settle. In fact, over 90% of such cases which are filed, settle. Further, a significant number of such small claims are settled before a lawsuit is filed. These built-in incentives exist even where a party is represented on a contingent fee basis. For example, a party that has suffered property damage already stands the risk of incurring significant legal expenses which are not contingent. The plaintiff is responsible for its own litigation costs regardless of the outcome of the case. Most of these costs cannot be recovered from the defendant, even with a successful verdict. Such a plaintiff also runs the risk of not being compensated for the loss it has already suffered. Thus, a plaintiff who has retained counsel on a contingent fee, is still the real party in interest both legally and practically. Small cases need the least extra incentive of any type of case to be settled. The additional requirement of settlement conferences will also encourage earlier settlements without the need for adoption of the English Rule.

We also oppose Section 7, which would repeal ORS 20.080 and 20.098.

RECIPROCITY OF STATUTORY ATTORNEY-FEE AWARDS

The adoption of Sections 8 through 138 amending 130 separate attorney-fee statutes should be analyzed on a case-by-case basis. The proponents of SB 385 categorized the existing attorney-fee statutes into three categories:

1. Statutes that currently award attorney fees in favor of the government when it is a prevailing party;
2. Statutes that allow the award of attorney fees in favor of a particular type of business in specified cases; and
3. Statutes providing for an award of attorney fee to consumers, crime victims, and certain disadvantaged persons in specific cases.

We have great concern about a wholesale making of the third class of statutes reciprocal. Each of these statutes were passed to level the playing field regarding a disadvantaged group of persons, or to make a particularly culpable class of wrongdoers in a particular case liable for attorney fees.

We are also concerned that a wholesale and indiscriminate amendment of statutes that provide a right of attorney fees to various individuals, will have unintended and unwanted consequences. For example, some of the statutes currently provide for an award of attorney fees against a criminal and in favor of the victim of a crime. Making statutes reciprocal would place the legislature and the State in the curious position of appearing to support criminal and other reprehensible conduct.

MISCELLANEOUS ATTORNEY-FEE PROVISIONS

As previously discussed, the amendments to Rules 17 will more than adequately clamp down on the rare frivolous filing, and will promote the fair and efficient resolution of meritorious cases. SB 385 contains a number of amendments to specific statutes and rules that become redundant and dangerous once Rule 17 has been amended. Accordingly, the Procedure and Practice Committee recommends that these miscellaneous provisions contained in SB 385 §1 subsection D(2) §2, and §3 either not be adopted or that they be severely limited.

A. Previously-Filed Actions

Section 1, subsection D(2) of SB 385 would amend Rule 54 D by adding a new provision to cover lawsuits that have been filed after the same subject matter had previously been the subject of the lawsuit that had been dismissed on its merits and with prejudice. The members of our committee have been unable to find any real-life examples of this problem, and believe it to be a rare occurrence. The only example that we could imagine is a situation that could come back to haunt well-intended business litigants. Under the doctrines of issue and claim preclusion, parties sometimes later find out that a settlement or judgment in an earlier case precludes suit in a related matter. The doctrines of issue and claim preclusion (also known as res judicata and collateral estoppel) are quite complicated. The proposed rule would set an unnecessary trap for litigants who are acting in good faith.

B. The Willful Disobedient Statute

Section 2 of the bill would amend ORS 20.105 to make an award of attorney fees in certain limited circumstances mandatory instead of discretionary. Section 2 would also delete an important limitation in the law that the court should award reasonable attorney fees that are "appropriate in the circumstances." The committee vigorously opposes the amendment that would delete the language "appropriate in the circumstances." Instead of amending ORS 20.105 as proposed, the joint subcommittee may want apply amended Rule 17, revised by our proposals.

C. Summary Judgments

Section 5 of SB 385 would amend ORCP 47 to make an award of attorney fees, expert witness fees, and all costs attributable to discovery available for a prevailing party who filed or won a summary judgment motion. We recommend that the entire proposal regarding summary judgments be stricken. The issue will more than adequately be taken care of by the amendments to Rule 17.

Summary judgments are just one of the many ways in which a case can be brought to a conclusion. Singling out summary judgments will have a deleterious effect on the civil justice system. Litigants and lawyers would be wrongly motivated to file motions for summary judgment, the vast majority of which will be denied, and many of which may be frivolous. These additional filings will impose a significant burden on the available time of the courts, resulting in delay in the court's other dockets. Such a flood of summary judgment motions is not to be encouraged, and

will cost the courts and parties much in the way of added delay and expense. In a close case, a court may deny a motion for fear of burdening a reasonable party with attorney fees. The denial of a motion for summary judgment is generally not reviewable on appeal.

In the last ten years, the bench and bar have strived to educate one another about the appropriate and inappropriate uses of summary judgment. Those efforts have largely been successful. The proposed amendments contained in SB 385 will unnecessarily increase litigation costs, delay, and likely encourage the filing of unnecessary and frivolous pleadings. We do not believe that summary judgments deserve this encouragement. We therefore oppose the amendments in Section 5 of SB 385. However, IF the joint subcommittee intends to enact ORCP 47 I, the proposal should be made reciprocal so that a party who files but loses a motion for summary judgment, will be responsible for the opposing party's attorney fees and costs.

We also strongly urge you to delete the ability of the court to award "expert witness fees" and "all costs attributable to discovery." Providing expert fee awards is especially unwarranted in light of the provisions of ORCP 47 E. ORCP 47 E allows a party's attorney who is opposing a motion for summary judgment to submit an attorney affidavit setting forth what the attorney believes his/her expert would say in response to the motion for summary judgment. This attorney affidavit obviates the need for an affidavit from the actual expert. In such a case, expert fees should not be awarded.

CONCLUSION REGARDING SB 385

We unanimously oppose SB 385. While we agree with the goals of discouraging frivolous filings and encouraging speedier resolution of lawsuits, we are concerned that many of the provisions of SB 385 paint with too broad a brush. Notwithstanding our opposition, and pursuant to the request of the subcommittee, we have analyzed SB 385. However, the points that we have made in our analysis do not cure the fundamental defects in SB 385.

SB 385 will result in significant clogging of court dockets. The courts' time would be diverted from other necessary duties, such as criminal cases and meritorious civil cases. Oregonians currently enjoy perhaps the speediest civil docket in the country. The ability of the courts to push cases to trial is perhaps the single most effective encouragement towards settlement. A delay in the time between filing and trial creates a delay between the time of filing and settlement. These delays will cause significant costs, not only to the litigants but also the courts and the public. We are particularly sensitive to these concerns because additional court time will be required to deal with criminal cases in view of the passage of Measures 10, 11 and 14.

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SENATE JUDICIARY COMMITTEE
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AGENDA

Senate Subcommittee on Civil Process
House Subcommittee on Civil Process
Work Session on Senate Bill 385 and 386
February 20, 1995
3:30 PM

Post-It Fax Note	7671	Date	2/17	# of Pages	1
To	Missy Hadden	From	M. Williams		
Co/Dept		Co.			
Phone #		Phone #	986-1640		
Fax #	946-1564	Fax #	986-1699		

3:30 PM

I. Open work session on SB 385

1. Testimony of Attorney General Kulongoski (15 Minutes)
2. Testimony of the Oregon State Bar Committee on Civil Practice and Procedure (20 Minutes)
3. Testimony of the Council on Court Procedures (20 Minutes)
4. Testimony of the Oregon Association of Defense Counsel (10 Minutes)
5. Testimony of Professor Edward Brunett (5 Minutes)
6. Testimony of the Honorable Donald Londer (5 Minutes)

II. Open work session on SB 386

STOEL RIVES BOLEY JONES & GREY

M E M O R A N D U M

February 21, 1995

TO: LITIGATION SECTION LEGISLATIVE SUBCOMMITTEE MEMBERS
FROM: GREGORY R. MOWE *GRM*
RE: Senate Bill 385

Enclosed please find a copy of the Litigation Section Report as presented to the Joint Judiciary Committee on February 20.

GRM:kw
Attachment

OREGON STATE BAR LITIGATION SECTION REPORT

ON

SENATE BILL 385

A. Introduction and Overview.

SB 385 significantly modifies existing Oregon substantive and procedural law relating to awards of attorneys fees, sanctions, summary judgment, offers of compromise and previously dismissed actions. The Litigation Section generally opposes the Bill as drafted, reflected in the specific comments which follow. The Section also offers the following overview of the issues raised by Senate Bill 385:

1. The Oregon Civil Justice System functions reasonably well. Oregon civil filings have not increased dramatically in recent years, and cases move promptly to resolution (generally within one year of filing). An increasing number of civil disputes are settled through court and private mediation.
2. The Council on Court Procedures is uniquely qualified to consider and propose changes in procedural rules. As reflected by the specific comments below, the Section believes that Senate Bill 385, as currently drafted, may have unintended consequences in many instances of increasing rather than decreasing litigation activity and costs. Deliberative review of the proposed legislation by the Council on Court Procedures would reduce the likelihood of such inadvertent impacts.
3. SB 385 contains some positive ideas. Modification of the sanctions provisions of ORCP 17 to more closely comply with Fed R Civ P 11 is in general a reasonable approach to attorney misconduct. The proposed amendment to amend ORCP 54 to authorize a court to order settlement conference is a positive change.
4. Some of the provisions of the Bill, primarily the proposed amendment to ORCP 47, relating to summary judgments, could well have an unintended effect of encouraging the proliferation of litigation. Summary judgments are not appropriate to resolve factual disputes and are rarely granted in Oregon state courts. However, the opportunity for fee shifting in a case in which attorneys fees are not otherwise recoverable would encourage the filing of summary judgment motions even with a low probability of success.
5. The provisions of the Bill providing for reciprocal attorneys fees raise significant issues of access to justice. The Section has no objection to attorney fee reciprocity in a

number of instances, but does have substantial concern about amendment of the statutes providing attorney fees and other remedies to consumers, employees and other individual subject to comparative economic or social disadvantage. While reciprocal fee shifting may deter some frivolous litigation, it will also chill meritorious litigation. Low and middle income consumers will be understandably reluctant to pursue even the most meritorious claim if there is even a slight risk of financial ruin through an open-ended liability for a corporate defendant's attorneys fees. Concerns for deterring frivolous litigation can more equitably be addressed through amendments to ORCP 17.

6. Notwithstanding our Section's general opposition to "loser pays" legislation, it is our belief that if changes are to be made with respect to attorney fee shifting, the appropriate place to make such changes is in ORCP 54E. Any amendment to ORCP 54E to provide fee shifting, however, should be made reciprocal to allow either party to invoke an offer of compromise, and should be tempered by an attorney fee cap or judicial discretion to limit fee awards.

7. To the extent that SB 385 seeks to encourage settlement and reduce litigation expense, the Section believes that amendments to ORCP 54 are more likely to accomplish such result than a general "loser pays" rule. The reason for this is that ORCP 54, if amended, will require a settlement offer as a condition for an award of attorneys' fees. A general "loser pays" rule, on the other hand, may actually make settlement more difficult, as the impact of a potential award of attorneys' fees tends to drive the parties' settlement positions farther apart. Additionally, in those instances in which the parties have a disparity in economic bargaining position (as in the case of a consumer and an insurance company or financial institution), the economic risk of an adverse attorneys' fee award tends to increase over the course of the litigation. The economically stronger party could thus rationally delay a settlement offer, or make none at all, in order to maximize its economic leverage.

B. Specific Comments.

1. Section 1.

Section 1 of SB 385 proposes several amendments to ORCP 54. The first amendment, to ORCP 54D(2), requires payment of attorneys fees upon refiling of a claim previously dismissed with prejudice. Since a dismissal with prejudice normally operates as a bar to a further action on this same claim, the intended operation of this amendment is not clear. The Section does not oppose this amendment, but would oppose any extension of mandatory attorneys fees to dismissals without prejudice,

since not all dismissals are the result of dilatory conduct on the part of a plaintiff.

The second major proposed change to ORCP 54 is in the offer of compromise language contained in ORCP 54E. The most significant substantive amendment to ORCP 54E is a provision granting a defendant recovery of reasonable attorneys fees and reasonable expert witness fees incurred after the date of an offer if the claimant does not recover a judgment more favorable than the offer. The Section interprets the proposed amendment to allow an award of attorneys fees to a defendant even in cases in which attorneys fees would not otherwise be recoverable by either party.

We believe ORCP 54E, as amended, will adversely impact access to our courts by Oregon citizens, and about fairness of the non-reciprocal aspect of the Bill as currently drafted, in that a defendant can trigger fee shifting in a non-attorneys fee case against a plaintiff which fails to accept a reasonable settlement offer, but a plaintiff would not have the same opportunity. The Section also believes that the practical benefits of the amendment to ORCP 54E would be enhanced by allowing a claimant as well as a defendant the opportunity to make an offer of compromise. A claimant's offer would simply be in the form of a mirror image of a defendant's offer (i.e., an offer to accept an entry of judgment in favor of the claimant and against the defendant for a specific amount), with the same potential for fee shifting if the defendant failed to obtain a more favorable judgment at trial.

The Section also believes that attorney fee liability should be tempered in order to discourage over-lawyering of cases, and to lessen the likelihood of catastrophic impact on a lower or middle class litigant who in good faith fails to improve on a settlement offer. In this regard, the protections of Alaska Rule 82(a) and (b) appears to be reasonable (presumptive award of 20 or 30 percent of actual attorneys' fees, subject to variation by Court upon consideration of a number of factors, including efforts to minimize fees, reasonableness of claims and defense pursued by each side, and vexatious or bad faith conduct).

The Section opposes recovery of expert witness fees under ORCP 54E. Such fees are not usually considered recoverable costs, and we see no reason to single out such fees for non-uniform treatment under a single procedural rule.

SB 385 also moves up the latest date of an offer of compromise from 10 days prior to trial to 30 days prior to trial. The Section has no substantive objection to an earlier deadline, but does note that it may reduce a defendant's flexibility in timing of offers. The proposed amendment also

allows the offer to be accepted within 30 days after the time it was made. This change creates an internal inconsistency in the rule, which currently requires that an offer be accepted and filed in court within three days of service. Allowing an offer to remain open for 30 days (particularly if the offer is made 30 days prior to trial) may also be contrary to a goal of reducing litigation expense. An intermediate period of ten to 15 days would appear to be a reasonable compromise, at least for offers made late in the litigation.

The final proposed change to ORCP 54 is a new Section F providing for settlement conferences at any time at the request of any party or on the court's motion. The Section supports this proposed amendment.

2. Section 2.

Section 2 amends ORS 20.105 to provide a mandatory award of attorneys fees as a sanction for bad faith claims. The Section does not oppose this amendment.

3. Section 3.

Section 3 amends ORS 20.125 to require imposition of attorneys fees against an attorney who causes a mistrial through deliberate misconduct. The Section does not oppose this amendment.

4. Section 4.

Section 4 amends ORCP 17. Many of the proposed changes track with Fed R Civ P 11. The Section does not oppose the proposed change, but believes that certain further amendments are in order. First, some consideration should be given to the special circumstance in which an attorney is required to file a civil action immediately prior to expiration of a statute of limitations. ORS 30.895(2), relating to wrongful use of civil proceedings, permits a 120 day period for further investigation and evaluation of a claim if the lawsuit was filed within 60 days of running of the statute of limitations. This situation could be addressed by modifying the proposed text of ORCP 17D(3) to allow a period of time greater than 21 days (perhaps 60 or 90 days) for amendment or withdrawal of a pleading if the pleading was initially filed within 60 days of running of the statute of limitations.

Second, the Section has some concern that the sanction procedure of proposed ORCP 17D will encourage proliferation of sanction motions. Although Oregon state and federal courts have generally been successful in maintaining civility among litigants, sanctions litigation under current Fed R Civ P 11 has proliferated and assumed a life of its own

in many federal courts. A reciprocal attorneys fee provision on sanction motions would tend to discourage casual filing of such motions.

Third, the Section is concerned about two aspects of certification of pleadings under proposed ORCP 17C. A requirement that certifications be based on "best" knowledge, information and belief presents problems of enforcement and interpretation. On the other hand, subsection C(4) creates a loophole which allows a party or an attorney to avoid certification entirely. This loophole could easily swallow the rule. A possible solution would be to replace the word "best" with the word "reasonable" in subsection C(1), and delete the certification exception from subsection C(4). Harshness remaining in subsection C(4) could be moderated by amending the first sentence to read as follows:

"A party or attorney certifies that the allegations and other factual assertions in the pleading, motion or other paper are supported by evidence, including reasonable inferences therefrom."

5. Section 5.

Section 5 of SB 385 would amend ORCP 47. It requires a court to award costs, attorneys fees, and expert witness fees for a party which prevails on summary judgment against all claims or defenses of the other party. The Section opposes this amendment.

As a policy matter, the proposed changes to ORCP 47 bear at most a tenuous relationship to the filing of frivolous lawsuits. Summary judgment motions are generally granted on narrow legal grounds, and are not the appropriate forum for resolving factual disputes. Negligence and other tort claims, even those greatly exaggerated, are generally unlikely candidates for summary judgment.

The Section is more troubled by the likely practical impact of this amendment. The amendment will in all probability have the unintended adverse effect of clogging the judicial system and increasing costs of litigation. The reason for this is that summary judgment will represent an opportunity for fee shifting in cases not otherwise subject to attorneys fee or expert fee liability. There will be no downside for a party which files a summary judgment motion. If the party prevails, it shifts attorneys and expert fees which would not otherwise be recoverable. If the party loses, it is not penalized for trying. A reasonably predictable result will be that expensive and time consuming summary judgment motions will be filed in all but the most frivolous cases. Given the

frequent pronouncements of the Oregon appellate courts that summary judgment is not a favored procedure and is not an appropriate forum for resolving contested issues of fact, the most likely result will be to increase litigation costs for all litigants.

The proposed amendment also raises an access to justice issue. The group of litigants most at risk would be individuals filing lawsuits (or defending lawsuits) against corporations or insurance companies. If a corporation prevails on a summary judgment motion against an individual, the individual risks losing more than his or her claims. Given the financial risk to a litigant of modest resources, summary judgment procedure could become a club by which litigants of modest means are intimidated from pursuing even valid claims or defenses.

Finally, if the Legislature nevertheless determines to amend the summary judgment rule to provide for attorneys fees to a prevailing party, the amendment should in fairness be made reciprocal to allow costs and attorneys fees to a party which successfully defeats a summary judgment motion. Such a further amendment would discourage automatic filing of summary judgment motions in every case.

6. Sections 6 and 7.

Section 6 provides for attorneys fee awards to the prevailing party in claims of \$20,000 or less. The Section opposes this provision. Any form of "loser pays" rule hampers equal access to courts, because it creates greater risk on lower and middle class persons who cannot risk a major loss, even if they have a reasonable claim or defense. The amended Rule 54 provisions regarding offers of compromise offer an alternative deterrent to frivolous cases (i.e., a defendant in a frivolous action can make a nominal offer upon receipt of a complaint, thus triggering a potential attorneys fee liability). The Section also opposes this amendment because it runs counter to other legislative efforts to resolve small claims in forums other than the courts, such as mediation, arbitration and small claims court.

The Section opposes repeal of ORS 20.098, a consumer protection statute which provides an award of attorneys fees to a successful claimant on a breach of warranty action where the amount in controversy is \$2,500 or less. The statute operates to remedy an imbalance in resources between consumers and manufacturers. Adoption of a reciprocal attorneys fee rule for such cases would restore the imbalance.

7. Sections 8-138.

Sections 8-138 modify statutory attorneys fee award provisions to create a "loser pays" rule. The Section strongly opposes wholesale adoption of such amendments.

While a number of the proposed amendments are unobjectionable (in that the Section can discern no strong policy reason for a one way attorneys fee provision), it is also clear that a significant number of the affected statutes provide remedies in consumer actions, employee actions, and actions by handicapped and other disadvantaged persons. The statutes represent a considered legislative decision to "level the playing field" between major business and institutional interests and low and middle income citizens. A loser pays rule will create a substantially greater economic risk for low and middle income citizens and will thus adversely affect access to justice in our state.

While there may be some reasonable room for debate as to which statutes reflect prior legislative policy remedying an imbalance in bargaining position between low and middle income citizens, on the one hand, and businesses, insurance companies and institutions, on the other hand, the Section opposes the following proposed amendments:

Section 11	ORS 20.107	Unlawful Discrimination
Section 12	ORS 30.075	Wrongful Death Claims
Section 15	ORS 30.580	Discrimination in Accommodations
Section 19	ORS 30.860	Discrimination - Foreign Governments
Section 21	ORS 30.864	Student Records Disclosure
Section 23	ORS 30.960	Liquor Liability
Section 24	ORS 59.115	Securities Law Violation
Section 25	ORS 59.127	Securities Law Violation
Section 27	ORS 59.670	Funeral Homes and Bonding Companies
Section 29	ORS 59.925	Mortgage Brokers
Section 30	ORS 62.335	Claims Against Coops by Shareholders

Section 31	ORS 62.440	Claims Against Coops by Shareholders
Section 32	ORS 65.207	Corporate Meeting Demands
Section 33	ORS 65.224	Corporate Record Keeping Violations
Section 35	ORS 70.415	Actions Against Limited Partnerships
Section 36	ORS 74.A3050	Action Against Bank for Delayed Transfer
Section 37	ORS 74A.4040	Bank Payments
Section 38	ORS 79.5070	Consumer Goods
Section 39	ORS 83.650	Consumer Purchases
Section 40	ORS 86.260	Lender's Consumer Trust Accounts
Section 41	ORS 86.265	Mortgage Lender Liability
Section 46	ORS 87.725	Agriculture Produce Liens
Section 47	ORS 87.772	Grain Producer's Lien
Section 48	ORS 87.865	Employee Benefit Plans
Section 49	ORS 90.710	Landlord Tenant
Section 57	ORS 192.590	Public Record Act Violations
Section 60	ORS 307.525	Low Income Housing
Section 65	ORS 346.630	Rental Discrimination - Blind People
Section 66	ORS 346.687	Theft or Injury to Assistance Animal
Section 67	ORS 346.690	Rental Discrimination - Blind People
Section 68	ORS 431.905	Toxic Household Substance
Section 71	ORS 462.110	Premises Liability - Racetracks
Section 89	ORS 618.516	Consumer Protection Seals
Section 92	ORS 646.140	Consumer Protection UTPA

Section 93	ORS 646.240	Consumer Protection UTPA
Section 94	ORS 646.359	Consumer Protection UTPA
Section 95	ORS 646.632	Consumer Protection UTPA
Section 96	ORS 646.638	Consumer Protection UTPA
Section 97	ORS 646.641	Unlawful Debt Collections
Section 98	ORS 646.642	Consumer Protection
Section 100	ORS 646.770	Consumer Protection
Section 101	ORS 646.775	Consumer Protection
Section 102	ORS 646.780	Consumer Protection
Section 103	ORS 646.865	Consumer Protection Debt
Section 104	ORS 646.876	Consumer Protection
Section 105	ORS 648.135	Consumer Protection
Section 106	ORS 650.020	Consumer Protection Franchises
Section 109	ORS 652.200	Wage Claims
Section 110	ORS 652.230	Wage Claims
Section 111	ORS 653.055	Wage Claims
Section 112	ORS 653.285	Employee's Equipment
Section 113	ORS 656.052	Employment
Section 114	ORS 658.220	Farm Labor
Section 115	ORS 658.415	Farm Labor
Section 116	ORS 659.160	Discrimination in Education
Section 117	ORS 659.165	Discrimination
Section 119	ORS 671.578	Consumer Protection/Professional Licenses
Section 120	ORS 671.705	Consumer Protection/Professional Licenses

Section 121	ORS 692.180	Consumer Protection/Funeral Parlors
Section 123	ORS 697.792	Debt Consolidation
Section 124	ORS 701.067	Licensed Contractors
Section 125	ORS 722.116	Inspection of Financial Records
Section 126	ORS 722.118	Inspection of Financial Records
Section 127	ORS 731.314	Consumer Protection/Insurance
Section 128	ORS 731.737	Consumer Protection/Insurance
Section 129	ORS 746.300	Consumer Protection/Insurance
Section 130	ORS 746.350	Consumer Protection/Insurance
Section 131	ORS 746.680	Consumer Protection/Insurance
Section 132	ORS 756.185	Consumer Protection Public Utilities
Section 133	ORS 759.720	Consumer Protection Communications Companies
Section 134	ORS 759.900	Consumer Protection Communications Companies
Section 135	ORS 760.540	Consumer Protection Communications Companies
Section 136	ORS 774.210	Consumer Protection Public Utilities
Section 137	ORS 815.410	Consumer Protection Odometer Tampering
Section 138	ORS 815.415	Consumer Protection Odometer Tampering

Finally, the Section notes that SB 385 as currently drafted does not propose an amendment to ORS 742.061, which provides reasonable attorneys' fees to an insured claimant suing his/her insurance carrier for failure to pay a claim within six months. This is also clearly a consumer protection statute, and the Section would oppose a "loser pays" amendment.

GRM/dlc

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MEMORANDUM

TO: SB 385 Work Group Participants

FROM: M. Max Williams II
Counsel, Senate Judiciary Committee *MW*

SUBJECT: Draft Memo to Legislative Counsel

DATE: February 28, 1995

Thank you again for your participation at the work group meeting on Friday.

I have attached for your review a draft memo to Legislative Counsel, asking them to prepare, for discussion purposes, amendments to SB 385. I appreciate those of you who provided me with your notes.

Please feel free to edit this if you think there is something that is unclear or incorrect. On several issues, we were not able to discuss them in detail, or we failed to bring them to closure with the work group. On these I made a judgment call for purposes of keeping things rolling.

If you have comments, feel free to jot them on the draft and fax it back. I'd prefer a written note, but if you don't have time to do that, always feel free to call me to discuss. My plan is to provide this to LC tomorrow afternoon, so they can begin work on the amendments.

Until we have a final "concept" memo to go to LC, I'd appreciate it if you would keep this draft to yourselves. No reason to get people all excited over something that may be my drafting error. On behalf of myself, and Senator Bryant, thank you again for your assistance.

cc: Senator Bryant

M E M O R A N D U M

TO : MAX WILLIAMS
FROM : ROBERT J. NEUBERGER
RE : POSSIBLE AMENDMENTS FOR SB 385 BASED UPON THE WORK
GROUP MEETING OF 2-24-95
DATE : 3-1-95

Max, I have your draft memorandum of 2-28-95. I offer the following comments:

Section I, Previously Dismissed Actions

The words "for costs and disbursements" should be stricken from page two, line 44 of the bill.

Section I, English Rule, ORCP 54D

There was no agreement regarding alternative #1 or alternative #2. In fact, all of the participants except for Mr. DiLorenzo are opposed to loser pays. Therefore, the first alternative should be an amendment striking any language regarding proposed 54Z out of SB 385.

One additional limiting factor that was considered was the provision from the contract with America that would provide that no party receiving fees under an offer of compromise could receive more than the other party pays in attorney fees.

With respect to the second paragraph on the top of page three of your memorandum, in addition to the Alaska factors, legislative counsel should also add the factors listed in the Practice and Procedure Committee's report: the factors set forth in UTCR; the

parties' conduct that gave rise to the subject of the litigation; and the conduct of the parties with respect to the litigation, both before and after suit was filed. Also, caps along the lines of those contained in Alaska Rule 82 need to be included as part of this alternative.

With regard to alternative #2, the proposal was not "objectively unreasonable," but a higher standard. The proposal was that attorney fees would only be awarded where the offending party's conduct is clearly unreasonable, constituting conscious indifference and disregard of the rights of others.

At the top of page two of your memorandum, you state, "leave ORCP 54E as it is." My notes reflect that, while we agreed to have a separate section for the offensive use of attorney fees (54Z), the existing Rule 54E would be amended to make it reciprocal so that a plaintiff could cut off a defendant's rights to costs and disbursements and attorney fees under a statute or contract.

Section II Regarding ORS 20.105

We agreed to the proposal to substitute "shall" for "may, in its discretion" as proposed by the bill. However, we agreed to not delete the current language of the statute "appropriate in the circumstances." In other words, that language would remain in the statute.

With respect to overruling Mattiza v. Foster, one suggestion was to delete from page three, line 42, "or solely for oppressive reasons." Also, the word "and" would be added so that line 42 would read "bad faith and wantonly."

Section IV Regarding ORCP 17

I disagree with your statement regarding Section C(1). Lines 33 and 34 on page four of the bill should be replaced with the following language: "The person's reasonable knowledge, information and belief, formed after making a reasonable inquiry under the circumstances."

The importing of the language from ORS 30.895(2) should probably be accompanied by a provision that the court may shorten or lengthen the time.

The joint liability language of proposed D(1) [page five, lines 13-15] should be stricken.

Your discussion of the 21-day safe harbor provision of D(3) needs to make it clear that the particular facts and specific points must be set forth in detail.

Section V Regarding Summary Judgment

We seem to be in agreement that all of proposed 47I would be deleted. There was no agreement that SB 608 could simply be imported in its place. You fail to mention that the consensus was that the matter should be referred by the legislature to the Council on Court Procedures for the Council's thorough consideration. There was some discussion about amending ORCP 47 at this time to simply make it clear that, in determining whether a material question of fact exists, should be decided using Oregon's directed verdict standard. There was no agreement that the remainder of SB 608 would be enacted at this time.

xc: Members of the Work Group

b

Chair
Senator Neil Bryant
Vice Chair
Senator Randy Miller

Members
Senator Ken Baker
Senator Jeannette Hamby
Senator Peter Sorenson
Senator Dick Springer
Senator Shirley Stoll

**SENATE JUDICIARY COMMITTEE**

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Staff
Bill Taylor,
M. Max Williams, II,
Co-Counsel

Diane Dussler
Dar Woodrum

MEMORANDUM

TO: SB 385 Work Group Participants

FROM: M. Max Williams II
Co-Counsel, Senate Judiciary Committee

SUBJECT: Memo re: Proposed Amendments

DATE: March 1, 1995

Thank you again for your assistance and comments. There have been several revisions to the memorandum, based on comments on the last draft. I realize that this may not include every concept which we discussed in the work group meeting. However, I have tried to include those concepts where I believe a consensus was reached that we should submit the concept to Legislative Counsel for proposed amendments.

The fact that there may have been consensus on a proposed amendment in no way means that the parties have agreed to these amendments in final form, or that any compromise was reached. I know that some of you are concerned that this document, or the work product of Friday's meeting, might be described as such.

Please call me if you have any questions or comments. Thank you again. I look forward to discussing the actual language of the amendments with you in the near future.

cc: Senator Bryant
Representative Parks
Ms. Holly Robinson

MEMORANDUM

TO: David Heyndrickx
Legislative Counsel

FROM: M. Max Williams II
Counsel, Senate Judiciary Committee 

SUBJECT: Amendments for SB 385

DATE: February 28, 1995

The following outlines proposed amendments for SB 385. I am requesting that legislative counsel prepare these amendments. The amendments are the product of a work group which met to examine SB 385. I am asking that you prepare a separate amendment (-1, -2, etc.) for each of the sections, so they may be treated individually. On several of the concepts, more than one possibility was discussed by the work group. In order to further facilitate the decision making process, I am asking you to prepare amendments for both possibilities. You will note that some of the amendments are quite specific, while others are more general. On the "concept" amendments, I am asking for your drafting assistance in helping determine the most appropriate language to accomplish the task. Please don't hesitate to call me with any questions or suggestions.

Thank you in advance for your assistance.

1. Section 1, beginning on page 3, line 2 (dealing with ORCP 54(d)(2)):
 - o Make the section party neutral (change plaintiff to party).
 - o Change the "shall" to "may"
 - o Change the attorney fees award to the attorney fees expended in the second action (getting the first action dismissed)
 - o Provide that the court may enter an order requiring a payment of any unsatisfied portion of a judgment in the action previously dismissed.
 - o Make sure language includes "counterclaim" or "crossclaim" from previously dismissed action.
 - o Provide that this section does not, in any way, allow for the revival of a claim.

2. Section 1, Page 3, beginning at line 6 (relating to offers of compromise):

- o Leave ORCP 54E as it is.
- o Create new ORCP 54 section (54Z) with the following provisions.
- o Make the rule reciprocal (party neutral)
- o Offer cannot be made until 120 days after service of the complaint.
- o Offer must be preceded by a ___ (14) day notice of intent to make a Rule 54Z offer.
- o Offer must be accompanied by a disclosure packet containing a list of the material evidence to be presented at trial (Material witnesses and a witness statement). Such disclosure is not a waiver of privilege or work product or to be used for discovery purposes. Subject to protection of settlement discussions
- o Offer to remain open for 30 days, unless extended by court order.
- o Parties may make multiple offers under the rule, but the last offer controls for purposes of calculating attorney fees.
- o The attorney fees accrue from the date of the last offer.
- o Last offer under the rule must be at least 30 days before trial.
- o Would not apply to domestic relations cases or to class action cases or eminent domain cases.
- o ALTERNATIVE #1 (offer method): 54Z triggers a settlement conference requirement. A party would at the time a settlement conference demand, indicate that it is a 54Z conference. This would give the non-offering party a chance to prepare. The parties in counties of less than 75,000 people would not be required to do it this way -- allow local rule to determine the method.
- o ALTERNATIVE #1 (Attorney Fees): 54Z creates a strict liability standard. This means that if a party does not improve his or her position relative to the offer, after there has been this "full disclosure", that party would be liable for the attorney fees of the offering party.
 - o Fees under this scenario would include the following caps:
 - o No net recovery against a losing plaintiff (If plaintiff got \$0 from the jury, there would be no attorney fees.

- o Attorney fees would be limited to difference between a party's final offer and the final judgment. (Offered \$125,000 -- jury awarded \$100,000, so fees would be capped at actual fees, not to exceed the \$25,000 gap).

- o The court could review other factors in determining the reasonable amount of the fees. See Alaska Rule 82 (3) for the factors the court should consider in determining the amount of the fee. (Attached).

- o ALTERNATIVE #2 (Attorney Fees): 54Z would only awarded if the court found the conduct of the party that rejected the better offer was "objectively unreasonable" in the settlement negotiations. There would be no capping of the fees in this case.

NOTE: There was a discussion about the standard being a "notch above unreasonableness" in order to trigger the fees. I'm not sure how you define this "notch above" standard. Its something less than bad faith -- does not require an "evil" or "malicious" purpose, but is worse than being objectively unreasonable. If you would like to discuss this with me, I'd be happy to try and explain it. However, for drafting purposes, please go ahead and prepare the amendments with the "objectively unreasonable" standard.

- o ALTERNATIVE # 3 (Attorney Fees) (See above). Please draft a version of the amendment which would follow alternative # 2 but would include this "notch above reasonableness" standard. See "gross negligence" as it is defined in ORS 30.115 for possible usage.

3. Section 1, beginning on page 3, line 29 (dealing with mandatory settlement conferences):

Strike [Upon the request of the judge or a party, a different judge shall preside at the conference.]

Insert "If a settlement conference is requested, a judge other than the trial judge shall preside at the settlement conference."

4. Section 2, beginning on page 3, line 35 (dealing with ORS 20.105):

Language which would overrule Mattiza v. Foster, 311 Or 1 (1990) (attached). Eliminating the requirement that a judge must find "the party taking the meritless position has done so with an improper purpose". Mattiza at 10. Allowing for the court to provide attorney fees if the position taken is meritless.

Page 3, line 42 delete *[or solely for oppressive reasons.]*

5. Section 3, page 4, beginning on line 7, after "fees incurred" insert "as a result of the misconduct".

6. Section 4, beginning on page 4, line 10 (dealing with ORCP 17):

o On page 4, line 33, delete [*best knowledge, information and belief, formed after making all inquiries that are reasonable under the circumstances.*] and insert "reasonable knowledge, information and belief, formed after making a reasonable inquiry under the circumstances".

o On page 4, delete from line 42 through line 2 on page 5. In its place, incorporate the language from ORS 30.895(2) to accomplish this task.

o Provide that the loser of a sanctions motions will be required to pay the winners attorney fees for the sanctions motion.

o Make sure (looking at Federal Rule 11) that the 21 day safe harbor requires that the party moving for sanctions is required to serve the motion, with supporting points and authorities, on the non-moving party. The facts and specific points must be set forth in detail. It should be only on the issues raised that a party be awarded sanctions -- and attorney fees.

7. Section 5, Page 7 (relating to summary judgment):

o Delete all new text from line 11 through line 22.

o **NOTE:** The work group discussed SB 608 (dealing with summary judgment) being referred to the Council on Court Procedures for further study. One recommendation has been that the Committee adopt SB 608 with its current language, with an effective date of January 1, 1998. This would ensure that the Council was prepared to make recommendations to the next legislature. If you have another recommendation for effecting this, please advise.

8. Section 6 (dealing with Attorney Fee Awards in Small Actions):

Strike all of Section 6.

Prepare amendments which reflect the following:

o Require mandatory arbitration for all claims \$25,000 or under. (See ORS 36.400)

o Require that an appellant from mandatory arbitration which does not improve its position in a trial de novo is required to pay the attorney fees of the opposing party.

o The attorney fees which may be awarded are:

If the defendant is an unsuccessful appellant the plaintiff shall be awarded reasonable attorney fees, not to exceed 20% of the plaintiff's recovery at the trial de novo, but not less than \$500.

If the plaintiff is the unsuccessful appellant, the defendant shall be awarded reasonable attorney fees, not to exceed 10% of the prayer at the commencement at the trial de novo, but not less than \$500.

o If either party is otherwise entitled to attorney fees by contract, or statute, those provisions will prevail over this provision.

o Allow that a parties, by agreement, with a claim in excess of \$25,000 may "opt in" to the provision above, but will be bound to the attorney fees provisions.

o The court may look to "all of the attorney fees" incurred by a party, not just those after the arbitration award or the appeal.

9. Prevailing Party Statutes: These will be dealt with in a later amendment request.

MEMORANDUM

TO: MAX WILLIAMS

FROM: DON CORSON

RE: YOUR 2/28 DRAFT MEMORANDUM ON AMENDMENTS FOR SB 385

DATE: 3/2/95

I appreciated your circulating a copy of your draft memo. I had hoped to talk with you personally yesterday in Salem, but the timing didn't work out. A few thoughts are offered below. Also, yesterday I was told that there may be another work group meeting on SB 385 next week. I regret that my trial schedule will prevent me from attending. I have briefed OTLA President Michael Adler on the previous discussion, and he would be available if there is another work session.

Regarding your memo on possible SB 385 amendments (aside from my opposition to a number of them):

#2: Section 1, page 3, beginning at line 6 (relating to offers of compromise):

It was my impression that the strongest view of the work group was to tie the 54Z offers to settlement conferences (except allowing smaller population counties to do otherwise, by local rule). I respectfully suggest that this should be in the draft amendments, and not be considered an "alternative." Also, I believe the work group was unanimous in concluding that there should be no Rule 54Z offer before 120 days after the filing of the complaint.

My notes also indicate that Rule 54Z should not be applicable to condemnation cases; I trust you could check with Greg Mowe about that.

Additionally, my notes indicate that there would be other factors besides those set forth in the Alaska rule that should be considered (under that alternative).

Finally, on this section, my notes indicate that the discussion on "alternative #2" on attorney fees was for a standard higher than unreasonableness. I don't know if there was ever consensus on the formulation, but "grossly negligent" was one suggestion put forward.

#4. Section 2, beginning on page 3, line 35 (dealing with ORS 20.105):

One specific suggestion I thought the work group agreed to was to have lines 38-39 read in relevant part: "the court shall award reasonable attorney fees appropriate in the circumstances"

#7. Section 5, page 7 (relating to summary judgment)

I was uncomfortable with the suggestion that SB 608 be enacted, effective January 1, 1998. It was my sense that although the work group was open to some changes in Rule 47, that the group preferred to have the entire matter sent to the Council on Court Procedures, and that the way to do this was to provide direction to the Council to incorporate a directed verdict standard in determining if there was a genuine issue of material fact.

#8. Section 6 (dealing with Attorney Fee Awards in Small Actions)

There was a suggestion that a party should be able to separately appeal an award of attorney fees in arbitration, or their amount, without the loser-pay elements.

cc: work group participants

Chair
Senator Neil Bryant
Vice Chair
Senator Randy Miller

Members
Senator Ken Baker
Senator Jeannette Hanby
Senator Peter Sorenson
Senator Dick Springer
Senator Shirley Stull



Staff
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M. Max Williams, II,
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SENATE JUDICIARY COMMITTEE

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MEMORANDUM

TO: SB 385 Work Group Participants
FROM: M. Max Williams II
Co-Counsel, Senate Judiciary Committee *mw*
SUBJECT: Work Group Meeting - Tuesday, March 7, 1995 at 2:30 PM
DATE: March 3, 1995

Do to some scheduling conflicts we have had to move the meeting on Tuesday from 11:00 AM to 2:30 PM. I will notify you on Monday as to location of the meeting. Sorry for any inconvenience that this has caused. Please call me if you have any questions.

cc: Senator Bryant
Representative Parks
Ms. Holly Robinson

986 1426

24

Chair
Senator Neil Bryant
Vice Chair
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MEMORANDUM

TO: SB 385 Work Group Participants

FROM: M. Max Williams II
Co-Counsel, Senate Judiciary Committee 

SUBJECT: Work Group Meeting - Tuesday, March 7, 1995 at 11:00 AM.

DATE: March 3, 1995

There has been some discussion about reconvening the work group to further discuss SB 385 amendments. As of this time, I still do not have amendments back from legislative counsel relating to our previous meeting. I hope to have those Monday morning. They may, however, not be complete. I think the first work session on 385 will be a higher level discussion among the committee members. Since this is the first time they have to discuss this matter among themselves, and on the record, I do not believe there will be much "detail." Thus, I think it may be premature to meet further regarding the areas we covered in our last meeting. That meeting might better take place the following week.

My recommendation would be for those interested members of the work group to come together on Tuesday, March 7, 1995 at 11:00 AM to discuss the Sections 8 through 132 of the bill (relating to the "prevailing party" attorney fees on those individual statutes.) I would like to think we could complete the task by 3:00 PM. We should plan on working through the lunch hour. (Bring your own brown bag.)

Please call me to confirm your attendance. I will hope to have arranged a location for the meeting sometime Monday morning. We may end up doing it at the capitol. I understand that the press of business may not allow for each of you to attend. If you can't attend, please feel free to submit any additional thoughts you have not already shared.

cc: Senator Bryant
Representative Parks
Ms. Holly Robinson

DRAFT**MEMORANDUM**

March 8, 1995

TO: OREGON STATE BAR PROCEDURE & PRACTICE COMMITTEE

FROM: Vivian Raits Solomon

RE: SENATE BILL 608

FILE: 14056-36

Senate Bill 608 would amend ORCP 47C by adding a second clause providing that in the alternative to the existing procedure for granting summary judgment, the court shall grant summary judgment if:

** * * the opposing affidavits and supporting documentation submitted by the adverse party fail to set forth specific facts supported by admissible evidence adequate to avoid the granting of a motion for directed verdict in a trial of the matter."

For the reasons set forth below, this proposed amendment to ORCP 47C is unnecessary, and it potentially conflicts with other sections of ORCP 47.

1. Improperly Allows Discovery

The proposed amendment could be used by the moving party to conduct discovery which is otherwise not allowed under Oregon law. A party could file a poorly supported motion for summary judgment, which would prevail under this alternative clause unless the opposing party's response came up to the new standard. Motions for summary judgment are specifically not intended to be used as discovery devices. ORCP 47E (first sentence).

2. Changes Existing Law Regarding Burden of Proof

Currently, an opposing affidavit is only required if the moving party's motion is supported with affidavits. Bevan v. Garrett, 284 Or 293, 586 P2d 1119 (1978). The proposed alternative clause could have the effect of modifying the burden of proof, which is currently on the moving party to show the absence of a genuine issue of material fact. If the movant fails to meet the burden of showing the absence of a genuine issue of material fact, no defense is required. The alternative clause could shift the burden on the respondent to show that a fact issue exists before the moving party has established the absence of material fact issues.

3. Conflicts with ORCP 47E

ORCP 47E allows an attorney affidavit in lieu of expert opinion. Such an attorney affidavit would not be sufficient to avoid the granting of a motion for directed verdict at trial.

4. Clause is Potentially Unnecessary

Oregon law already provides that "* * * a party against whom an adequately supported motion for summary judgment is made must, to defeat it, specify some evidence which could be produced if the case were to go to trial." Engelking v. Boyce, 278 Or 237, 241-242, 563 P2d 703 (1977). An opposing party cannot defeat a properly supported motion for summary judgment merely by making "bare assertions." Millspaugh v. Port of Portland, 65 Or App 389, 394, 671 P2d 743 (1984) pet rev den 296 Or 411 (1984).

5. ORCP 47 Modeled after Fed R Civ P 56

There are only two differences between ORCP 47 and Fed R Civ P 56: ORCP 47E allows attorney affidavits in lieu of expert opinion, and the Oregon rule omits a provision requiring federal courts to enter an order specifying facts deemed established at trial. Fed R Civ P 56(d). Because the Oregon rule was patterned on the federal rule, Oregon courts will give "considerable weight" to federal decisions under Fed R Civ P 56. Garrison v. Cook, 280 Or 205, 209, 570 P2d 646 (1977). The purpose of enacting the federal rule was to overrule the doctrine that well-pleaded claims and defenses were invulnerable to attack by motion for summary judgment. Wright, Miller & Kane, Federal Practice and Procedure: Civil Second, § 2739 (1983). Under federal law, the party opposing summary judgment does not have the right to withhold evidence until trial. Walker v. Hoffman, 583 F2d 1073, 1075 (9th Cir 1978), cert denied, 439 US 1127 (1979). There is no reason peculiar to Oregon law why Oregon litigants and courts should be deprived of this substantial body of federal decisional law.

6. Alternative Suggestion

I do not know what prompted the proposed amendment. In my view, the rule is appropriate as written and no alternative clause is necessary. Bill Sime suggested that the new language in Senate Bill 608 be deleted and that instead the following language be added:

"For the purpose of this rule, a genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party."

This language does not present any of the problems set forth above, other than to probably preclude citing federal law as authoritative precedent.

VRS


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Vice Chair
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Co-Counsel

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MEMORANDUM

TO: SB 385 Work Group Members

FROM: M. Max Williams II
Co-Counsel, Senate Judiciary Committee

SUBJECT: Meeting -- Monday, March 13, 1995 at 10:00 AM.

DATE: March 9, 1995

We have scheduled a work group meeting for 10:00 AM on Monday, March 13, 1995. Please come prepared to discuss the draft amendments to SB 385 that were prepared by legislative counsel. (-2 through -12 amendments). I would like your assistance in catching any technical problems in the amendments, along with making any substantive changes necessary to give the amendments their intended effect.

If you can, please review the language of H.R. 988 which passed the US House of Representatives, and includes a very similar reciprocal offer proposal to the one we have proposed as Rule 54F. I'd like to discuss their approach and see if there is anything that we can learn from it. (Information is available on LEXIS).

Additionally, I am asking each of the participants in the work group to make a list of those 130 statutory sections that you really are interested in, and conversely, those that you don't really care about. I looking for a method to focus the group on those key statutes which should be object of our attention. I am not sure we are going to get to those statutes on Monday, but if time allows, we will try to get to these issues.

As always, thanks again for your assistance in this process. Please call me if you have any questions.

cc. Senator Bryant
Representative Parks
Ms. Holly Robinson

SB 385-13

**PROPOSED AMENDMENTS TO
SENATE BILL 385**

On page 73 of the printed bill, insert:

Section 142.

(1) In determining whether to award attorney fees to a party pursuant to any statute or rule that gives the court discretion whether to award attorney fees to such party, the court shall consider the following factors:

- (a) the nature of the parties' conduct including whether any of the parties engaged in reckless, willful, malicious, bad faith, or illegal conduct in connection with the transactions or occurrences that form the basis of the litigation;
- (b) the reasonableness of the claims and defenses asserted by the parties;
- (c) the extent to which an award or denial of attorney fees would deter others from asserting good faith claims or defenses in similar cases; *which to which award or denial will discourage ~~asserting~~ non-meritorious claims and defenses.*
- (d) the reasonableness of the conduct of the parties and their attorneys after commencement of the action;
- (e) the reasonableness of the parties' conduct regarding settlement;
- (f) the extent to which the award or denial of attorney's fees would further the purpose of the statute or rule that confirms the right of attorney's fees;
- delete* (g) the ability of the opposing party to satisfy an award of attorney fees; and
- (h) such other factors as the court may deem *equitable* appropriate under the circumstances of the case.

(2) If the court makes a determination to award attorney fees to a party pursuant to a statute or rule that gives the court discretion whether to award attorney fees, the court may award all or part of the attorney fees claimed by the requesting party, but in determining the amount of the award of attorney fees, the court shall consider the factors in Section (1) of this statute, and in addition, the court shall consider the following factors:

SB 385-13

- (a) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (b) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (c) the fee customarily charged in the locality for similar legal services;
 - (d) the amount involved and the results obtained;
 - (e) the time limitations imposed by the client or by the circumstances;
 - (f) the nature and length of the professional relationship with the client;
 - (g) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (h) whether the fee is fixed or contingent.
- (3) Nothing in Section (2) of this statute shall authorize the court to enter an award of attorney fees in an amount that is in excess of a reasonable fee.
- (4) In the review of a judgment or order granting or denying a claim for attorney fees based on any statute that gives the court the discretion whether to award attorney fees, the standard of review is abuse of discretion *and not de novo.*
- (5) In the review of the amount of any award of attorney fees, the standard of review is abuse of discretion.

M E M O R A N D U M

TO : SB 385 Work Group
FROM : RJN
DATE : March 15, 1995
SUBJECT : Proposed Addition to ORCP 47C

=====

The court shall grant summary judgment if, based upon the record properly before it viewed in the light most favorable to the non-moving party, a reasonable person could not return a verdict for the non-moving party.

Proposed Amendment of ORCP 47 C to Incorporate "Directed Verdict Standard"

C. Motion and Proceedings Thereon. The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The judgment sought [*Summary judgment*] shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [*on the state of the evidence disclosed by any depositions, admissions, and affidavits on file, the moving party would at trial be entitled to a directed verdict.*] A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. [*Partial summary judgment shall likewise be rendered as to any material issue respecting which, on the state of the evidence thus disclosed, the moving party would at trial be entitled to have such issue withdrawn from the jury.*]

Proposed Amendment of ORCP 47 C to Incorporate "Directed Verdict Standard"

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Proposed Amendment of ORCP 47 C to Incorporate "Directed Verdict Standard"

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Chair
Senator Neil Bryant
Vice Chair
Senator Randy Miller

Staff
Bill Taylor,
M. Max Williams, II,
Co-Counsel

Diane Dussler
Dar Woodrum

**SENATE JUDICIARY COMMITTEE**

S401 State Capitol
Salem Oregon 97310
(503) 986-1640

FAX #

986-1005

Members
Senator Ken Baker
Senator Jeannette Hamby
Senator Peter Sorenson
Senator Dick Springer
Senator Shirley Stull

MEMORANDUM

TO: SB 385 Work Group Participants

FROM: M. Max Williams II
Counsel, Senate Judiciary Committee 

SUBJECT: Draft Memo to Legislative Counsel

DATE: February 28, 1995

Thank you again for your participation at the work group meeting on Friday.

I have attached for your review a draft memo to Legislative Counsel, asking them to prepare, for discussion purposes, amendments to SB 385. I appreciate those of you who provided me with your notes.

Please feel free to edit this if you think there is something that is unclear or incorrect. On several issues, we were not able to discuss them in detail, or we failed to bring them to closure with the work group. On these I made a judgment call for purposes of keeping things rolling.

If you have comments, feel free to jot them on the draft and fax it back. I'd prefer a written note, but if you don't have time to do that, always feel free to call me to discuss. My plan is to provide this to LC tomorrow afternoon, so they can begin work on the amendments.

Until we have a final "concept" memo to go to LC, I'd appreciate it if you would keep this draft to yourselves. No reason to get people all excited over something that may be my drafting error. On behalf of myself, and Senator Bryant, thank you again for your assistance.

cc: Senator Bryant

MEMORANDUM

DRAFT

TO: David Hendrickx
Legislative Counsel

FROM: M. Max Williams II
Counsel, Senate Judiciary Committee

SUBJECT: Amendments for SB 385

DATE: February 28, 1995

The following outlines proposed amendments for SB 385. I am requesting that legislative counsel prepare these amendments. The amendments are the product of a work group which met to examine SB 385. I am asking that you prepare a separate amendment (-1, -2, etc.) for each of the sections, so they may be treated individually. On several of the concepts, more than one possibility was discussed by the work group. In order to further facilitate the decision making process, I am asking you to prepare amendments for both possibilities. You will note that some of the amendments are quite specific, while others are more general. On the "concept" amendments, I am asking for your drafting assistance in helping determine the most appropriate language to accomplish the task. Please don't hesitate to call me with any questions or suggestions.

Thank you in advance for your assistance.

1. **Section 1, beginning on page 3, line 2 (dealing with ORCP 54(d)(2)):**
 - o Make the section party neutral (change plaintiff to party).
 - o Change the "shall" to "may"
 - o Change the attorney fees award to the attorney fees expended in the second action (getting the first action dismissed)
 - o Provide that the court may enter an order requiring a payment of any unsatisfied portion of a judgment in the action previously dismissed.
 - o Make sure language includes "counterclaim" or "crossclaim" from previously dismissed action.
 - o Provide that this section does not, in any way, allow for the revival of a claim.

DRAFT

2. Section 1, Page 3, beginning at line 6 (relating to offers of compromise):

- o Leave ORCP 54E as it is.

- o Create new ORCP 54 section (54Z) with the following provisions:

- o Make the rule reciprocal (party neutral)

- o Offer must be preceded by a __ (14) day notice of intent to make a Rule 54Z offer.

- o Offer must be accompanied by a disclosure packet containing a list of the material evidence to be presented at trial (Material witnesses and a witness statement). Such disclosure is not a waiver of privilege or work product or to be used for discovery purposes. Subject to protection of settlement discussions.

- o Offer to remain open for 30 days, unless extended by court order.

- o Parties may make multiple offers under the rule, but the last offer controls for purposes of calculating attorney fees.

- o The attorney fees accrue from the date of the last offer.

- o Last offer under the rule must be at least 30 days before trial.

- o Would not apply to domestic relations cases or to class action cases.

- o ALTERNATIVE #1 (offer method): 54Z triggers a settlement conference requirement. A party would at the time a settlement conference demand, indicate that it is a 54Z conference. This would give the non-offering party a chance to prepare. The parties in counties of less than 75,000 people would not be required to do it this way -- allow local rule to determine the method.

- o ALTERNATIVE #1 (Attorney Fees): 54Z creates a strict liability standard. This means that if a party does not improve his or her position relative to the offer, after there has been this "full disclosure", that party would be liable for the attorney fees of the offering party.

- o Fees under this scenario would include the following caps:

- o No net recovery against a losing plaintiff (If plaintiff got \$0 from the jury, there would be no attorney fees.

DRAFT

o Attorney fees would be limited to difference between a party's final offer and the final judgment. (Offered \$125,000 -- jury awarded \$100,000, so fees would be capped at actual fees, not to exceed the \$25,000 gap).

o The court could review other factors in determining the reasonable amount of the fees. See Alaska Rule 82 (3) for the factors the court should consider in determining the amount of the fee. (Attached).

o ALTERNATIVE #2 (Attorney Fees): 54Z would only awarded if the court found the conduct of the party that rejected the better offer was "objectively unreasonable" in the settlement negotiations. There would be no capping of the fees in this case.

NOTE: There was a discussion about the standard being a "notch above unreasonableness" in order to trigger the fees. I'm not sure how you define this "notch above" standard. Its something less than bad faith -- does not require an "evil" or "malicious" purpose, but is worse than being objectively unreasonable. If you would like to discuss this with me, I'd be happy to try and explain it. However, for drafting purposes, please go ahead and prepare the amendments with the "objectively unreasonable" standard.

3. Section 1, beginning on page 3, line 29 (dealing with mandatory settlement conferences):

Strike [*Upon the request of the judge or a party, a different judge shall preside at the conference.*]

Insert "If a settlement conference is requested, a judge other than the trial judge shall preside at the settlement conference."

4. Section 2, beginning on page 3, line 35 (dealing with ORS 20.105):

Language which would overrule Mattiza v. Foster, 311 Or 1 (1990) (attached). Eliminating the requirement that a judge must find "the party taking the meritless position has done so with an improper purpose". Mattiza at 10. Allowing for the court to provide attorney fees if the position taken is meritless.

5. Section 3, page 4, beginning on line 7, after "fees incurred" insert "as a result of the misconduct".

6. Section 4, beginning on page 4, line 10 (dealing with ORCP 17):

o On page 4, line 33, delete [*best*] and insert "reasonable".

DRAFT

o On page 4, delete from line 42 through line 2 on page 5. In its place, incorporate the language from ORS 30.895(2) to accomplish this task.

o Provide that the loser of a sanctions motions will be required to pay the winners attorney fees for the sanctions motion.

o Make sure (looking at Federal Rule 11) that the 21 day safe harbor requires that the party moving for sanctions is required to serve the motion, with supporting points and authorities, on the non-moving party. It should be only on the issues raised that a party be awarded sanctions -- and attorney fees.

7. **Section 5, Page 7 (relating to summary judgment):**

o Delete all new text from line 11 through line 22.

o **NOTE:** The work group discussed SB 608 (dealing with summary judgment) being referred to the Council on Court Procedures for further study. One recommendation has been that the Committee adopt SB 608 with its current language, with an effective date of January 1, 1998. This would ensure that the Council was prepared to make recommendations to the next legislature. If you have another recommendation for effecting this, please advise.

8. **Section 6 (dealing with Attorney Fee Awards in Small Actions):**

Strike all of Section 6.

Prepare amendments which reflect the following:

o Require mandatory arbitration for all claims \$25,000 or under. (See ORS 36.400)

o Require that an appellant from mandatory arbitration which does not improve its position in a trial de novo is required to pay the attorney fees of the opposing party.

o The attorney fees which may be awarded are:

If the defendant is an unsuccessful appellant the plaintiff shall be awarded reasonable attorney fees, not to exceed 20% of the plaintiff's recovery at the trial de novo, but not less than \$500.

If the plaintiff is the unsuccessful appellant, the defendant shall be awarded reasonable attorney fees, not to exceed 10% of the prayer at the commencement at the trial de novo, but not less than \$500.

DRAFT

o If either party is otherwise entitled to attorney fees by contract, or statute, those provisions will prevail over this provision.

o Allow that a parties, by agreement, with a claim in excess of \$25,000 may "opt in" to the provision above, but will be bound to the attorney fees provisions.

o The court may look to "all of the attorney fees" incurred by a party, not just those after the arbitration award or the appeal.

9. Prevailing Party Statutes: These will be dealt with in a later amendment request.

January 19, 1995

BY FAX (503-986-1699)

Mr. M. Max Williams, II, Co-Counsel
Senate Judiciary Committee
Capitol
Salem, Oregon

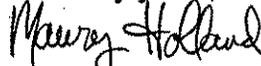
Dear Mr. Williams:

I have learned from Bob Oleson that the Senate Judiciary Committee will fairly soon begin consideration of a package of proposed statutory amendments along with some related amendments to the Oregon Rules of Civil Procedure (ORCP). I have not yet been able to contact John Hart, Chair of the Council on Court Procedures, but am confident that he would like the Council to have an opportunity to review any proposed ORCP amendments, if that would be agreeable to Senator Bryant, and presumably prepare comments upon them for submission to the Judiciary Committee through your good offices.

When these proposals are in the bill form in which the Committee will consider them, I would very much appreciate your forwarding a copy of the proposed amendments to me so that I can make prompt distribution of them to Council members and work with John on the logistics of developing comments within what I understand from Bob will likely be a rather short turn-around time. Although the Council's comments are likely to be limited to proposed ORCP amendments, I suggest that these could be more usefully prepared if members also have before them the related proposed statutory amendments which, according to my information, are part of an integrated package. These materials can be either faxed to me at 503-346-1564 or mailed to me at the address shown below.

With thanks for your anticipated assistance,

Sincerely yours,



Maury Holland
Executive Director

Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403-1221
(Tel. 503-346-3834)

bcc: John Hart
Bob Oleson

*Maury: This had to be sent
by mail because we couldn't
reach Salem by fax or phone.
They are uprs upgrading the
system. b.*

January 25, 1995

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES
FROM: Maury Holland, Executive Director *M.J.H.*
RE: Important Legislative Update

PLEASE NOTE REQUEST FOR RESPONSE ON PAGE 2

John Hart has directed me to get the enclosed two items out to all members as soon as possible. One of them, the January 20 letter to John from Tom Tongue, speaks for itself. Note in particular the statement: "[t]he future of the Council may be at stake here."

I received the two enclosed items under covering letter from John in which he asks that I canvass the Council's members as to their willingness to attend a special meeting for the purpose of formulating the Council's position on, or recommendations regarding, a legislative package that is reported to include some pretty major proposed ORCP amendments. (I have asked for copies of the proposed ORCP amendments, as well as related statutory amendments, but have not yet received them, as they are apparently not yet in formal "bill form.")

Late on the afternoon of January 24, I learned some additional facts from the ever vigilant Bob Oleson. Two hearings have been scheduled on the bill that will combine proposed statutory and ORCP amendments before the Senate Judiciary Committee, for February 2 and February 9. The time has not yet been set, but the likelihood is in the afternoons. Fortunately, my teaching schedule permits me to "cover" both of these hearings, and will do so, if for no other reason than to show the flag. John will have to decide whether he can attend either or both of these hearings, or designate one or more other members to attend in his place.

The obvious problem is that, of course, I cannot speak on behalf of the Council at either of these hearings until the Council decides on what response it wishes to make, if any, and I suppose the same thing goes even for John. John will presumably decide fairly soon on whether to call a special meeting, when and where, and so forth, and Gilma and I will help with the logistics. When and if the Council formulates a collegial response, it would be far more effective if the resulting testimony before Senate Judiciary were presented by John or some member designated by him, rather than by me, although I'll be on hand to render all possible assistance to whoever appears.

In addition to the hearings scheduled for February 2 and 9, Senator Bryant, Chair of the Senate Judiciary Committee, has said that he would be willing to hold a third hearing a bit later, probably on February 16, "if that should be necessary," by which I assume is meant necessary for the Council to have time to get its act together and then place formal testimony into the record. Furthermore, and this is critically important to note, he has indicated that he, along with committee staff, would be willing to take time out of a busy legislative session to attend a special meeting of the Council if one were held. This special meeting would presumably be in addition to the hearing at which the committee would hear formal testimony on the Council's behalf. Bob Oleson told me that Sen. Bryant would be willing to come to OSB headquarters for this purpose, although Bob also suggested that it might be more appropriate and considerate on the Council's part if those members who can attend the meeting were willing to hold it in the State Capitol.

I wish I had the text of the proposals to include with this mailing, but don't, and didn't want to hold up on letting all of you know what seems to be going on. Naturally, I'll get the text out as soon as I can get my hands on it.

In the meantime, so that I can gather the information John has asked for, **please let me know as soon as possible:**

1) whether you favor or oppose a special meeting of the Council for this purpose, 2) whether you are willing to do your best to attend (I realize I cannot fairly ask for anything more definite than that at this stage), 3) whether you have a strong preference as between meeting at OSB headquarters or at the State Capitol if the latter would better accommodate the legislative people, and 4) what dates and times would be possible or best for you during the period February 10 through 27, and in particular, is your preference for a Saturday morning meeting on February 11, 18, or 25?

Kindly phone your response to Gilma at 346-3990 (you may leave a detailed message on her voice mail if she is temporarily unavailable) or to me at 346-3834, or fax it to either of us at 346-1564. It goes without saying that you can contact John directly if you prefer to, but I believe he is in the midst of some trials just now and would like Gilma and me to provide the collection point.

Encs.

01/24/95 11:35
01/20/95 16:41

503 222 2301
503 224 7324

HOFF HART & WAG
DUNN CARNEY →→→ HOFFMAN HART

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002

OADC

Oregon Association
of Defense Counsel

January 20, 1995

Association Office

SANDRA E. KELLER
Association Manager
625 N.E. 20th Avenue, Suite 120
Portland, Oregon 97232
256-9439
FAX 256-4722

SENT VIA FACSIMILE AND REGULAR MAIL
(Fax No. 222-2301)

OADC Board of Directors

Officers

ROBERT E. MALONEY, JR.
President
800 Pacific Building
520 S.W. Yamhill Street
Portland, Oregon 97204
226-6151
FAX 224-0388

John E. Hart
Hoffman, Hart & Wagner
Suite 2000
1000 S.W. Broadway
Portland, Oregon 97205

FRANK H. LARSEN
Vice President/President Elect
Suite 1200
121 S.W. Morrison
Portland, Oregon 97204
323-2020
FAX 323-8019

Dear John:

LARRY A. BRISBEE
Secretary/Treasurer
130 N.E. Lincoln
P.O. Box 667
Hillsboro, Oregon 97123
648-6677
FAX 648-1091

I am writing you in your capacity as Chair of the Council on Court Procedures. I am the OADC Board member charged with monitoring legislation for the 1995 session. On December 27th Senator Neil Bryant, the Chairman of the Senate Judiciary Committee, requested that the OADC comment on a number of proposals. A copy of what he forwarded to us is enclosed. In general, our response was to the effect that all matters involving amendments of ORCP should be first processed through the Council on Court Procedures. I have had discussions with Max Williams, counsel for the Senate Judiciary Committee about the importance of having the Council on Court Procedures involved in these matters and have referred him to the statutes setting up the Council. He has talked to Senator Bryant and reports back that the Senator would involve the Council on these matters if the Council is willing to respond quickly. I believe Senator Bryant feels caught in a political dilemma wherein certain forces have prevailed on the Legislature to give a hearing to these measures and while he personally may want to have all of them run through the Council that is not possible in this session.

Members at Large

JOHN POLAWK
1820 Benj. Franklin Plaza
One S.W. Columbia
Portland, Oregon 97258
229-1650
FAX 229-1656

Enclosed is a joint statement that the OTLA and the OADC submitted to the Public Affairs Committee of the Board of Governors of the Oregon State Bar on January 19, 1995. It is my understanding that that Committee is recommending to the Board of Governors that the Oregon State Bar adopt that statement and authorize its lobbyists to ask the Legislature to route all ORCP amendments through the Council.

PAUL T. PORTINO
2500 US Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
295-4400
FAX 295-6733

I know that the Council wants to do its work between sessions. Frankly, I think the future of

CHRYS MARTIN
5th Floor Tower
688 S.W. Fifth Avenue
Portland, Oregon 97204
499-4420
FAX 295-0315

DAVID H. MILLER
Suite 1200 KOIN Center
222 S.W. Columbia
Portland, Oregon 97201
222-4499
FAX 222-2301

STEVE H. PRATT
59 South Central
P.O. Box 4280
Medford, Oregon 97501
775-2353
FAX 773-6379

TOM H. TONGUE
Suite 1500
651 S.W. Sixth Avenue
Portland, Oregon 97204
324-6440
FAX 224-7324

01/24/95 11:35
01/20/95 16:42

☎503 222 2301
☎503 224 7324

HOFF HART & WAG
DUNN CARNEY →→→ HOFFMAN HART

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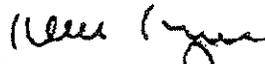
the Council may be at stake here. If the Council is unwilling to take up these matters for the limited purpose of commenting on them during this session, then the Legislature will proceed to deal with them. In other words, I think the Council needs to decide whether it wants to aboard the train or be left at the station.

The OADC Board believes the Council should be the entity through which all procedural rule changes are funneled. We are hopeful that you will recognize the extra-ordinary circumstances that presently exist and poll your committee members on their willingness to participate. I expect that the level of participation will be reduced to commenting on proposals. You may wish to talk directly to Max Williams regarding the expectations of the Senate Judiciary Committee on a time for a response. I understand from talking to him that he would like a response within two weeks of submission of bills. I pointed out to him that the statute requires two weeks' notice of agendas for meetings and a two week response would be not possible. Mr. Williams' telephone number is 986-1476 and his fax number is 986-1699.

At an OADC Board meeting earlier this week, Dave Miller assured the Board that he could persuade you to ask the Council to provide comments on these proposals. We hope that you will do so and that the Council will agree to participate.

Again, it is the OADC's goal to provide a precedent under which the Council is the vehicle through which these measures must pass, not just in this session, but in future sessions. The Oregon Trial Lawyers have agreed to that principle by their participation in the joint statement.

~~Very truly yours,~~


Thomas H. Tongue

THT/kno

Enclosures

cc: Frank H. Lagesen
OADC Board Members

THT/OADC.025

01/24/95 11:36 ☎503 222 2301
01/20/95 18:42 ☎503 224 7324

HOFF HART & WAG
DUNN CARNEY --- HOFFMAN HART

☐005
☐004

JOINT STATEMENT

DATE: January 19, 1995

TO: Oregon State Bar
Board of Governors
Public Affairs Committee

The OTLA and the OADC, through their members, represent opposite sides in civil disputes. Both agree that the present Oregon system for dispute resolution based on civil jury trials works well and should not be fundamentally changed. The much publicized problems of courts in other states do not exist in Oregon. Oregon dockets are kept current by the combined efforts of trial lawyers and the judiciary. This cooperative effort is reflected in the Council on Court Procedures which reviews, comments on and makes recommended changes in the Rules of Civil Procedure. Both the OTLA and the OADC support processing all proposed rule changes through the Council. Procedural rules interrelate and a balanced workable set of procedural rules is necessary for the efficient resolution of disputes.

Both the OTLA and the OADC are in favor of constructive dialogue on ways to improve the present system, as long as any changes do not impair the right of all citizens to have their civil disputes brought before a jury for resolution in a fair and efficient manner.

January 26, 1995

TO: Maury Holland

FROM: Gilma Henthorne

RE: HB 2335

Milt Jones with the HOUSE JUDICIARY COMMITTEE called you to find out whether or not you have any opinion or position on HB 2335, which would substitute an affidavit or a statement signed under penalty of perjury for the usual notary statement in civil proceedings.

He said that a hearing is coming up very shortly regarding this bill (he did not give a date).

Milt Jones's phone number is 986-1489.

H3

6-11: Sec. 1 17 - 9th version,

Karen Hightower 986-5500

Let her know what Council position Jane: act to be.

January 27, 1995

BY FAX

To: John Hart, Chair, Council on Court Procedures

From: Maury Holland *M. H.*

Re: HB 2335

This is written and will be faxed out about 9:00 a.m., Monday, Jan. 30 as backup in case we cannot make telephone contact over the weekend. Milt Jones, staffer of House Judiciary, called to find out what "the Council" position would be on HB 2335, which is sponsored by Chair of House Judiciary, Rep. Del Parks. The gist of HB 2335 is that it would amend ORCP at every point, such as R. 47, where they require or permit submission of an affidavit, so that in lieu of a notarized affidavit, the document could be submitted in the form of a "certification" or "verification," by which is meant a recitation that the signatory signs subject to pains and penalties for perjury, but with no jurat or other notarial attestation. Jones says that Rep. Parks is sponsoring this bill because he thinks there are occasions "in the field" where a notary is not available and this leads to delay and inconvenience.

Naturally, I told Jones that I could not give him the Council's position on this bill because it had not formulated one, indeed hadn't even been informed of this proposal. I also told him that I would contact the Council's leadership pronto to see if it thought this was important enough issue for Council to try to formulate some collegial opinion about in time for the hearing on this bill, now scheduled for Wednesday, Feb. 1 at 10:00 a.m. (Incidentally, while writing this I was just interrupted by a call from Bill Gaylord about the "special meeting," which he favors with reservations. I asked for his off-the-cuff reaction to HB 2335. He said he thought it is pretty bad and probably important enough for the Council to oppose, at least on the merits and leaving aside the politics, if the logistical problems of eliciting a collective view this quickly can be solved.

I guess the questions are these:

1. In your quick judgment, is this important enough for us to try to obtain a collective Council opinion?
2. Since a special meeting seems out of the question before the Feb. 1 hearing, do you want Gilma and me to try to contact as many Council members as possible by phone or fax in the hopes of eliciting a collective opinion?
3. Will you present whatever the Council's opinion turns out to be in testimony at the Feb. 1 hearing, designate another member to do so, or assign me to do it. I have a class to teach on Wed. morning, but am willing to reschedule and testify in Salem if: 1. you think the issue is important enough, 2. a Council position can be developed in time, with Gilma and me manning the phones, faxes, etc., 3. you are unable or prefer not to testify and do not deputize a Council member in your stead.

P.S: As I finished this I reached Mike Phillips by phone. His initial reaction was that this is at least a moderately questionable proposal that he could almost certainly oppose were it to come before the Council in the ordinary course. He said he was undecided about whether the Council as a body should try to formulate a view and present it in testimony on Wednesday, but added he would give the matter more thought over the weekend.

cc: Mike Phillips (by fax)

BY FAX

January 30, 1995

To: John Hart

Fm: Maury Holland *M.H.*

Re: Telling the Legislature to "Stuff It"

Gilma recalled and retrieved from the files the attached letter that Ron Marceau sent to the 1989 legislature, asking in effect that it respect the role of the Council by insisting that all proposed ORCP amendments be first referred to the latter before the legislature agrees to consider any such amendments. My guess, from talking with Bob Oleson and Tom Tongue, is that a letter from you along these lines to the current legislature would be politically very unwise. For one thing, my recollection is that the leadership of the '89 legislature was much more inclined to be friendly toward the Council than is the present one. Nonetheless, perhaps the theme of Ron's letter should be woven in discreetly to any testimony that might be presented by you or others on the Council's behalf.

Handwritten: 0008.21

MARCEAU, KARNOPP, PETERSEN, NOTEBOOM & HUBEL
ATTORNEYS AT LAW
835 N.W. BOND STREET • BEND, OREGON 97701-2799
(503) 382-3011

LYMAN C. JOHNSON
1957 - 1986

TELECOPIER
(503) 388-5410

RONALD L. MARCEAU
DENNIS C. KARNOPP
JAMES E. PETERSEN
JAMES D. NOTEBOOM
DENNIS J. HUBEL*
STIN E. HANSEN*
WARD G. ARNETT**
THOMAS J. SAYEG***†
RONALD L. ROOME***
CHARLES M. BOTTORFF

*Also admitted in Washington
**Also admitted in Arizona
***Also Admitted in California
†LL.M. in Taxation

March 9, 1989

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

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

RE: Council on Court Procedures

The Council on Court Procedures is aware that about 10 bills have been submitted to the legislature by various groups to revise the Oregon Rules of Civil Procedure in one way or another. This is reminiscent of the situation prior to the establishment of the Council in 1978 by the 1977 legislature, i.e. competing groups were pushing and pulling on the legislature to revise Oregon civil court rules to suit their particular interest. The Council has directed that I write to remind of the Council's role lest the bad old days return.

The Council was established in 1978 because procedural revision was becoming bogged down in legislative tugs of war between groups with different axes to grind. In establishing the Council, the legislature made the following findings:

- Prompt and efficient administration of justice in the state courts required civil procedure laws which met the needs of litigants and the court system, and
- There wasn't any coordinated system for reviewing civil procedure laws, and

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- The Council on Court Procedures was established to review civil procedure laws, and
- The Council on Court Procedures would review civil procedure laws and proposals advanced by all interested persons. (ORS 1.725)

The Council is a 23-person body created by statute and comprised of judges, lawyers, one law teacher and one public member. The lawyer members on the Council are representative of the civil trial practice in Oregon, i.e. both plaintiffs personal injury attorneys and insurance defense attorneys are members of the Council.

The Council has statutory authority to enact civil procedure rules each biennium which become law unless changed by the legislative assembly. The Council has submitted 11 rule changes to the legislative assembly this biennium.

Most of the ten bills which propose changes to the civil procedure rules have not been first submitted to the Council on Court Procedures. The Council's very strong experience and belief is that revision of civil procedure rules can be a very complicated process. Individual rule changes often have ramifications beyond the change itself which are not immediately foreseen. The hustle and bustle of a legislative session is definitely not the best environment for changing Oregon civil court procedures. The Council cannot effectively fulfill its statutory role if civil procedure changes are not first presented to it.

Accordingly, the Council suggests that the best way for the legislature to respond to proposed civil procedure changes is to first ask whether the proposal has been submitted to the Council on Court Procedures. If it has and if the Council has not reacted in the way desired by the proposer, then the legislature should act as it sees fit on the proposal.

But if the proposal has not been submitted first to the Council on Court Procedures and if there are no circumstances that require immediate legislative action, the legislature should not consider the proposal. To consider the proposal would simply encourage special interest groups to bypass the legislatively established process for civil procedure revision.

Please understand that the Council is not trying to suggest that civil procedure is the exclusive turf of the Council

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on Court Procedures. The Council is only suggesting that the role and function of the Council as established by the 1977 legislature is the best way to handle civil procedure revision.

Sincerely,



R. L. MARCEAU
CHAIRER, COUNCIL ON COURT PROCEDURES

RLM:dlh

cc: Senator Joyce E. Cohen, Senate Judiciary Chair
Representative Tom L. Mason, House Judiciary Chair
Representative Judith Bauman, House Judiciary Civil
Subcommittee Chair
Catherine Webber, Counsel, Senate Judiciary
Committee
Bill Taylor, Counsel, House Judiciary Committee
Members of the Council on Court Procedures
Bob Oleson, Oregon State Bar

COUNCIL ON COURT PROCEDURES

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January 31, 1995

To: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES
From: Maury Holland, Executive Director *M. J. H.*
Re: Legislative Update #2; 1. LC 1892 2. LC 117

1. The "Tort Reform" Package/LC 1892. Enclosed are pages 1-12 of LC 1892 that would amend ORCP 17, 47 and 54. The remaining 88 pages of this draft bill would amend the ORS at several places, mostly having to do with attorney fees awards. After a hasty and preliminary look at them, I don't see anything in the proposed ORS amendments that would impact upon or damage the ORCP.

John Hart has appointed a small, ad hoc subcommittee of members to help him deal with LC 1892 and any other matters that might come up during this session, with Gilma and me providing staff support. No decision has yet been made by John concerning special meetings of the Council with Sen. Bryant and his staff. John might or might not decide upon some method, other than a special meeting, for garnering views and suggestions of all members regarding LC 1892, and possibly other matters. I am providing you with the ORCP portion of LC 1892 because I believe it likely that, at some point and in some manner, John or the ad hoc committee will want to give all Council members the chance to provide their views.

2. LC 117. The text of this draft bill arrived under the enclosed covering letter from Rep. Kate Brown this afternoon. I have replied that the Council does not submit bills, although it does sometimes offer testimony or other commentary on bills sponsored or submitted by others. I suggested to her, as one possibility, that she defer action in this session and allow the Council to take her proposed ORCP-36 D under consideration in the coming biennium with a view toward promulgating an appropriate amendment should it conclude it would represent sound procedural policy. My hunch, however, is that, since the Council obviously will not be submitting a bill along these lines in this or any session, she will go ahead and sponsor something on the order of LC 117.

Time is short because of, among other things, the deadline on filing bills, the date of which I don't yet know but will soon find out. My letter to Rep. Brown stated that I would do my best

"Legislative Update #2" to CCP 1/31/95
Page Two

to gather comments from as many Council members as possible, perhaps along with suggested alternative language, and forward to her whatever I could gather. Time is so pressing that I have not even cleared this request to you with John Hart, who is really immersed in trials, but have assumed this is how he would want this handled.

I have no opinion on whether proposed 36 D represents good public policy or sound procedural policy in the narrower sense. The Council's concern is presumably with the latter only. Generally speaking, I hate to see the ORCP getting cluttered with special provisions applicable only to specific, relatively narrow substantive contexts. But if enough legislators are convinced this protection is important and urgent enough, they will probably enact something like LC-117 regardless of what the Council thinks, and rightly so I suppose.

In the narrower senses of draftsmanship and sound procedure, LC-117 seems to me pretty bad and in need of a lot of work. The mini-trial it calls for, with its requirement that certain "specific facts" be "proved," strikes me as a nightmare. Also, why would any plaintiff informally agree to provide protected information if it could not be discovered without a court order that presumably would not be readily granted? This seems to me far different from Rule 44 physical or mental exams, where my understanding is that orders are most often stipulated, in large part because lawyers know they are routinely granted or would be if they were not stipulated.

But enough of what I think! If any reactions, suggestions or possible alternative language occur to you, please mail or fax the same to me as soon as possible (FAX 503-346-1564). I realize this is not the best way for the Council to perform its assigned function, but being consulted in this way is better than having legislators plunge ahead and the Council being afforded no opportunity to be heard at all. Please trust me to synthesize whatever I receive from Council members (unless John prefers to designate some member to do it) for forwarding to Rep. Brown, so that any damage to Rule 36 can be prevented or at least minimized. Naturally, I shall distribute copies of what is sent to her to all Council members.

DRAFT

SUMMARY

Requires plaintiff who previously dismissed action with prejudice and who refiles action to pay all attorney fees incurred by defendants in dismissed action. Allows defendant to recover certain attorney fees and expert witness expenses from plaintiff if defendant offers to allow judgment be taken against defendant and plaintiff fails to obtain more favorable judgment than offered. Allows settlement conference at any time.

Requires award of attorney fees for certain misconduct, including causing mistrial. Requires sanctions for certain false certifications in pleadings, motions, papers and arguments to court.

Requires award of attorney fees to party who prevails on motion for summary judgment if summary judgment adjudicates all claims or defenses of party against whom judgment is entered.

Authorizes award of attorney fees to prevailing party in any action based on contract or common law tort if amount claimed is \$20,000 or less.

Amends statutes allowing or requiring award of attorney fees to prevailing plaintiff to allow or require award of attorney fees to prevailing party.

A BILL FOR AN ACT

1
2 Relating to civil procedure; creating new provisions; amending ORS 20.090,
3 20.094, 20.096, 20.105, 20.107, 20.125, 30.075, 30.184, 30.190, 30.680, 30.820,
4 30.822, 30.825, 30.860, 30.862, 30.864, 30.866, 30.960, 59.115, 59.127, 59.255,
5 59.670, 59.890, 59.925, 62.335, 62.440, 65.207, 65.224, 65.781, 70.415, 74A.3050,
6 74A.4040, 79.5070, 83.650, 86.260, 86.265, 86.720, 86.742, 87.076, 87.585, 87.725,
7 87.772, 87.865, 90.710, 92.018, 96.030, 97.760, 105.831, 110.378, 133.739,
8 166.725, 180.510, 192.590, 223.615, 279.365, 307.525, 311.673, 311.679, 311.711,
9 311.771, 346.630, 346.687, 346.690, 431.905, 455.440, 460.165, 462.110, 469.421,
10 474.085, 478.965, 479.265, 480.600, 527.665, 540.120, 540.250, 545.104, 545.502,
11 548.620, 548.660, 553.560, 554.140, 583.126, 583.146, 585.150, 618.516, 621.246,
12 645.225, 646.140, 646.240, 646.359, 646.632, 646.638, 646.641, 646.642, 646.760,
13 646.770, 646.775, 646.780, 646.865, 646.876, 648.135, 650.020, 650.065, 650.250,
14 652.200, 652.230, 653.055, 653.285, 656.052, 658.220, 658.415, 659.160, 659.165,

1 661.280, 671.578, 671.705, 692.180, 697.762, 697.792, 701.067, 722.116, 722.118,
2 731.314, 731.737, 746.300, 746.350, 746.680, 756.185, 759.720, 759.900, 760.540,
3 774.210, 815.410 and 815.415 and ORCP 17, 47 and 54; and repealing ORS
4 20.080 and 20.098.

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

6

7 **OFFERS OF COMPROMISE, SETTLEMENT AND PREVIOUSLY**
8 **DISMISSED ACTIONS**

9

10 **SECTION 1.** ORCP 54 is amended to read:

11 **A. Voluntary dismissal; effect thereof.**

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

25 **A(2) By order of court.** Except as provided in subsection (1) of this sec-
26 tion, an action shall not be dismissed at the plaintiff's instance save upon
27 judgment of dismissal ordered by the court and upon such terms and condi-
28 tions as the court deems proper. If a counterclaim has been pleaded by a
29 defendant prior to the service upon the defendant of the plaintiff's motion
30 to dismiss, the defendant may proceed with the counterclaim. Unless other-
31 wise specified in the judgment of dismissal, a dismissal under this subsection

1 is without prejudice.

2 A(3) Costs and disbursements. When an action is dismissed under this
3 section, the judgment may include any costs and disbursements, including
4 attorney fees, provided by rule or statute. Unless the circumstances indicate
5 otherwise, the dismissed party shall be considered the prevailing party.

6 B. Involuntary dismissal.

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

11 B(2) Insufficiency of evidence. After the plaintiff in an action tried by the
12 court without a jury has completed the presentation of plaintiff's evidence,
13 the defendant, without waiving the right to offer evidence in the event the
14 motion is not granted, may move for a judgment of dismissal on the ground
15 that upon the facts and the law the plaintiff has shown no right to relief.
16 The court as trier of the facts may then determine them and render judgment
17 of dismissal against the plaintiff or may decline to render any judgment until
18 the close of all the evidence. If the court renders judgment of dismissal with
19 prejudice against the plaintiff, the court shall make findings as provided in
20 Rule 62.

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

1 dismissal by the court at any time, for want of prosecution of any action
2 upon motion of any party thereto.

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

6 C. Dismissal of counterclaim, cross-claim, or third party claim. The pro-
7 visions of this rule apply to the dismissal of any counterclaim, cross-claim,
8 or third party claim.

9 D. Costs of previously dismissed action.

10 D(1) If a plaintiff who has once dismissed an action in any court com-
11 mences an action based upon or including the same claim against the same
12 defendant, the court may make such order for the payment of any unpaid
13 judgment for costs and disbursements against plaintiff in the action previ-
14 ously dismissed as it may deem proper and may stay the proceedings in the
15 action until the plaintiff has complied with the order.

16 D(2) If a plaintiff who previously filed an action that was dismissed
17 with prejudice subsequently commences an action based upon or in-
18 cluding the same claim against the same defendant, the court shall
19 enter an order requiring the payment of all attorney fees incurred by
20 the defendant in the action previously dismissed.

- what about judgment in the words
Technical re judicata problem.
What if some or all fees were awarded in previous action

to extent not awarded and in such action

21 E. Compromise; effect of acceptance or rejection. Except as provided in
22 ORS 17.065 through 17.085, the party against whom a claim is asserted may,
23 at any time up to [10] 30 days prior to trial, serve upon the party asserting
24 the claim an offer to allow judgment to be given against the party making
25 the offer for the sum, or the property, or to the effect therein specified. The
26 party asserting the claim may accept the offer in the manner specified
27 by this section at any time within 30 days after the offer is made. The
28 court may extend the period during which an offer under this section
29 may be accepted by an additional 30 days if the court determines that
30 the party against whom the claim is made has unreasonably resisted
31 efforts to obtain discovery during the 30-day period following the

1 making of the offer. If the party asserting the claim accepts the offer, the
 2 party asserting the claim or such party's attorney shall endorse such ac-
 3 ceptance thereon, and file the same with the clerk before trial, and within
 4 three days from the time it was served upon such party asserting the claim;
 5 and thereupon judgment shall be given accordingly, as a stipulated judgment.
 6 Unless agreed upon otherwise by the parties, costs, disbursements, and at-
 7 torney fees shall be entered in addition as part of such judgment as provided
 8 in Rule 68. If the offer is not accepted and filed within the time prescribed,
 9 it shall be deemed withdrawn, and shall not be given in evidence on the trial;
 10 and if the party asserting the claim fails to obtain a more favorable judg-
 11 ment, the party asserting the claim shall not recover costs, disbursements,
 12 and attorney fees incurred after the date of the offer, but the party against
 13 whom the claim was asserted shall recover of the party asserting the claim
 14 reasonable attorney fees, reasonable expert witness fees, and costs and
 15 disbursements from the time of the service of the offer. For the purpose
 16 of determining whether the party asserting the claim failed to obtain
 17 a more favorable judgment, the court shall disregard any award of
 18 attorney fees made to the claimant.

19 F. Settlement Conferences. A settlement conference may be ordered
 20 by the court at any time at the request of any party or upon the
 21 court's own motion. Upon the ^{request} of the ^{judge} or a party, a dif-
 22 ferent judge shall preside at the conference.

usually a good idea
not the Federal system of judge assignment

24 AWARD OF ATTORNEY FEES AS SANCTION FOR FALSE OR
 25 FRIVOLOUS
 26 PLEADINGS AND OTHER MISCONDUCT

27
 28 SECTION 2. ORS 20.105 is amended to read:

29 20.105. (1) In any civil action, suit or other proceeding in a district court,
 30 a circuit court or the Oregon Tax Court, or in any civil appeal to or review
 31 by the Court of Appeals or Supreme Court, the court [may, in its

1 *discretion,]* shall award reasonable attorney fees [*appropriate in the circum-*
2 *stances]* to a party against whom a claim, defense or ground for appeal or
3 review is asserted, if that party is a prevailing party in the proceeding and
4 to be paid by the party asserting the claim, defense or ground, upon a finding
5 by the court that the party willfully disobeyed a court order or acted in bad
6 faith, wantonly or solely for oppressive reasons.

7 (2) All attorney fees paid to any agency of the state under this section
8 shall be deposited to the credit of the agency's appropriation or cash account
9 from which the costs and expenses of the proceeding were paid or incurred.
10 If the agency obtained an Emergency Board allocation to pay costs and ex-
11 penses of the proceeding, to that extent the attorney fees shall be deposited
12 in the General Fund available for general governmental expenses.

13 **SECTION 3.** ORS 20.125 is amended to read:

14 20.125. In the case of a mistrial in a civil or criminal action, if the court
15 determines that the mistrial was caused by the deliberate misconduct of an
16 attorney, the court, upon motion by the opposing party or upon motion of
17 the court, [*may*] shall assess costs and disbursements, as defined in ORCP
18 68, [*of*] and reasonable attorney fees incurred by the opposing party
19 against the attorney causing the mistrial. Those costs and disbursements
20 [*may*] and attorney fees shall be assessed against the attorney for the trial
21 that ended in the mistrial.

22 **SECTION 4.** ORCP 17 is amended to read:

23 **A. Signing by party or attorney; certificate.** Every pleading, motion and
24 other paper of a party represented by an attorney shall be signed by at least
25 one attorney of record who is an active member of the Oregon State Bar. A
26 party who is not represented by an attorney shall sign the pleading, motion
27 or other paper and state the address of the party. Pleadings need not be
28 verified or accompanied by affidavit. [*The signature constitutes a certificate*
29 *that the person has read the pleading, motion or other paper, that to the best*
30 *of the knowledge, information and belief of the person formed after reasonable*
31 *inquiry it is well grounded in fact and is warranted by existing law or a good*

1 *faith argument for the extension, modification or reversal of existing law, and*
2 *that it is not interposed for any improper purpose, such as to harass or to cause*
3 *unnecessary delay or needless increase in the cost of litigation.]*

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

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

13 C. Certifications to court.

14 C(1) An attorney or party who signs, files or otherwise submits an
15 argument in support of a pleading, motion or other paper, makes the
16 certifications to the court identified in subsections (2) to (5) of this
17 section, and further certifies that the certifications are based on the
18 person's best knowledge, information and belief, formed after making
19 all inquiries that are reasonable under the circumstances.

20 C(2) A party or attorney certifies that the pleading, motion or other
21 paper is not being presented for any improper purpose, such as to
22 harass or to cause unnecessary delay or needless increase in the cost
23 of litigation.

24 C(3) An attorney certifies that the claims, defenses, and other legal
25 positions taken in the pleading, motion or other paper are warranted
26 by existing law or by a nonfrivolous argument for the extension,
27 modification or reversal of existing law or the establishment of new
28 law.

29 C(4) A party or attorney certifies that the allegations and other
30 factual assertions in the pleading, motion or other paper are supported
31 by evidence. Any allegation or other factual assertion that the party

1 or attorney does not wish to certify to be supported by evidence must
2 be specifically identified. The attorney or party certifies that the at-
3 torney or party believes that an allegation or other factual assertion
4 so identified will be supported by evidence after further investigation
5 and discovery.

6 C(5) The party or attorney certifies that any denials of factual as-
7 sertion are supported by evidence. Any denial of factual assertion that
8 the party or attorney does not wish to certify to be supported by evi-
9 dence must be specifically identified. The attorney or party certifies
10 that the attorney or party believes that a denial of a factual assertion
11 so identified is reasonably based on a lack of information or belief.

12 D. Sanctions.

13 D(1) The court may impose sanctions against a person or party who
14 is found to have made a false certification under section C of this rule,
15 or who is found to be responsible for a false certification under section
16 C of this rule. A sanction may be imposed under this section only after
17 notice and an opportunity to be heard are provided to the party or
18 attorney. A law firm is jointly liable for any sanction imposed against
19 a partner, associate or employee of the firm, unless the court deter-
20 mines that joint liability would be unjust under the circumstances.

21 D(2) Sanctions may be imposed under this section upon motion of
22 a party or upon the court's own motion. If the court seeks to impose
23 sanctions on its own motion, the court shall direct the party or at-
24 torney to appear before the court and show cause why the sanctions
25 should not be imposed. The court may not issue an order to appear
26 and show cause under this subsection at any time after the filing of
27 a voluntary dismissal, compromise or settlement of the action with
28 respect to the party or attorney against whom sanctions are sought
29 to be imposed.

30 D(3) A motion by a party to the proceeding for imposition of sanc-
31 tions under this section must be made separately from other motions

1 and pleadings, and must describe with specificity the alleged false
2 certification. Sanctions may not be imposed against a party until at
3 least 21 days after the party is served with the motion in the manner
4 provided by Rule 9. Notwithstanding any other provision of this sec-
5 tion, the court may not impose sanctions against a party if within 21
6 days after the motion is served on the party, the party amends or
7 otherwise withdraws the pleading, motion, paper, or argument in a
8 manner that corrects the false certification specified in the motion.

*Will change
process as
integrated as
trial and
appellate level*

9 D(4) Sanctions under this section must be limited to amounts suf-
10 ficient to reimburse the moving party for attorney fees and other ex-
11 penses incurred by reason of the false certification, including
12 reasonable attorney fees and expenses incurred by reason of the mo-
13 tion for sanctions, and amounts sufficient to deter future false certif-
14 ication by the party or attorney and by other parties and attorneys.
15 The sanction may include nonmonetary penalties and monetary pen-
16 alties payable to the court. The sanction must include an order re-
17 quiring payment of reasonable attorney fees and expenses incurred by
18 the moving party by reason of the false certification.

19 D(5) An order imposing sanctions under this section must specif-
20 ically describe the false certification and the grounds for determining
21 that the certification was false. The order must explain the grounds
22 for the imposition of the specific sanction that is ordered.

23 E. Rule not applicable to discovery. This rule does not apply to any
24 motions, pleading or conduct that is subject to sanction under Rule
25 46.

26

27 ASSESSMENT OF ATTORNEY FEES UPON ENTRY OF SUMMARY
28 JUDGMENT

29

30 SECTION 5. ORCP 47 is amended to read:

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

1 or cross-claim or to obtain a declaratory judgment may, at any time after the
2 expiration of 20 days from the commencement of the action or after service
3 of a motion for summary judgment by the adverse party, move, with or
4 without supporting affidavits, for a summary judgment in that party's favor
5 upon all or any part thereof.

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

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

21 D. Form of affidavits; defense required. Except as provided by section E
22 of this rule, supporting and opposing affidavits shall be made on personal
23 knowledge, shall set forth such facts as would be admissible in evidence, and
24 shall show affirmatively that the affiant is competent to testify to the mat-
25 ters stated therein. Sworn or certified copies of all papers or parts thereof
26 referred to in an affidavit shall be attached thereto or served therewith. The
27 court may permit affidavits to be supplemented or opposed by depositions or
28 further affidavits. When a motion for summary judgment is made and sup-
29 ported as provided in this rule an adverse party may not rest upon the mere
30 allegations or denials of that party's pleading, but the adverse party's re-
31 sponse, by affidavits or as otherwise provided in this section, must set forth

1 specific facts showing that there is a genuine issue as to any material fact
2 for trial. If the adverse party does not so respond, summary judgment, if
3 appropriate, shall be entered against such party.

4 E. Affidavit of attorney when expert opinion required. Motions under
5 this rule are not designed to be used as discovery devices to obtain the
6 names of potential expert witnesses or to obtain their facts or opinions. If
7 a party, in opposing a motion for summary judgment, is required to provide
8 the opinion of an expert to establish a genuine issue of material fact, an
9 affidavit of the party's attorney stating that an unnamed qualified expert has
10 been retained who is available and willing to testify to admissible facts or
11 opinions creating a question of fact, will be deemed sufficient to controvert
12 the allegations of the moving party and an adequate basis for the court to
13 deny the motion. The affidavit shall be made in good faith based on admis-
14 sible facts or opinions obtained from a qualified expert who has actually
15 been retained by the attorney who is available and willing to testify and who
16 has actually rendered an opinion or provided facts which, if revealed by af-
17 fidavit, would be a sufficient basis for denying the motion for summary
18 judgment.

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

25 G. Affidavits made in bad faith. Should it appear to the satisfaction of the
26 court at any time that any of the affidavits presented pursuant to this rule
27 are presented in bad faith or solely for the purpose of delay, the court shall
28 forthwith order the party employing them to pay to the other party the
29 amount of the reasonable expenses which the filing of the affidavits caused
30 the other party to incur, including reasonable attorney fees, and any of-
31 fending party or attorney may be subject to sanctions for contempt.

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

4 I. Summary judgment that adjudicates all claims and defenses of a
5 party.

6 I(1) If summary judgment is entered in favor of any party other
7 than the state or a political subdivision of the state, and the summary
8 judgment adjudicates all claims and defenses of the party in favor of
9 the party, the court shall enter judgment against the party who did
10 not prevail for reasonable attorney fees, expert witness fees and all
11 costs attributable to discovery in the action. Attorney fees shall be
12 awarded in the manner provided by ORCP 68.

*Well used
only for A
exception
don't bring
summary judgment*

13 I(2) If a party to an action other than the state or a political sub-
14 division of the state files a motion for summary judgment as to one
15 or more claims or defenses of another party, and within 20 days before
16 the scheduled hearing on the motion the other party repleads or oth-
17 erwise takes action to voluntarily dismiss one or more of the claims
18 or defenses that are challenged in the motion for summary judgment,
19 the court shall not award to the party filing the motion all reasonable
20 attorney fees and expert witness fees incurred by the moving party
21 that are attributable to the abandoned claim or defense.

*One-keg
No award for
party who
precedes on
summary judgment*

22
23 **ATTORNEY FEE AWARDS IN SMALL ACTIONS**

24
25 SECTION 6. (1) Except as provided in subsection (2) of this section,
26 in any action based on contract or common law tort in which the
27 amount claimed is \$20,000 or less, the court shall award reasonable
28 attorney fees to the prevailing party.

29 (2) The court shall not award attorney fees to a prevailing plaintiff
30 in a civil action subject to subsection (1) of this section unless the
31 plaintiff served a copy of the complaint asserting the claim on all de-

KATE BROWN
MULTNOMAH COUNTY
DISTRICT 13

REPLY TO ADDRESS INDICATED:

- House of Representatives
Salem, OR 97310
- PO Box 82699
Portland, OR 97282



HOUSE OF REPRESENTATIVES
SALEM, OREGON
97310

January 26, 1995

Professor Maurice Holland
University of Oregon Law School
Eugene, Oregon 97403

Dear Professor Holland,

You will find enclosed a draft of legislation that I am prepared to submit this session. However, I first want you to see it as I understand that the Oregon Council on Court Procedures may also be interested in submitting such a bill. If this is the case, please let me know. I am happy to defer.

Please call my office in Salem at 986-1413 with your response. I look forward to hearing from you.

Thank you for your time.

Sincerely,

Representative Kate Brown

D R A F T

SUMMARY

Limits discovery of information on sexual conduct of alleged victim in certain civil cases. Allows discovery after motion and hearing in specified circumstances. Requires sanction against person who makes or opposes motion in bad faith.

A BILL FOR AN ACT

1
2 Relating to discovery; creating new provisions; and amending ORCP 36.

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

4 **SECTION 1.** ORCP 36 is amended to read:

5 **A. Discovery methods.** Parties may obtain discovery by one or more of the
6 following methods: depositions upon oral examination or written questions;
7 production of documents or things or permission to enter upon land or other
8 property, for inspection and other purposes; physical and mental examina-
9 tions; and requests for admission.

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

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

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

22 B(2)(a) A party, upon the request of an adverse party, shall disclose the

1 existence and contents of any insurance agreement or policy under which a
2 person transacting insurance may be liable to satisfy part or all of a judg-
3 ment which may be entered in the action or to indemnify or reimburse for
4 payments made to satisfy the judgment.

5 B(2)(b) The obligation to disclose under this subsection shall be performed
6 as soon as practicable following the filing of the complaint and the request
7 to disclose. The court may supervise the exercise of disclosure to the extent
8 necessary to insure that it proceeds properly and expeditiously. However, the
9 court may limit the extent of disclosure under this subsection as provided
10 in section C of this rule.

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

15 B(2)(d) As used in this subsection, "disclose" means to afford the adverse
16 party an opportunity to inspect or copy the insurance agreement or policy.

17 B(3) Trial preparation materials. Subject to the provisions of Rule 44, a
18 party may obtain discovery of documents and tangible things otherwise
19 discoverable under subsection B(1) of this rule and prepared in anticipation
20 of litigation or for trial by or for another party or by or for that other par-
21 ty's representative (including an attorney, consultant, surety, indemnitor,
22 insurer, or agent) only upon a showing that the party seeking discovery has
23 substantial need of the materials in the preparation of such party's case and
24 is unable without undue hardship to obtain the substantial equivalent of the
25 materials by other means. In ordering discovery of such materials when the
26 required showing has been made, the court shall protect against disclosure
27 of the mental impressions, conclusions, opinions, or legal theories of an at-
28 torney or other representative of a party concerning the litigation.

29 A party may obtain, without the required showing, a statement concern-
30 ing the action or its subject matter previously made by that party. Upon
31 request, a person who is not a party may obtain, without the required

1 showing, a statement concerning the action or its subject matter previously
2 made by that person. If the request is refused, the person or party requesting
3 the statement may move for a court order. The provisions of Rule 46 A(4)
4 apply to the award of expenses incurred in relation to the motion. For pur-
5 poses of this subsection, a statement previously made is (a) a written state-
6 ment signed or otherwise adopted or approved by the person making it, or
7 (b) a stenographic, mechanical, electrical, or other recording, or a tran-
8 scription thereof, which is a substantially verbatim recital of an oral state-
9 ment by the person making it and contemporaneously recorded.

10 C. Court order limiting extent of disclosure. Upon motion by a party or
11 by the person from whom discovery is sought, and for good cause shown, the
12 court in which the action is pending may make any order which justice re-
13 quires to protect a party or person from annoyance, embarrassment, op-
14 pression, or undue burden or expense, including one or more of the following:
15 (1) that the discovery not be had; (2) that the discovery may be had only on
16 specified terms and conditions, including a designation of the time or place;
17 (3) that the discovery may be had only by a method of discovery other than
18 that selected by the party seeking discovery; (4) that certain matters not be
19 inquired into, or that the scope of the discovery be limited to certain mat-
20 ters; (5) that discovery be conducted with no one present except persons
21 designated by the court; (6) that a deposition after being sealed be opened
22 only by order of the court; (7) that a trade secret or other confidential re-
23 search, development, or commercial information not be disclosed or be dis-
24 closed only in a designated way; (8) that the parties simultaneously file
25 specified documents or information enclosed in sealed envelopes to be opened
26 as directed by the court; or (9) that to prevent hardship the party requesting
27 discovery pay to the other party reasonable expenses incurred in attending
28 the deposition or otherwise responding to the request for discovery.

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

1 to the award of expenses incurred in relation to the motion.

2 D. Discovery of sexual conduct of alleged victim in certain cases.

3 D(1) Limitation on discovery. In any action in which sexual
4 harassment is alleged, or conduct that would constitute a crime under
5 ORS 163.355 to 163.427 is alleged, a party seeking discovery of infor-
6 mation relating to the sexual conduct of the alleged victim with per-
7 sons other than the alleged perpetrator of the harassment or conduct
8 must prove specific facts that establish that there is good cause for
9 seeking discovery, that the information is relevant to the subject
10 matter of the action, and that the information is admissible as evi-
11 dence or is reasonably calculated to lead to the discovery of admissible
12 evidence.

13 D(2) Order for discovery. A court may allow discovery of informa-
14 tion relating to the sexual conduct of a victim in an action subject to
15 this section only after a motion for discovery and a hearing on the
16 motion. The hearing on the motion may be held only after notice is
17 provided to the victim and may not be conducted ex parte. A motion
18 under this section may not be granted unless the party seeking the
19 discovery attaches to the motion an affidavit stating facts showing a
20 good faith attempt by the moving party to informally resolve the is-
21 sues presented by the motion.

Instead, should conform to Unit Trial Court Rules

22 D(3) Sanctions. Upon a finding by the court that a person did not
23 ~~act in good faith in making or opposing a motion under this section,~~
24 ~~the court shall impose an appropriate sanction against the person if~~
25 ~~the person does not prevail on the motion. The sanction may include~~
26 ~~reasonable expenses incurred by the prevailing party on the motion,~~
27 ~~including attorney fees.~~

28 SECTION 2. The amendments to ORCP 36 by section 1 of this Act
29 apply only to actions commenced on or after the effective date of this
30 Act.

31

Delete _____

COUNCIL ON COURT PROCEDURES

University of Oregon
School of Law
Eugene, Oregon 97403-1221

Telephone: (503) 346-3990
Facsimile: (503) 346-1564

January 30, 1995

Representative Kate Brown
House of Representatives
Salem, OR 97310

Dear Representative Brown: Re: LC 117

Thank you for your January 26 letter regarding LC 117, concerning which I replied by phone call to one of your staff people whose name I unfortunately neglected to get. This letter is merely to confirm what I told that person on behalf of the Council.

First, the Council very much appreciates being notified about any proposed legislation that would amend the ORCP, something many legislators do not take the trouble to do.

Secondly, the Council does not submit legislation, although when permitted, it often expresses its views on legislation sponsored or submitted by others that would amend the ORCP, by testimony or otherwise. By statute, the Council must "promulgate" any ORCP amendments it generates during a given biennium prior to the convening of the legislative session. One possible option would be for the Council, if you would like it to, to take the policy decision embodied in LC 117 under consideration during the coming 1995-97 biennium and possibly promulgate an appropriate ORCP amendment in December 1996. Such an amendment would, unless overridden by the 1997 legislature, take effect Jan. 1, 1998.

However, my guess is that a delay of such duration would not be agreeable to you and that you will decide to introduce a bill this session. Obviously, the Council cannot put itself in the position of telling, or even asking, legislators not to legislate. On the assumption that you will want to move forward this session, I would then respectfully request you to give the Council two or three weeks from now to develop some comments, and possibly some suggested alternative language, for forwarding to you for your consideration. I realize there is a deadline on filing bills. We will try to respond as quickly as possible, but if a filing deadline problem arises, perhaps it could be finessed by filing LC 117 and then amending it in committee if, and to the extent, you are persuaded by the Council's comments and suggested alternative language.

Allow me to point out one or two things that trouble me a bit with the present language of LC 117. Proposed D(1) provides that a party seeking the protected information "must prove specific facts that establish that there is good cause" This standard is so rigorous that it might require judges to hold mini-trials in order to find "specific facts," but these would presumably be something other than the facts sought to be discovered about the plaintiff's asserted or suspected sexual conduct with persons other than the defendant. This sort of evidentiary hearing might itself require some preliminary discovery, plus live testimony and the like, to the point where the protected information would itself be disclosed.

Trial and motion judges are pretty good and well experienced at determining "good cause" without a full blown evidentiary hearing of the kind the present language would seem to require. You might want something along the lines of what ORCP 44 A now provides regarding physical and mental examinations: "The order [for a physical or mental examination] may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties"

Another difficulty I have has to do with D(2). The latter provides that a court may allow discovery of protected information only upon motion and after hearing, presumably by order. But the final sentence of D(2) provides that a motion under this proposed section must be accompanied by affidavits showing efforts to resolve the issues informally. However, why, if discovery is permitted only pursuant to an order accompanied by specific findings, etc., would a plaintiff ever informally agree to provide the protected information?

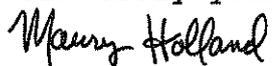
Finally, one more thought. I have great difficulty imagining situations where a judge would be justified, in the civil context, in ordering a sexual harassment plaintiff to provide discovery about sexual conduct with persons other than the alleged harasser. This might be justified in 1 out of 100 cases. To deal with that very rare instance, LC 117 would set in place a rather cumbersome, time-consuming, expensive and often nasty hearing procedure that itself might defeat the underlying policy even when the motion for discovery is denied. Might it not make more sense to amend the Oregon Evidence Code to provide that, at least in civil contexts, the information LC 117 seeks to protect is subject to an evidentiary privilege, in which case of course it would never be discoverable? Another advantage of going the evidentiary privilege route is that it would also make this information inadmissible at trial, so that a defendant's lawyer would be barred from asking the plaintiff about this, something that might be attempted even without the benefit of having had prior discovery. Just a thought!

Letter to Rep. Kate Brown 1/31/95

Page Three

Unless I hear from your office to the contrary, I shall assume that you are going forward to introduce LC 117, and will gather as much input as I can from the Council as promptly as possible, in an effort to avoid filing deadline problems. I shall then forward to your office whatever I can gather at the earliest possible date so that you can give it whatever weight you conclude it merits.

Sincerely yours,



Maurice J. Holland
Executive Director

P.S: Should you decide to go the evidentiary privilege route, you could not do better than consult my colleague, Prof. Laird Kirkpatrick (tel. 503-346-3854).

KATE BROWN
MULTNOMAH COUNTY
DISTRICT 13

REPLY TO ADDRESS INDICATED:

- House of Representatives
Salem, OR 97310
- PO Box 82699
Portland, OR 97282



HOUSE OF REPRESENTATIVES
SALEM, OREGON
97310

February 6, 1995

Professor Maurice Holland
University of Oregon Law School
Eugene, Oregon 97402

Dear Professor Holland,

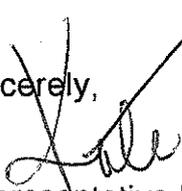
Thank you for your response to my letter.

I want you to know that I have decided to introduce the bill in question this session, although I do not expect it to gather any support now. It is important, however, to raise the issue.

I would like to work with the Counsel and Court Process Committee to further address this issue during the interim with the expectation that we may be able to pass it next session.

Thank you for your continuing interest and I look forward to working with you.

Sincerely,


Representative Kate Brown

GAYLORD & EYERMAN, P.C.

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PORTLAND, OREGON 97201-6093

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(503) 222-3526
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WILLIAM A. GAYLORD
LINDA K. EYERMAN
TODD A. BRADLEY
PEGGY M. TOOLE

*ALSO ADMITTED IN WASHINGTON

February 14, 1995

John Hart
Maurice Holland
J. Michael Alexander
Hon. Jack Billings
Marianne Bottini
Hon. Sid Brockley
Patricia Crain
Hon. Mary Deits
Hon. Stephen Gallagher
Hon. Susan Graber
Bruce Hamlin

Hon. Nely Johnson
Bernard Jolles
Hon. John Kelly
Rudy Lachenmeier
Hon. Michael Marcus
John McMillan
Michael Phillips
Hon. Milo Pope
Hon. Charles Sam
Stephan J.R. Shepard
Nancy Tauman

RE: Senate Bill 385

Dear Council Members:

The Council on Courts Procedure is scheduled for a special meeting by telephone conference at 9:30 am on Saturday, February 18, 1995. I am writing to propose, and frankly to lobby for, a position to be taken by the Council at that time. Recognizing that we are only being offered one brief opportunity to consider and respond to several profound changes in important ORCPs, and mindful of the difficulties of discussion by a large group in teleconference, I will describe in this letter the Motions I plan to make at that time, and my reasons for them.¹

I refer you to sections 1, 4, and 5 of Senate Bill 385, containing all of its proposed amendments to ORCP, copies attached, for your convenience.

¹There are several observations I could make about the process that is being employed by legislative committee leaders which places unprecedented time constraint on any effort of ours (or theirs) to act thoughtfully on behalf of our (or their) constituents in dealing with potentially huge changes in fundamental rules. I will limit myself to this comment: if these ideas are so good, and so widely supported by voters, why not let them be discussed in daylight, through normal channels, without special limitations placed on opportunities for citizens to express opposition, and without the announcement, prior to public hearings, that opponents cannot stop this bill no matter what they establish about its merits?

The Problem

The Problem, as I see it, is not really what is right or wrong with the ORCP as much as it is the threat of drastic and unnecessary changes being foisted on us by and for a narrow and unknowledgeable special interest group. For those who may not know, this legislation has been drafted by a small group of lobbyists at the request of e.g., Mark Hemstreet, the owner of Shilo Inns (see 1/25/95 Willamette Week front page story for discussion of his spending \$400,000 on state campaigns this election, apparently for purposes of promoting his legal "reform" agenda).

I am writing because I am concerned about the Council's role in this issue, both from a procedural standpoint, and on the merits. Procedurally, I am troubled that proponents have decided to ignore the established routes for new civil procedures in our state, and instead pursue drastically restrictive rules in legislative committee which have never been aired before the Council. This probably reflects the fact that these restrictions are not being proposed by or for any knowledgeable group in the bar or the judiciary, but by outsiders to our system, venting resentment for their own unhappy experiences as litigants. That does not, in my view, justify this end-run around the Council's authority. Under ordinary circumstances, I would prefer to refuse participation in the issue unless it was referred to the Council for its usual careful treatment during the off-legislative year, with ample public hearing and notice to interest groups of all ilks.

Therefore, my **First Motion** is that we resolve that these changes are within our jurisdiction, that they portend major impacts on the way our system works, that there is serious question whether they are needed or useful, and that we ask the legislature to refer them to the Council, as a standing interim committee, to be studied and returned to the 1997 legislature with our recommendations.

However, as I will explain below about the merits of this issue, what is proposed is too serious and too likely to pass through the legislative committees to let it happen without the Council's input. Whether anything the Council says on these issues will make any difference or not, I believe we must vote on them and announce our position, or else our ability to effect future important rule changes will be doubtful.

My **Second Motion** will be that the Council adopt a resolution opposing, and asking the legislature to reject, sections 1, 4, and 5 of Senate Bill 385.² If necessary these can be separated into multiple motions without hurting my feelings. And, if there are strong feelings in favor of statewide mandatory settlement conferences, I am willing to except part F of section 1 of the bill from my motions. See footnote 4 below.

My **Third Motion** will be a simple alternative to my second motion, in case some members are not prepared to be as specifically judgmental as I am.

SB 385 is a bad idea

Overview:

Senate Bill 385 is a massive bill with a small-minded theme. It proposes to amend most provisions throughout the ORS which provide for attorney fee awards, so that they become reciprocal and require courts to award fees against virtually every unsuccessful litigant. The great majority of provisions in the bill represent misguided alterations of ORS sections which promote the use of the courts to remedy various socially unacceptable conduct, but they do not effect, ORCP sections. Specific provisions would amend ORCP 54 (section 1 of the bill), ORCP 17 (section 4 of the bill), and ORCP 47 (section 5 of the bill).

²After drafting this letter, I received Maury's memo and materials dated February 8, 1995, causing me to add the following commentary in response to Senator Bryant's "friendly" advice that we not waste our time opposing the provisions of this bill because it will pass anyway: 1) what else would anyone say, who is a prime mover of legislation, regardless of its political or social merits?; and 2) the comments attributed to the Senator by Maury were made before the first opportunity was allowed by the Senator's committee for any public comment except by the proponents of the bill. On February 9, 1995, the committee hearing room, and an additional room for overflow were packed by citizens there to plead for preserving individual rights against the special interests behind this bill. Five Circuit Court judges and two respected law professors spoke eloquently against changing to this "loser pays" system. If the promoters of this idea still say it cannot be defeated, then it was never going to be about the merits of the bill anyway, and there is nothing to lose by our taking a principled position for its defeat.

ORCP 54E, offer of compromise amendment

My greatest fear and strongest opposition to this bill, arises from its first section, which would amend ORCP 54 E so that an offer of compromise has the effect of shifting onto every plaintiff the obligation to pay the defendants' attorneys fees and expert witness fees, unless the plaintiff wins an award in excess of the offer. Proponents of this bill have claimed to the press and the judiciary committee that it is not a "loser pays" bill, because of the offer of compromise condition, and that it is only fair that losers should pay, in any event.³⁴

chilling effect on exercise of rights

The intent and effect of this change would be to restrict access to the courts to only those litigants who can afford to risk thousands (sometimes hundreds of thousands) of dollars in order to have their day in court, and those who have no assets and therefore, nothing to lose if a large judgement is entered against them under this provision. The bill is disguised as something other than "loser pays" by the use of the offer of compromise to trigger that effect, but in fact makes it even worse: i.e., even "winners" will pay the other side's costs, if the judge or jury should find in their favor but not measure

³The bill also effects ORCP 54 by adding part D(2), requiring payment of previously ordered attorney fees before one can refile after dismissal with prejudice of the same claim. Part D(2) baffles me. I am not aware of any provision in law allowing pursuit of the same claim again after dismissal with prejudice, so I am struggling to understand the reason for conditioning the exercise of this non-existing right on anything.

⁴The bill also effects ORCP 54 by adding part F permitting court ordered settlement conferences at the request of any party or the court. I have no resistance to this proposal. However, while I served on the Uniform Trial Court Rules Committee, the same idea was rejected on more than one occasion, in favor of UTCR 6.200 which reserves a local option to adopt mandatory settlement conferences by Supplemental Local Rule. I also note that UTCR 6.010 already empowers any court to call the parties to a conference to consider, *inter alia*, "(g) the possible settlement of the case;".

their damages or comparative fault as favorably as they expected.⁵

impact likely on every case

No one has explained to me any reason why a defendant would ever fail to make an offer of compromise of some amount under this rule, just to make sure they have evoked the leverage effect this threat would have. Moreover, most meritorious cases for deserving middle-class citizens would never get started, in view of the threat of losing everything they have if they should fail to convince the jury they are right about both the liability for their claim AND the proper award of damages to compensate for it.

Claims by the proponents of this change ring hollow in part because of the deception used in conveying to the legislature the intent and effect of the bill: eg. in materials circulated to us with Maury's recent memo, John DiLorenzo (principle draftsman of the bill apparently for Mr. Hemstreet) tells the legislative committee:

"The purposes of this provision [offer of compromise triggering loser pays] is twofold: (1) It encourages defendants to make real offers of settlement (there is no tactical advantage to make a low-ball offer), and (2) It encourages plaintiffs to focus upon their case at earlier stages prior to trial and to take a hard look at offers which are so made." [emphasis added]

If he intended to suggest that the ability to shift the potential burden of all of the defendants' legal fees and costs onto the

⁵ One lawyer testified at the Joint Senate-House Judiciary Committee Hearing on this bill on February 9, about a drug products liability case in which an estimated 1 million dollars had been spent by more than one corporate defendant. As that lawyer observed, one or more of multiple defendants can often become prevailing parties by being let out of litigation as discovery and tactics become more focused. I have personal knowledge of an expert witness for an all terrain manufacturer who charged over \$600,000 for his pre-trial preparation work on a single case. A plaintiff could win a very large verdict against the main or remaining defendant, and under this rule, still collect nothing.

plaintiff by making any offer above zero is not a "tactical advantage", I think we need some new definitions of terms. If he meant to say plaintiffs are "encouraged" toward earlier analysis of their cases, his skill at understatement is admirable, because any plaintiff with anything of value to lose will be "encouraged" to run away and hide rather than to ever file any lawsuit of any kind, no matter what has been done to harm them, once the prospects of this provision are explained by their lawyer.

a bludgeon against the middle class

I personally would feel compelled to advise every client prior to starting litigation that they are likely to require bankruptcy if we do not win enough to overcome the effects of this bill. On the chance that I am imperfect in advising them how to respond to an offer of settlement at any point during their representation, I will have to notify the PLF that my client may have incurred huge liability in reliance on my advise. Numerous witnesses in the legislative hearings on February 9, including all five circuit court judges, told the committee there is no serious problem of frivolous lawsuits in our court system, no overcrowded docket demanding relief, and no reason to treat plaintiffs who do not prevail as *per se* frivolous litigants. As Judge RP Jones said, the playing field is reasonably well balanced. Don't fix it when it ain't broke.

No valid argument exists to support this restriction on the rights of ordinary citizens to be treated equally in court. Proponents take out radio ads attacking juries for perceived errors based on grossly inaccurate summaries of the facts of notorious cases.⁶ Those of us working in the courts know there is no flood of frivolous litigation (or any other kind - civil case filings have dropped steadily for several years), and no major broken part of the system that needs drastic fixing. My perception (but they will have to speak for themselves) is that my colleagues in the defense bar do not clamor for this restriction of individual rights, and do not overlook the fact

⁶ Such as the recent award against McDonalds for the woman who suffered third degree burns over her entire groin area because of corporate policy to keep coffee 50 degrees hotter than most home coffee makers can make it (despite over 700 hundred prior burn injuries caused, including some very similar to plaintiff's), none of which facts are reported in the current radio ad harangue about the case.

that it would seriously disrupt the balance of power and opportunity between aggrieved individuals and insured or wealthy corporate interests.

the English Rule

Proponents point to England as the model for restricting access to the courts. However, most observers (including judges who testified on February 9 against this bill) notice that the English system is based on the assumption that trade unions will pay any judgments allowed against unsuccessful injured members who lose under their loser pays rule. Other sources recognize that the English rule works better in a country built on economic class distinctions than it would where we take pride in equal opportunity regardless of station. As a columnist in The Oregonian wrote for Sunday, February 5, 1995, quoting from the conservative English magazine, The Economist: "Enormous numbers of mostly middle-class people' simply cannot use the courts... because they must pay the other side's lawyers if they lose. 'For most people this means that they are risking financial ruin.'" Anthony Lewis, 'Tort Reform' Shelters the Rich, The Oregonian, p. D3, 2/5/95. [See the economist excerpt in materials sent out by Maury].

violation of state constitutional Remedies clause

Constitutional law Professor David Schuman told the Joint Judiciary Committee on Thursday, February 9, 1995, that the effects of this bill of denying access to the courts for a class of citizens is likely to be found unconstitutional under the Remedies clause of the state constitution. It should be no surprise that constitutional protections would be offended by legislation that has as its avowed purpose the prevention of ordinary legal causes for ordinary people against businesses. It cannot be overstated that this provision makes no attempt to limit the restriction of citizen's rights to situations of frivolous litigation.

basic unfairness

I can offer anecdotal evidence to support my vision of how this bill would restrict people's options and work very unfairly against righteous claims. Mr Lewis' column quotes a government executive from Utah to the effect that this bill does not just stop frivolous lawsuits, it stops them all. I recently tried a case for a retired railroad machinist who underwent successful

heart valve surgery, but became permanently paraplegic when his physicians failed to diagnose a hemorrhage in his spine caused by medication they gave him after surgery. Several respected physicians testified for my client's case, but a jury in Lane County found for the local doctors. If this bill had been law (and assuming I and my client had the guts to proceed at all), he and his wife would probably have lost their savings and their house, for not winning their non-frivolous, but unsuccessful legal action. I can describe a dozen other persons with catastrophic injuries who would have been inhibited or prevented from pursuing their ultimately successful claims by this onerous provision.

the Summary Judgment Hammer

Section 5 of SB 385 adds a section to ORCP 47 so that losing a summary judgment motion will have the same terrible effect as failing to exceed an offer of compromise: the losing party will pay the winning party's attorneys and expert witnesses. Of course this could theoretically effect either plaintiffs or defendants, except that there are very few situations where summary judgment is even sought, let alone granted, in favor of a plaintiff. Business litigants (who, relatively speaking, can afford the costs and risks of litigation) may get equal advantage and detriment from this change whether they are plaintiffs or defendants. For injury plaintiffs, it would again put a premium on being perfect or wealthy, or otherwise never venturing near the court system.

I represented a quadriplegic man who lost the only usable extremity he had due to medical negligence, and sued a treating doctor for his damages. A pro tem judge granted summary judgment against all claims on the basis of a mis-reading of the statute of limitations discovery rule. We were successful appealing this outcome to the Court of Appeals, and the State Supreme Court, after which the case was settled for the policy limits of the doctor's insurance coverage. There could be no doubt about the meritorious nature of the case. But under the restrictions sought in SB 385, it is doubtful my client could have risked filing the case in the first place, and especially whether he could have continued the contest into the appellate courts after being ordered to pay attorney fees and witness fees for losing summary judgment.

Council on Court Committee Members
February 14, 1995

Page 9

Conclusions

Please join me in voting to take an official position for the Council against these changes. I would be glad to discuss the merits of the proposed restrictions either before or at the time of our telephone meeting. Thanks for your indulgence of this over-long message.

Very truly yours,

GAYLORD & EYERMAN, P.C.



William A. Gaylord

WAG:jki

Enclosures

P.S. I am also enclosing a Draft Bill which I just received, scheduled for hearing soon, and modifying ORCP 47 summary judgment procedures profoundly. It would require granting summary judgment either if the moving party met the usual burden for such a motion or [new language] the respondent failed to set forth "admissible evidence" to avoid the granting of the motion. This not only would return us to the days of summary judgment motions used to discover expert witnesses, it would reverse our traditions that provide trials as the means of resolving facts unless a moving party can meet its burden to establish that trial is unnecessary. We all know of situations in which summary judgment is inappropriate on its face without any opposition to the motion being filed at all, or with strictly legal argument opposing it. I will move a resolution to refer this bill to the council, or oppose it on the merits in this legislature, at the time of our teleconference.

Council On Courts Procedure

teleconference meeting for 2/18/95

Motions Proposed by Bill Gaylord

1. Resolved that the Council on Courts Procedure delegates its chair, or one or more members if he is not available, to attend the hearing of the combined Senate and House Judiciary Committee on Senate Bill 385 (as of the time this motion is written, scheduled for February 20, 1995) and to convey on behalf of the Council the following position:

that the Council on Courts Procedure finds the portions of Senate Bill 385 which would amend certain Oregon Rules of Civil Procedure, to wit, sections 1, 4, and 5 of the bill, to be directly within the statutory, historical, and appropriate authority of the Council on Courts Procedure;

that the Council on Courts Procedure is best equipped to study the problems raised and addressed by these provisions, to take input from interest groups effected by them, and to craft solutions consistent with law, constitutional fundamentals, and societal interests, and to advise the legislature on these matters;

that the subjects of these sections of the bill have never been brought before the Council on Courts Procedure for consideration or action;

that the sections in question have potential for significant change in the procedure by which disputes are resolved, including the practice of law, the conduct of courts, and the rights of citizens;

that there is no apparent emergency requiring hasty legislative action without the benefit of Council input;

that therefore, these sections (1,4, and 5) of Senate Bill 385 should be submitted to the Council on Courts Procedure, along with whatever guidance or instruction the legislature wishes to provide, for consideration and action during the next annual interim term of the Council, to be returned with recommendations to the 1997 legislative session.

2. Resolved that, if Motion 1 above is not adopted by the Council, or if it is adopted, is not followed by the legislature, then the Council on Courts Procedure delegates its chair, or one or more members if he is not available, to attend the hearing of the combined Senate and House Judiciary Committee on Senate Bill 385

(as of the time this motion is written, scheduled for February 20, 1995) and to convey on behalf of the Council the following position:

based on the merits of the propose changes to ORCP embodied in sections 1, 4, and 5 of Senate Bill 385, (and without an opportunity to fully perform its quasi-legislative role of fact-finding, including public hearings, debate, and reasoned consideration over time), the Council finds these proposed changes to be:

unnecessary because the present system provides reasonable and effective deterrence against frivolous litigation (as evidenced by the lack of crowding of our court dockets and the rarity of truly frivolous actions);

unfair because they would place undue burdens and risks on the plaintiffs who seek civil justice under that system;

inappropriate because of the sanctions they create against good faith exercise of rights of citizenship by individuals to the special detriment of the middle class;

therefore, the Council on Courts Procedure opposes the adoption of sections 1, 4, and 5 of SB 385.

3. [In alternative to both 1 and 2 above] Resolved that the Council on Courts Procedure opposes the adoption of sections 1, 4, and 5 of SB 385, and authorizes the Chair, or his delegee, to convey that position to the legislature.

LC 2752

1/30/95 (DH/hl)

D R A F T

SUMMARY

Requires granting of summary judgment unless opposing affidavits and supporting documentation set forth specific facts supported by admissible evidence adequate to avoid granting of motion for directed verdict in trial of matter.

A BILL FOR AN ACT

1
2 Relating to summary judgment; amending ORCP 47 C.

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

4 SECTION 1. ORCP 47 C is amended to read:

5 C. Motion and proceedings thereon. The motion and all supporting docu-
6 ments shall be served and filed at least 45 days before the date set for trial.
7 The adverse party shall have 20 days in which to serve and file opposing
8 affidavits and supporting documents. The moving party shall have five days
9 to reply. The court shall have discretion to modify these stated times. The
10 judgment sought shall be rendered forthwith if: (1) the pleadings, depo-
11 sitions, and admissions on file, together with the affidavits, if any, show that
12 there is no genuine issue as to any material fact and that the moving party
13 is entitled to a judgment as a matter of law; or (2) the opposing affidavits
14 and supporting documentation submitted by the adverse party fail to
15 set forth specific facts supported by admissible evidence adequate to
16 avoid the granting of a motion for a directed verdict in a trial of the
17 matter. A summary judgment, interlocutory in character, may be rendered
18 on the issue of liability alone although there is a genuine issue as to the
19 amount of damages.

20

Senate Bill 385

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

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

Requires plaintiff who previously dismissed action with prejudice and who refiles action to pay all attorney fees incurred by defendants in dismissed action. Allows defendant to recover certain attorney fees and expert witness expenses from plaintiff if defendant offers to allow judgment be taken against defendant and plaintiff fails to obtain more favorable judgment than offered. Allows settlement conference at any time.

Requires award of attorney fees for certain misconduct, including causing mistrial. Requires sanctions for certain false certifications in pleadings, motions, papers and arguments to court.

Requires award of attorney fees to party who prevails on motion for summary judgment if summary judgment adjudicates all claims or defenses of party against whom judgment is entered.

Authorizes award of attorney fees to prevailing party in any action based on contract or common law tort if amount claimed is \$20,000 or less.

Amends statutes allowing or requiring award of attorney fees to prevailing plaintiff to allow or require award of attorney fees to prevailing party.

A BILL FOR AN ACT

1
2 Relating to civil procedure; creating new provisions; amending ORS 20.090, 20.094, 20.096, 20.105,
3 20.107, 20.125, 30.075, 30.184, 30.190, 30.680, 30.820, 30.822, 30.825, 30.860, 30.862, 30.864, 30.866,
4 30.960, 59.115, 59.127, 59.255, 59.670, 59.890, 59.925, 62.335, 62.440, 65.207, 65.224, 65.781, 70.415,
5 74A.3050, 74A.4040, 79.5070, 83.650, 86.260, 86.265, 86.720, 86.742, 87.076, 87.585, 87.725, 87.772,
6 87.865, 90.710, 92.018, 96.030, 97.760, 105.831, 110.378, 133.739, 166.725, 180.510, 192.590, 223.615,
7 279.365, 307.525, 311.673, 311.679, 311.711, 311.771, 346.630, 346.687, 346.690, 431.905, 455.440,
8 460.165, 462.110, 469.421, 474.085, 478.965, 479.265, 480.600, 527.665, 540.120, 540.250, 545.104,
9 545.502, 548.620, 548.660, 553.560, 554.140, 583.126, 583.146, 585.150, 618.516, 621.246, 645.225,
10 646.140, 646.240, 646.359, 646.632, 646.638, 646.641, 646.642, 646.760, 646.770, 646.775, 646.780,
11 646.865, 646.876, 648.135, 650.020, 650.065, 650.250, 652.200, 652.230, 653.055, 653.285, 656.052,
12 658.220, 658.415, 659.160, 659.165, 661.280, 671.578, 671.705, 692.180, 697.762, 697.792, 701.067,
13 722.116, 722.118, 731.314, 731.737, 746.300, 746.350, 746.680, 756.185, 759.720, 759.900, 760.540,
14 774.210, 815.410 and 815.415 and ORCP 17, 47 and 54; and repealing ORS 20.080 and 20.098.

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

16 OFFERS OF COMPROMISE, SETTLEMENT AND PREVIOUSLY 17 DISMISSED ACTIONS 18

19 SECTION 1. ORCP 54 is amended to read:

20 A. Voluntary dismissal; effect thereof.

21 A(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 D and of any statute of this
22 state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of
23 dismissal with the court and serving such notice on the defendant not less than five days prior to
24 the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed
25

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in boldfaced type.

1 by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of
2 dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates
3 as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court
4 of the United States or of any state an action against the same parties on or including the same
5 claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal
6 or stipulation under this subsection, the court shall enter a judgment of dismissal.

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

13 A(3) Costs and disbursements. When an action is dismissed under this section, the judgment may
14 include any costs and disbursements, including attorney fees, provided by rule or statute. Unless the
15 circumstances indicate otherwise, the dismissed party shall be considered the prevailing party.

16 B. Involuntary dismissal.

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

20 B(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury
21 has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to
22 offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the
23 ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier
24 of the facts may then determine them and render judgment of dismissal against the plaintiff or may
25 decline to render any judgment until the close of all the evidence. If the court renders judgment of
26 dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

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

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

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

41 D. Costs of previously dismissed action.

42 D(1) If a plaintiff who has once dismissed an action in any court commences an action based
43 upon or including the same claim against the same defendant, the court may make such order for
44 the payment of any unpaid judgment for costs and disbursements against plaintiff in the action
45 previously dismissed as it may deem proper and may stay the proceedings in the action until the

1 plaintiff has complied with the order.

2 D(2) If a plaintiff who previously filed an action that was dismissed with prejudice sub-
3 sequently commences an action based upon or including the same claim against the same
4 defendant, the court shall enter an order requiring the payment of all attorney fees incurred
5 by the defendant in the action previously dismissed.

6 E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through
7 17.085, the party against whom a claim is asserted may, at any time up to [10] 30 days prior to trial,
8 serve upon the party asserting the claim an offer to allow judgment to be given against the party
9 making the offer for the sum, or the property, or to the effect therein specified. The party asserting
10 the claim may accept the offer in the manner specified by this section at any time within
11 30 days after the offer is made. The court may extend the period during which an offer under
12 this section may be accepted by an additional 30 days if the court determines that the party
13 against whom the claim is made has unreasonably resisted efforts to obtain discovery during
14 the 30-day period following the making of the offer. If the party asserting the claim accepts the
15 offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon,
16 and file the same with the clerk before trial, and within three days from the time it was served upon
17 such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated
18 judgment. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall
19 be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted
20 and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evi-
21 dence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment,
22 the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after
23 the date of the offer, but the party against whom the claim was asserted shall recover of the party
24 asserting the claim reasonable attorney fees, reasonable expert witness fees, and costs and
25 disbursements from the time of the service of the offer. For the purpose of determining whether
26 the party asserting the claim failed to obtain a more favorable judgment, the court shall
27 disregard any award of attorney fees made to the claimant.

28 F. Settlement conferences. A settlement conference may be ordered by the court at any
29 time at the request of any party or upon the court's own motion. Upon the request of the
30 judge or a party, a different judge shall preside at the conference.

31

32 **AWARD OF ATTORNEY FEES AS SANCTION FOR FALSE OR FRIVOLOUS**
33 **PLEADINGS AND OTHER MISCONDUCT**

34

35 SECTION 2. ORS 20.105 is amended to read:

36 20.105. (1) In any civil action, suit or other proceeding in a district court, a circuit court or the
37 Oregon Tax Court, or in any civil appeal to or review by the Court of Appeals or Supreme Court,
38 the court [*may, in its discretion,*] shall award reasonable attorney fees [*appropriate in the circum-*
39 *stances*] to a party against whom a claim, defense or ground for appeal or review is asserted, if that
40 party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense
41 or ground, upon a finding by the court that the party willfully disobeyed a court order or acted in
42 bad faith, wantonly or solely for oppressive reasons.

43 (2) All attorney fees paid to any agency of the state under this section shall be deposited to the
44 credit of the agency's appropriation or cash account from which the costs and expenses of the pro-
45 ceeding were paid or incurred. If the agency obtained an Emergency Board allocation to pay costs

1 and expenses of the proceeding, to that extent the attorney fees shall be deposited in the General
2 Fund available for general governmental expenses.

3 SECTION 3. ORS 20.125 is amended to read:

4 20.125. In the case of a mistrial in a civil or criminal action, if the court determines that the
5 mistrial was caused by the deliberate misconduct of an attorney, the court, upon motion by the op-
6 posing party or upon motion of the court, *[may]* shall assess costs and disbursements, as defined in
7 ORCP 68, *[of]* and reasonable attorney fees incurred by the opposing party against the attorney
8 causing the mistrial. Those costs and disbursements *[may]* and attorney fees shall be assessed
9 against the attorney for the trial that ended in the mistrial.

10 SECTION 4. ORCP 17 is amended to read:

11 A. Signing by party or attorney; certificate. Every pleading, motion and other paper of a party
12 represented by an attorney shall be signed by at least one attorney of record who is an active
13 member of the Oregon State Bar. A party who is not represented by an attorney shall sign the
14 pleading, motion or other paper and state the address of the party. Pleadings need not be verified
15 or accompanied by affidavit. *[The signature constitutes a certificate that the person has read the*
16 *pleading, motion or other paper, that to the best of the knowledge, information and belief of the person*
17 *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good*
18 *faith argument for the extension, modification or reversal of existing law, and that it is not interposed*
19 *for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the*
20 *cost of litigation.]*

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

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

29 C. Certifications to court.

30 C(1) An attorney or party who signs, files or otherwise submits an argument in support
31 of a pleading, motion or other paper makes the certifications to the court identified in sub-
32 sections (2) to (5) of this section, and further certifies that the certifications are based on
33 the person's best knowledge, information and belief, formed after making all inquiries that
34 are reasonable under the circumstances.

35 C(2) A party or attorney certifies that the pleading, motion or other paper is not being
36 presented for any improper purpose, such as to harass or to cause unnecessary delay or
37 needless increase in the cost of litigation.

38 C(3) An attorney certifies that the claims, defenses, and other legal positions taken in
39 the pleading, motion or other paper are warranted by existing law or by a nonfrivolous ar-
40 gument for the extension, modification or reversal of existing law or the establishment of
41 new law.

42 C(4) A party or attorney certifies that the allegations and other factual assertions in the
43 pleading, motion or other paper are supported by evidence. Any allegation or other factual
44 assertion that the party or attorney does not wish to certify to be supported by evidence
45 must be specifically identified. The attorney or party certifies that the attorney or party

1 believes that an allegation or other factual assertion so identified will be supported by evi-
2 dence after further investigation and discovery.

3 C(5) The party or attorney certifies that any denials of factual assertion are supported
4 by evidence. Any denial of factual assertion that the party or attorney does not wish to
5 certify to be supported by evidence must be specifically identified. The attorney or party
6 certifies that the attorney or party believes that a denial of a factual assertion so identified
7 is reasonably based on a lack of information or belief.

8 D. Sanctions.

9 D(1) The court may impose sanctions against a person or party who is found to have
10 made a false certification under section C of this rule, or who is found to be responsible for
11 a false certification under section C of this rule. A sanction may be imposed under this sec-
12 tion only after notice and an opportunity to be heard are provided to the party or attorney.
13 A law firm is jointly liable for any sanction imposed against a partner, associate or employee
14 of the firm, unless the court determines that joint liability would be unjust under the cir-
15 cumstances.

16 D(2) Sanctions may be imposed under this section upon motion of a party or upon the
17 court's own motion. If the court seeks to impose sanctions on its own motion, the court shall
18 direct the party or attorney to appear before the court and show cause why the sanctions
19 should not be imposed. The court may not issue an order to appear and show cause under
20 this subsection at any time after the filing of a voluntary dismissal, compromise or settle-
21 ment of the action with respect to the party or attorney against whom sanctions are sought
22 to be imposed.

23 D(3) A motion by a party to the proceeding for imposition of sanctions under this section
24 must be made separately from other motions and pleadings, and must describe with
25 specificity the alleged false certification. Sanctions may not be imposed against a party until
26 at least 21 days after the party is served with the motion in the manner provided by Rule
27 9. Notwithstanding any other provision of this section, the court may not impose sanctions
28 against a party if within 21 days after the motion is served on the party, the party amends
29 or otherwise withdraws the pleading, motion, paper, or argument in a manner that corrects
30 the false certification specified in the motion.

31 D(4) Sanctions under this section must be limited to amounts sufficient to reimburse the
32 moving party for attorney fees and other expenses incurred by reason of the false certif-
33 ication, including reasonable attorney fees and expenses incurred by reason of the motion for
34 sanctions, and amounts sufficient to deter future false certification by the party or attorney
35 and by other parties and attorneys. The sanction may include nonmonetary penalties and
36 monetary penalties payable to the court. The sanction must include an order requiring pay-
37 ment of reasonable attorney fees and expenses incurred by the moving party by reason of
38 the false certification.

39 D(5) An order imposing sanctions under this section must specifically describe the false
40 certification and the grounds for determining that the certification was false. The order
41 must explain the grounds for the imposition of the specific sanction that is ordered.

42 E. Rule not applicable to discovery. This rule does not apply to any motion, pleading or
43 conduct that is subject to sanction under Rule 46.

44
45

ASSESSMENT OF ATTORNEY FEES UPON ENTRY OF SUMMARY JUDGMENT

1 **SECTION 5. ORCP 47 is amended to read:**

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

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

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

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

30 E. Affidavit of attorney when expert opinion required. Motions under this rule are not designed
31 to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their
32 facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the
33 opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney
34 stating that an unnamed qualified expert has been retained who is available and willing to testify
35 to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert
36 the allegations of the moving party and an adequate basis for the court to deny the motion. The
37 affidavit shall be made in good faith based on admissible facts or opinions obtained from a qualified
38 expert who has actually been retained by the attorney who is available and willing to testify and
39 who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a
40 sufficient basis for denying the motion for summary judgment.

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

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TIME SENT: (PST)

SENT BY: Jacque Ihander

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*ALSO ADMITTED IN WASHINGTON

February 14, 1995

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Hon. Mary Deits
Hon. Stephen Gallagher
Hon. Susan Graber
Bruce HamlinHon. Nely Johnson
Bernard Jolles
Hon. John Kelly
Rudy Lachenmeier
Hon. Michael Marcus
John McMillan
Michael Phillips
Hon. Milo Pope
Hon. Charles Sam
Stephan J.R. Shepard
Nancy Tauman

RE: Senate Bill 385

Dear Council Members:

The Council on Courts Procedure is scheduled for a special meeting by telephone conference at 9:30 am on Saturday, February 18, 1995. I am writing to propose, and frankly to lobby for, a position to be taken by the Council at that time. Recognizing that we are only being offered one brief opportunity to consider and respond to several profound changes in important ORCPs, and mindful of the difficulties of discussion by a large group in teleconference, I will describe in this letter the Motions I plan to make at that time, and my reasons for them.¹

I refer you to sections 1, 4, and 5 of Senate Bill 385, containing all of its proposed amendments to ORCP, copies attached, for your convenience.

¹There are several observations I could make about the process that is being employed by legislative committee leaders which places unprecedented time constraint on any effort of ours (or theirs) to act thoughtfully on behalf of our (or their) constituents in dealing with potentially huge changes in fundamental rules. I will limit myself to this comment: if these ideas are so good, and so widely supported by voters, why not let them be discussed in daylight, through normal channels, without special limitations placed on opportunities for citizens to express opposition, and without the announcement, prior to public hearings, that opponents cannot stop this bill no matter what they establish about its merits?

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The Problem

The Problem, as I see it, is not really what is right or wrong with the ORCP as much as it is the threat of drastic and unnecessary changes being foisted on us by and for a narrow and unknowledgeable special interest group. For those who may not know, this legislation has been drafted by a small group of lobbyists at the request of e.g., Mark Hemstreet, the owner of Shilo Inns (see 1/25/95 Willamette Week front page story for discussion of his spending \$400,000 on state campaigns this election, apparently for purposes of promoting his legal "reform" agenda).

I am writing because I am concerned about the Council's role in this issue, both from a procedural standpoint, and on the merits. Procedurally, I am troubled that proponents have decided to ignore the established routes for new civil procedures in our state, and instead pursue drastically restrictive rules in legislative committee which have never been aired before the Council. This probably reflects the fact that these restrictions are not being proposed by or for any knowledgeable group in the bar or the judiciary, but by outsiders to our system, venting resentment for their own unhappy experiences as litigants. That does not, in my view, justify this end-run around the Council's authority. Under ordinary circumstances, I would prefer to refuse participation in the issue unless it was referred to the Council for its usual careful treatment during the off-legislative year, with ample public hearing and notice to interest groups of all ilks.

Therefore, my First Motion is that we resolve that these changes are within our jurisdiction, that they portend major impacts on the way our system works, that there is serious question whether they are needed or useful, and that we ask the legislature to refer them to the Council, as a standing interim committee, to be studied and returned to the 1997 legislature with our recommendations.

However, as I will explain below about the merits of this issue, what is proposed is too serious and too likely to pass through the legislative committees to let it happen without the Council's input. Whether anything the Council says on these issues will make any difference or not, I believe we must vote on them and announce our position, or else our ability to effect future important rule changes will be doubtful.

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My Second Motion will be that the Council adopt a resolution opposing, and asking the legislature to reject, sections 1, 4, and 5 of Senate Bill 385.² If necessary these can be separated into multiple motions without hurting my feelings. And, if there are strong feelings in favor of statewide mandatory settlement conferences, I am willing to except part F of section 1 of the bill from my motions. See footnote 4 below.

My Third Motion will be a simple alternative to my second motion, in case some members are not prepared to be as specifically judgmental as I am.

SB 385 is a bad idea

Overview:

Senate Bill 385 is a massive bill with a small-minded theme. It proposes to amend most provisions throughout the ORS which provide for attorney fee awards, so that they become reciprocal and require courts to award fees against virtually every unsuccessful litigant. The great majority of provisions in the bill represent misguided alterations of ORS sections which promote the use of the courts to remedy various socially unacceptable conduct, but they do not effect, ORCP sections. Specific provisions would amend ORCP 54 (section 1 of the bill), ORCP 17 (section 4 of the bill), and ORCP 47 (section 5 of the bill).

²After drafting this letter, I received Maury's memo and materials dated February 8, 1995, causing me to add the following commentary in response to Senator Bryant's "friendly" advice that we not waste our time opposing the provisions of this bill because it will pass anyway: 1) what else would anyone say, who is a prime mover of legislation, regardless of its political or social merits?; and 2) the comments attributed to the Senator by Maury were made before the first opportunity was allowed by the Senator's committee for any public comment except by the proponents of the bill. On February 9, 1995, the committee hearing room, and an additional room for overflow were packed by citizens there to plead for preserving individual rights against the special interests behind this bill. Five Circuit Court judges and two respected law professors spoke eloquently against changing to this "loser pays" system. If the promoters of this idea still say it cannot be defeated, then it was never going to be about the merits of the bill anyway, and there is nothing to lose by our taking a principled position for its defeat.

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ORCP 54E, offer of compromise amendment

My greatest fear and strongest opposition to this bill, arises from its first section, which would amend ORCP 54 E so that an offer of compromise has the effect of shifting onto every plaintiff the obligation to pay the defendants' attorneys fees and expert witness fees, unless the plaintiff wins an award in excess of the offer. Proponents of this bill have claimed to the press and the judiciary committee that it is not a "loser pays" bill, because of the offer of compromise condition, and that it is only fair that losers should pay, in any event.³⁴

chilling effect on exercise of rights

The intent and effect of this change would be to restrict access to the courts to only those litigants who can afford to risk thousands (sometimes hundreds of thousands) of dollars in order to have their day in court, and those who have no assets and therefore, nothing to lose if a large judgement is entered against them under this provision. The bill is disguised as something other than "loser pays" by the use of the offer of compromise to trigger that effect, but in fact makes it even worse: i.e., even "winners" will pay the other side's costs, if the judge or jury should find in their favor but not measure

³The bill also effects ORCP 54 by adding part D(2), requiring payment of previously ordered attorney fees before one can refile after dismissal with prejudice of the same claim. Part D(2) baffles me. I am not aware of any provision in law allowing pursuit of the same claim again after dismissal with prejudice, so I am struggling to understand the reason for conditioning the exercise of this non-existing right on anything.

⁴The bill also effects ORCP 54 by adding part F permitting court ordered settlement conferences at the request of any party or the court. I have no resistance to this proposal. However, while I served on the Uniform Trial Court Rules Committee, the same idea was rejected on more than one occasion, in favor of UTCR 6.200 which reserves a local option to adopt mandatory settlement conferences by Supplemental Local Rule. I also note that UTCR 6.010 already empowers any court to call the parties to a conference to consider, *inter alia*, "(g) the possible settlement of the case;".

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their damages or comparative fault as favorably as they expected.⁵

impact likely on every case

No one has explained to me any reason why a defendant would ever fail to make an offer of compromise of some amount under this rule, just to make sure they have evoked the leverage effect this threat would have. Moreover, most meritorious cases for deserving middle-class citizens would never get started, in view of the threat of losing everything they have if they should fail to convince the jury they are right about both the liability for their claim AND the proper award of damages to compensate for it.

Claims by the proponents of this change ring hollow in part because of the deception used in conveying to the legislature the intent and effect of the bill: eg. in materials circulated to us with Maury's recent memo, John DiLorenzo (principle draftsman of the bill apparently for Mr. Hemstreet) tells the legislative committee:

"The purposes of this provision [offer of compromise triggering loser pays] is twofold: (1) It encourages defendants to make real offers of settlement (there is no tactical advantage to make a low-ball offer), and (2) It encourages plaintiffs to focus upon their case at earlier stages prior to trial and to take a hard look at offers which are so made." [emphasis added]

If he intended to suggest that the ability to shift the potential burden of all of the defendants' legal fees and costs onto the

⁵ One lawyer testified at the Joint Senate-House Judiciary Committee Hearing on this bill on February 9, about a drug products liability case in which an estimated 1 million dollars had been spent by more than one corporate defendant. As that lawyer observed, one or more of multiple defendants can often become prevailing parties by being let out of litigation as discovery and tactics become more focused. I have personal knowledge of an expert witness for an all terrain manufacturer who charged over \$600,000 for his pre-trial preparation work on a single case. A plaintiff could win a very large verdict against the main or remaining defendant, and under this rule, still collect nothing.

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plaintiff by making any offer above zero is not a "tactical advantage", I think we need some new definitions of terms. If he meant to say plaintiffs are "encouraged" toward earlier analysis of their cases, his skill at understatement is admirable, because any plaintiff with anything of value to lose will be "encouraged" to run away and hide rather than to ever file any lawsuit of any kind, no matter what has been done to harm them, once the prospects of this provision are explained by their lawyer.

a bludgeon against the middle class

I personally would feel compelled to advise every client prior to starting litigation that they are likely to require bankruptcy if we do not win enough to overcome the effects of this bill. On the chance that I am imperfect in advising them how to respond to an offer of settlement at any point during their representation, I will have to notify the PLF that my client may have incurred huge liability in reliance on my advise. Numerous witnesses in the legislative hearings on February 9, including all five circuit court judges, told the committee there is no serious problem of frivolous lawsuits in our court system, no overcrowded docket demanding relief, and no reason to treat plaintiffs who do not prevail as per se frivolous litigants. As Judge RP Jones said, the playing field is reasonably well balanced. Don't fix it when it ain't broke.

No valid argument exists to support this restriction on the rights of ordinary citizens to be treated equally in court. Proponents take out radio ads attacking juries for perceived errors based on grossly inaccurate summaries of the facts of notorious cases.⁶ Those of us working in the courts know there is no flood of frivolous litigation (or any other kind - civil case filings have dropped steadily for several years), and no major broken part of the system that needs drastic fixing. My perception (but they will have to speak for themselves) is that my colleagues in the defense bar do not clamor for this restriction of individual rights, and do not overlook the fact

⁶ Such as the recent award against McDonalds for the woman who suffered third degree burns over her entire groin area because of corporate policy to keep coffee 50 degrees hotter than most home coffee makers can make it (despite over 700 hundred prior burn injuries caused, including some very similar to plaintiff's), none of which facts are reported in the current radio ad harangue about the case.

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that it would seriously disrupt the balance of power and opportunity between aggrieved individuals and insured or wealthy corporate interests.

the English Rule

Proponents point to England as the model for restricting access to the courts. However, most observers (including judges who testified on February 9 against this bill) notice that the English system is based on the assumption that trade unions will pay any judgments allowed against unsuccessful injured members who lose under their loser pays rule. Other sources recognize that the English rule works better in a country built on economic class distinctions than it would where we take pride in equal opportunity regardless of station. As a columnist in *The Oregonian* wrote for Sunday, February 5, 1995, quoting from the conservative English magazine, *The Economist*: "Enormous numbers of mostly middle-class people' simply cannot use the courts... because they must pay the other side's lawyers if they lose. 'For most people this means that they are risking financial ruin.'" Anthony Lewis, *'Tort Reform' Shelters the Rich*, *The Oregonian*, p. D3, 2/5/95. [See the economist excerpt in materials sent out by Maury].

violation of state constitutional Remedies clause

Constitutional law Professor David Schuman told the Joint Judiciary Committee on Thursday, February 9, 1995, that the effects of this bill of denying access to the courts for a class of citizens is likely to be found unconstitutional under the Remedies clause of the state constitution. It should be no surprise that constitutional protections would be offended by legislation that has as its avowed purpose the prevention of ordinary legal causes for ordinary people against businesses. It cannot be overstated that this provision makes no attempt to limit the restriction of citizen's rights to situations of frivolous litigation.

basic unfairness

I can offer anecdotal evidence to support my vision of how this bill would restrict people's options and work very unfairly against righteous claims. Mr Lewis' column quotes a government executive from Utah to the effect that this bill does not just stop frivolous lawsuits, it stops them all. I recently tried a case for a retired railroad machinist who underwent successful

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heart valve surgery, but became permanently paraplegic when his physicians failed to diagnose a hemorrhage in his spine caused by medication they gave him after surgery. Several respected physicians testified for my client's case, but a jury in Lane County found for the local doctors. If this bill had been law (and assuming I and my client had the guts to proceed at all), he and his wife would probably have lost their savings and their house, for not winning their non-frivolous, but unsuccessful legal action. I can describe a dozen other persons with catastrophic injuries who would have been inhibited or prevented from pursuing their ultimately successful claims by this onerous provision.

the Summary Judgment Hammer

Section 5 of SB 385 adds a section to ORCP 47 so that losing a summary judgment motion will have the same terrible effect as failing to exceed an offer of compromise: the losing party will pay the winning party's attorneys and expert witnesses. Of course this could theoretically effect either plaintiffs or defendants, except that there are very few situations where summary judgment is even sought, let alone granted, in favor of a plaintiff. Business litigants (who, relatively speaking, can afford the costs and risks of litigation) may get equal advantage and detriment from this change whether they are plaintiffs or defendants. For injury plaintiffs, it would again put a premium on being perfect or wealthy, or otherwise never venturing near the court system.

I represented a quadriplegic man who lost the only usable extremity he had due to medical negligence, and sued a treating doctor for his damages. A *pro tem* judge granted summary judgment against all claims on the basis of a mis-reading of the statute of limitations discovery rule. We were successful appealing this outcome to the Court of Appeals, and the State Supreme Court, after which the case was settled for the policy limits of the doctor's insurance coverage. There could be no doubt about the meritorious nature of the case. But under the restrictions sought in SB 385, it is doubtful my client could have risked filing the case in the first place, and especially whether he could have continued the contest into the appellate courts after being ordered to pay attorney fees and witness fees for losing summary judgment.

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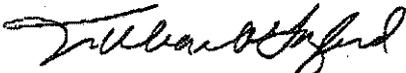
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Conclusions

Please join me in voting to take an official position for the Council against these changes. I would be glad to discuss the merits of the proposed restrictions either before or at the time of our telephone meeting. Thanks for your indulgence of this over-long message.

Very truly yours,

GAYLORD & EYERMAN, P.C.



William A. Gaylord

WAG:jki

Enclosures

P.S. I am also enclosing a Draft Bill which I just received, scheduled for hearing soon, and modifying ORCP 47 summary judgment procedures profoundly. It would require granting summary judgment either if the moving party met the usual burden for such a motion or [new language] the respondent failed to set forth "admissible evidence" to avoid the granting of the motion. This not only would return us to the days of summary judgment motions used to discover expert witnesses, it would reverse our traditions that provide trials as the means of resolving facts unless a moving party can meet its burden to establish that trial is unnecessary. We all know of situations in which summary judgment is inappropriate on its face without any opposition to the motion being filed at all, or with strictly legal argument opposing it. I will move a resolution to refer this bill to the council, or oppose it on the merits in this legislature, at the time of our teleconference.

LC 2752

1/30/95 (DH/hl)

D R A F T

SUMMARY

Requires granting of summary judgment unless opposing affidavits and supporting documentation set forth specific facts supported by admissible evidence adequate to avoid granting of motion for directed verdict in trial of matter.

A BILL FOR AN ACT

1
2 Relating to summary judgment; amending ORCP 47 C.

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

4 SECTION 1. ORCP 47 C is amended to read:

5 C. Motion and proceedings thereon. The motion and all supporting docu-
6 ments shall be served and filed at least 45 days before the date set for trial.
7 The adverse party shall have 20 days in which to serve and file opposing
8 affidavits and supporting documents. The moving party shall have five days
9 to reply. The court shall have discretion to modify these stated times. The
10 judgment sought shall be rendered forthwith if: (1) the pleadings, depo-
11 sitions, and admissions on file, together with the affidavits, if any, show that
12 there is no genuine issue as to any material fact and that the moving party
13 is entitled to a judgment as a matter of law; or (2) the opposing affidavits
14 and supporting documentation submitted by the adverse party fail to
15 set forth specific facts supported by admissible evidence adequate to
16 avoid the granting of a motion for a directed verdict in a trial of the
17 matter. A summary judgment, interlocutory in character, may be rendered
18 on the issue of liability alone although there is a genuine issue as to the
19 amount of damages.

20

68th OREGON LEGISLATIVE ASSEMBLY--1995 Regular Session

Senate Bill 385

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

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

Requires plaintiff who previously dismissed action with prejudice and who refiles action to pay all attorney fees incurred by defendants in dismissed action. Allows defendant to recover certain attorney fees and expert witness expenses from plaintiff if defendant offers to allow judgment be taken against defendant and plaintiff fails to obtain more favorable judgment than offered. Allows settlement conference at any time.

Requires award of attorney fees for certain misconduct, including causing mistrial. Requires sanctions for certain false certifications in pleadings, motions, papers and arguments to court.

Requires award of attorney fees to party who prevails on motion for summary judgment if summary judgment adjudicates all claims or defenses of party against whom judgment is entered.

Authorizes award of attorney fees to prevailing party in any action based on contract or common law tort if amount claimed is \$20,000 or less.

Amends statutes allowing or requiring award of attorney fees to prevailing plaintiff to allow or require award of attorney fees to prevailing party.

A BILL FOR AN ACT

1
2 Relating to civil procedure; creating new provisions; amending ORS 20.090, 20.094, 20.096, 20.105,
3 20.107, 20.125, 30.075, 30.184, 30.190, 30.680, 30.820, 30.822, 30.825, 30.860, 30.862, 30.864, 30.866,
4 30.960, 59.115, 59.127, 59.255, 59.670, 59.890, 59.925, 62.335, 62.440, 65.207, 65.224, 65.781, 70.415,
5 74A.3050, 74A.4040, 79.5070, 83.650, 86.260, 86.265, 86.720, 86.742, 87.076, 87.585, 87.725, 87.772,
6 87.865, 90.710, 92.018, 96.030, 97.760, 105.831, 110.378, 133.739, 166.725, 180.510, 192.590, 223.615,
7 279.365, 307.525, 311.673, 311.679, 311.711, 311.771, 346.630, 346.687, 346.690, 431.905, 455.440,
8 460.165, 462.110, 469.421, 474.085, 478.965, 479.265, 480.600, 527.665, 540.120, 540.250, 545.104,
9 545.502, 548.620, 548.660, 553.560, 554.140, 583.126, 583.146, 585.150, 618.516, 621.246, 645.225,
10 646.140, 646.240, 646.359, 646.632, 646.638, 646.641, 646.642, 646.760, 646.770, 646.775, 646.780,
11 646.865, 646.876, 648.135, 650.020, 650.065, 650.250, 652.200, 652.230, 653.055, 653.285, 656.052,
12 658.220, 658.415, 659.160, 659.165, 661.280, 671.578, 671.705, 692.180, 697.762, 697.792, 701.067,
13 722.116, 722.118, 731.314, 731.737, 746.300, 746.350, 746.680, 756.185, 759.720, 759.900, 760.540,
14 774.210, 815.410 and 815.415 and ORCP 17, 47 and 54; and repealing ORS 20.080 and 20.098.

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

16
17 **OFFERS OF COMPROMISE, SETTLEMENT AND PREVIOUSLY**
18 **DISMISSED ACTIONS**
19

20 **SECTION 1.** ORCP 54 is amended to read:

21 **A. Voluntary dismissal; effect thereof.**

22 **A(1) By plaintiff; by stipulation.** Subject to the provisions of Rule 32 D and of any statute of this
23 state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of
24 dismissal with the court and serving such notice on the defendant not less than five days prior to
25 the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed

NOTE: Matter in boldfaced type in an amended section is new; matter (*italic and bracketed*) is existing law to be omitted.
New sections are in boldfaced type.

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1 by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of
2 dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates
3 as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court
4 of the United States or of any state an action against the same parties on or including the same
5 claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal
6 or stipulation under this subsection, the court shall enter a judgment of dismissal.

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

13 A(3) Costs and disbursements. When an action is dismissed under this section, the judgment may
14 include any costs and disbursements, including attorney fees, provided by rule or statute. Unless the
15 circumstances indicate otherwise, the dismissed party shall be considered the prevailing party.

16 B. Involuntary dismissal.

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

20 B(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury
21 has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to
22 offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the
23 ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier
24 of the facts may then determine them and render judgment of dismissal against the plaintiff or may
25 decline to render any judgment until the close of all the evidence. If the court renders judgment of
26 dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

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

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

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

41 D. Costs of previously dismissed action.

42 D(1) If a plaintiff who has once dismissed an action in any court commences an action based
43 upon or including the same claim against the same defendant, the court may make such order for
44 the payment of any unpaid judgment for costs and disbursements against plaintiff in the action
45 previously dismissed as it may deem proper and may stay the proceedings in the action until the

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1 plaintiff has complied with the order.

2 D(2) If a plaintiff who previously filed an action that was dismissed with prejudice sub-
3 sequently commences an action based upon or including the same claim against the same
4 defendant, the court shall enter an order requiring the payment of all attorney fees incurred
5 by the defendant in the action previously dismissed.

6 E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through
7 17.085, the party against whom a claim is asserted may, at any time up to [10] 30 days prior to trial,
8 serve upon the party asserting the claim an offer to allow judgment to be given against the party
9 making the offer for the sum, or the property, or to the effect therein specified. The party asserting
10 the claim may accept the offer in the manner specified by this section at any time within
11 30 days after the offer is made. The court may extend the period during which an offer under
12 this section may be accepted by an additional 30 days if the court determines that the party
13 against whom the claim is made has unreasonably resisted efforts to obtain discovery during
14 the 30-day period following the making of the offer. If the party asserting the claim accepts the
15 offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon,
16 and file the same with the clerk before trial, and within three days from the time it was served upon
17 such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated
18 judgment. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall
19 be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted
20 and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evi-
21 dence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment,
22 the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after
23 the date of the offer, but the party against whom the claim was asserted shall recover of the party
24 asserting the claim reasonable attorney fees, reasonable expert witness fees, and costs and
25 disbursements from the time of the service of the offer. For the purpose of determining whether
26 the party asserting the claim failed to obtain a more favorable judgment, the court shall
27 disregard any award of attorney fees made to the claimant.

28 F. Settlement conferences. A settlement conference may be ordered by the court at any
29 time at the request of any party or upon the court's own motion. Upon the request of the
30 judge or a party, a different judge shall preside at the conference.

31
32 **AWARD OF ATTORNEY FEES AS SANCTION FOR FALSE OR FRIVOLOUS**
33 **PLEADINGS AND OTHER MISCONDUCT**
34

35 SECTION 2. ORS 20.105 is amended to read:

36 20.105. (1) In any civil action, suit or other proceeding in a district court, a circuit court or the
37 Oregon Tax Court, or in any civil appeal to or review by the Court of Appeals or Supreme Court,
38 the court [may, in its discretion,] shall award reasonable attorney fees [appropriate in the circum-
39 stances] to a party against whom a claim, defense or ground for appeal or review is asserted, if that
40 party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense
41 or ground, upon a finding by the court that the party willfully disobeyed a court order or acted in
42 bad faith, wantonly or solely for oppressive reasons.

43 (2) All attorney fees paid to any agency of the state under this section shall be deposited to the
44 credit of the agency's appropriation or cash account from which the costs and expenses of the pro-
45 ceeding were paid or incurred. If the agency obtained an Emergency Board allocation to pay costs

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1 and expenses of the proceeding, to that extent the attorney fees shall be deposited in the General
2 Fund available for general governmental expenses.

3 **SECTION 3.** ORS 20.125 is amended to read:

4 20.125. In the case of a mistrial in a civil or criminal action, if the court determines that the
5 mistrial was caused by the deliberate misconduct of an attorney, the court, upon motion by the op-
6 posing party or upon motion of the court, [may] shall assess costs and disbursements, as defined in
7 ORCP 68, [of] and reasonable attorney fees incurred by the opposing party against the attorney
8 causing the mistrial. Those costs and disbursements [may] and attorney fees shall be assessed
9 against the attorney for the trial that ended in the mistrial.

10 **SECTION 4.** ORCP 17 is amended to read:

11 **A. Signing by party or attorney; certificate.** Every pleading, motion and other paper of a party
12 represented by an attorney shall be signed by at least one attorney of record who is an active
13 member of the Oregon State Bar. A party who is not represented by an attorney shall sign the
14 pleading, motion or other paper and state the address of the party. Pleadings need not be verified
15 or accompanied by affidavit. *[The signature constitutes a certificate that the person has read the*
16 *pleading, motion or other paper, that to the best of the knowledge, information and belief of the person*
17 *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good*
18 *faith argument for the extension, modification or reversal of existing law, and that it is not interposed*
19 *for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the*
20 *cost of litigation.]*

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

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

29 **C. Certifications to court.**

30 C(1) An attorney or party who signs, files or otherwise submits an argument in support
31 of a pleading, motion or other paper makes the certifications to the court identified in sub-
32 sections (2) to (5) of this section, and further certifies that the certifications are based on
33 the person's best knowledge, information and belief, formed after making all inquiries that
34 are reasonable under the circumstances.

35 C(2) A party or attorney certifies that the pleading, motion or other paper is not being
36 presented for any improper purpose, such as to harass or to cause unnecessary delay or
37 needless increase in the cost of litigation.

38 C(3) An attorney certifies that the claims, defenses, and other legal positions taken in
39 the pleading, motion or other paper are warranted by existing law or by a nonfrivolous ar-
40 gument for the extension, modification or reversal of existing law or the establishment of
41 new law.

42 C(4) A party or attorney certifies that the allegations and other factual assertions in the
43 pleading, motion or other paper are supported by evidence. Any allegation or other factual
44 assertion that the party or attorney does not wish to certify to be supported by evidence
45 must be specifically identified. The attorney or party certifies that the attorney or party

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1 believes that an allegation or other factual assertion so identified will be supported by evi-
2 dence after further investigation and discovery.

3 C(5) The party or attorney certifies that any denials of factual assertion are supported
4 by evidence. Any denial of factual assertion that the party or attorney does not wish to
5 certify to be supported by evidence must be specifically identified. The attorney or party
6 certifies that the attorney or party believes that a denial of a factual assertion so identified
7 is reasonably based on a lack of information or belief.

8 D. Sanctions.

9 D(1) The court may impose sanctions against a person or party who is found to have
10 made a false certification under section C of this rule, or who is found to be responsible for
11 a false certification under section C of this rule. A sanction may be imposed under this sec-
12 tion only after notice and an opportunity to be heard are provided to the party or attorney.
13 A law firm is jointly liable for any sanction imposed against a partner, associate or employee
14 of the firm, unless the court determines that joint liability would be unjust under the cir-
15 cumstances.

16 D(2) Sanctions may be imposed under this section upon motion of a party or upon the
17 court's own motion. If the court seeks to impose sanctions on its own motion, the court shall
18 direct the party or attorney to appear before the court and show cause why the sanctions
19 should not be imposed. The court may not issue an order to appear and show cause under
20 this subsection at any time after the filing of a voluntary dismissal, compromise or settle-
21 ment of the action with respect to the party or attorney against whom sanctions are sought
22 to be imposed.

23 D(3) A motion by a party to the proceeding for imposition of sanctions under this section
24 must be made separately from other motions and pleadings, and must describe with
25 specificity the alleged false certification. Sanctions may not be imposed against a party until
26 at least 21 days after the party is served with the motion in the manner provided by Rule
27 9. Notwithstanding any other provision of this section, the court may not impose sanctions
28 against a party if within 21 days after the motion is served on the party, the party amends
29 or otherwise withdraws the pleading, motion, paper, or argument in a manner that corrects
30 the false certification specified in the motion.

31 D(4) Sanctions under this section must be limited to amounts sufficient to reimburse the
32 moving party for attorney fees and other expenses incurred by reason of the false certifi-
33 cation, including reasonable attorney fees and expenses incurred by reason of the motion for
34 sanctions, and amounts sufficient to deter future false certification by the party or attorney
35 and by other parties and attorneys. The sanction may include nonmonetary penalties and
36 monetary penalties payable to the court. The sanction must include an order requiring pay-
37 ment of reasonable attorney fees and expenses incurred by the moving party by reason of
38 the false certification.

39 D(5) An order imposing sanctions under this section must specifically describe the false
40 certification and the grounds for determining that the certification was false. The order
41 must explain the grounds for the imposition of the specific sanction that is ordered.

42 E. Rule not applicable to discovery. This rule does not apply to any motion, pleading or
43 conduct that is subject to sanction under Rule 46.

44

45

ASSESSMENT OF ATTORNEY FEES UPON ENTRY OF SUMMARY JUDGMENT

1 **SECTION 5. ORCP 47 is amended to read:**

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

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

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

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

30 **E. Affidavit of attorney when expert opinion required.** Motions under this rule are not designed
31 to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their
32 facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the
33 opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney
34 stating that an unnamed qualified expert has been retained who is available and willing to testify
35 to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert
36 the allegations of the moving party and an adequate basis for the court to deny the motion. The
37 affidavit shall be made in good faith based on admissible facts or opinions obtained from a qualified
38 expert who has actually been retained by the attorney who is available and willing to testify and
39 who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a
40 sufficient basis for denying the motion for summary judgment.

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

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

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

10 I. Summary judgment that adjudicates all claims and defenses of a party.

11 I(1) If summary judgment is entered in favor of any party other than the state or a pol-
12 itical subdivision of the state, and the summary judgment adjudicates all claims and defenses
13 of the party in favor of the party, the court shall enter judgment against the party who did
14 not prevail for reasonable attorney fees, expert witness fees and all costs attributable to
15 discovery in the action. Attorney fees shall be awarded in the manner provided by ORCP 68.

16 I(2) If a party to an action other than the state or a political subdivision of the state files
17 a motion for summary judgment as to one or more claims or defenses of another party, and
18 within 20 days before the scheduled hearing on the motion the other party repleads or oth-
19 erwise takes action to voluntarily dismiss one or more of the claims or defenses that are
20 challenged in the motion for summary judgment, the court shall not award to the party filing
21 the motion all reasonable attorney fees and expert witness fees incurred by the moving party
22 that are attributable to the abandoned claim or defense.

23
24 **ATTORNEY FEE AWARDS IN SMALL ACTIONS**
25

26 SECTION 6. (1) Except as provided in subsection (2) of this section, in any action based
27 on contract or common law tort in which the amount claimed is \$20,000 or less, the court
28 shall award reasonable attorney fees to the prevailing party.

29 (2) The court shall not award attorney fees to a prevailing plaintiff in a civil action sub-
30 ject to subsection (1) of this section unless the plaintiff served a copy of the complaint as-
31 serting the claim on all defendants against whom the claim was made at least 30 days before
32 filing the complaint with the court. The provisions of this subsection do not apply to
33 counterclaims, cross-claims or third-party claims.

34 SECTION 7. ORS 20.080 and 20.098 are repealed.
35

36 **RECIPROCITY OF ATTORNEY FEE AWARDS**
37

38 SECTION 8. ORS 20.090 is amended to read:

39 20.090. [(1) Except as otherwise provided in subsection (2) of this section,] In any action against
40 the maker of any check, draft or order for the payment of money which has been dishonored for lack
41 of funds or credit to pay the same or because payment has been stopped, the court shall [allow]
42 award a reasonable attorney fee at trial and on appeal to the prevailing party, in addition to dis-
43 bursements.

44 [(2) If the plaintiff prevails in an action described in subsection (1) of this section, the court shall
45 not allow a reasonable attorney fee to the plaintiff as provided in subsection (1) of this section unless

CONFIDENTIAL

February 21, 1995

To: Members, Council on Court Procedures
From: Maury Holland, Executive Director *M. A. H.*
Re: Legislative Update #5: Council Testimony re SB 385

Attached is a copy of the prepared statement submitted yesterday by John Hart on the Council's behalf to the Joint Subcommittees in Civil Process regarding Sections 1, 4 and 5 of SB 385 that would amend ORCP 54, 17 and 47. His testimony was an effectively extemporized version of the prepared statement. Given his regular line of work, John is able to do that sort of thing well.

Both the prepared statement and John's testimony accurately reflected a broad and essentially unanimous consensus expressed by the 12 Council members who participated in the Feb. 18 teleconference. While there were some slight differences of opinion among participating members about how assertive as opposed to deferential the Council's approach to the legislature should be, John's effort was to capture the essence of the views expressed and I believe he succeeded. Our appearance was well received. John drew no hostile questions, even about the examples he provided of perceived glitches in the proposed ORCP amendments. The purpose of showcasing these quite technical, but important, deficiencies was naturally to try to impress upon subcommittee members the damage that can be done if the Council is bypassed or given short shrift. Our appearance, incidentally, followed the much more aggressive and policy-oriented statement of the Attorney General, who was really taking no prisoners, as well as highly effective appearances by the Committee on Procedure and Practice, the Section of Litigation, and OADC.

Everything I heard and saw Monday afternoon, and I believe John would agree with this, suggests that the Council's first, preferred request--that the sections of SB 385 that would amend the ORCP be excised and the matters referred to the Council for processing in the 1995-97 biennium--is unlikely to be granted. Even if this turns out to be so, I think it was important that this request and this strong preference be clearly stated and placed on the record. What is nearly certain to be granted is our second, less preferred request, that the Council be allowed as much input as possible before the bill is finalized during this session. What now appears to be in order is a series of informal working sessions in which the Council, along with such other groups as the Procedure and Practice Committee, the Litigation Section, the Department of Justice, plus I believe OTLA and OADC, will be invited to send two representatives each. John will do his best to be one of those representatives, and has asked me to accompany him as the other, which I shall do. If John is unable to participate in any of these working sessions, he will do his best to arrange for some member who has the time and willingness to substitute for him. I would feel somewhat uncomfortable about participating on the Council's behalf unaccompanied by John or some member he has been able to recruit. We have been alerted to expect the first of these working sessions to be all day Friday, Feb. 24.

What follows in this paragraph is perhaps a little bit sensitive, which is why I have marked this covering memo "Confidential" and ask that, unlike a memo a couple of years ago that I intended for Council members only, this stay in the family, where I trust it will not be misunderstood. (This does not of course apply to the attached prepared statement, which is now a matter of public record.) This sensitivity relates to another impression I formed yesterday. This impression is that the proponents of SB 385, and of the larger package of which it is a part, have since my earlier report to you been placed somewhat on

the defensive. The attitude of "this train is going to leave the station regardless of what you think, and your only option is to help clean the passenger car windows," seemed to me far less evident yesterday than two weeks ago. In fact, at one point, Sen. Bryant stated that some "compromises" are under discussion and consideration. He mentioned making the amendment of Rule 54 E regarding offers of compromise reciprocal as an example. My reading of this is that the proponents of "tort reform" have been surprised and somewhat taken aback by the breadth of opposition to their legislative package. Certainly they seemed surprised to see OADC joining ranks with OTLA to oppose much of it. It has been interesting how much their by-passing the Council appears to be costing the proponents. This fact was prominently featured in the Attorney General's statement, as well as virtually all other statements in opposition that I have seen or heard. The persuasive statements of the judges who have testified, including Judge Brockley's (on his own behalf, not that of the Council) also seem to have undercut some of the proponents' momentum.

Please do not interpret this observation as implying that the Council is, or necessarily should be, officially opposed to the substance of SB 385, because I am aware it has taken no such official position and, in accordance with the consensus of last Saturday's teleconference and John's statement yesterday, presumably will not do so. My point is simply that the narrow, but important, position the Council has taken on the matter of process seems to be attracting widespread reinforcement.

cc: John Hart (w/o enc.)

CONFIDENTIAL

February 20, 1995

Before the Joint Senate/House Subcommittees on Civil Process

Re: SB 385

Prepared Statement of John E. Hart on Behalf of
The Council on Court Procedures

Co-Chair Bryant, Co-Chair Parks, and members of the joint subcommittees, for the record, my name is John E. Hart. I have been in active trial practice for 20 years in Portland, primarily representing physicians as defendants in civil actions. This afternoon, however, I appear before you in my capacity as the current Chair of the Council on Court Procedures, a position I have held for almost two years, prior to which I served as a Council member. With me at the witness table is Prof. Maury Holland, formerly Dean of the University of Oregon School of Law, and presently a member of its faculty as well as being the Council's Executive Director. I have provided your counsel with copies of my prepared statement, and ask that, with your permission, my statement be entered into the record. Attached to the statement is a brief description of the Council's history, its statutory mission and functions, its composition, and the methods by which it performs its statutory mission.

At the outset, let me, on behalf of the Council, thank both Co-Chairs of these joint subcommittees, and the members, for inviting this testimony concerning what is obviously extremely important legislation. I shall begin by emphasizing that the Council's concern with SB 385 is strictly limited to those provisions of this large bill that are within its statutory jurisdiction. By this I mean two things, one of which can be stated simply while the other is a bit more subtle and complex. The point that can be simply stated is that the Council's concern is limited to §§1, 4 and 5 of the bill, the sections that would amend the ORCP. The subtler point is that, even with respect to the proposed ORCP amendments, the Council's concern is limited to their technical quality as rules of procedure, and definitely does not extend to agreement or disagreement with their substantive, policy goals or effects. To the extent that ORCP amendments are intended to achieve substantive policy goals, the Council's position is that these are matters exclusively for you as the people's elected representatives to determine. This important limitation is not because Council members, as individual lawyers, judges and citizens, have no opinions on matters of public policy, but because the Council's organic statute limits its authority to "rules governing pleading, practice and procedure, . . . which shall not abridge, enlarge, or modify the substantive rights of any litigant." [ORS 1.735] This jurisdictional restriction is something that, in my observation, the Council has been highly scrupulous about

strictly observing. On more than one occasion that I can personally recall, this self-restraint has caused the Council to reject a proposed ORCP amendment, even when it might otherwise have obtained the support of the required supermajority of members, on the sole ground that it would substantially affect substantive rights and should thus be left solely to our state legislature.

What, then, is the Council's view concerning the sections of SB 385 that would amend ORCP 17, 47, and 54? Although the Council historically completes its biennial cycle of regular meetings prior to the convening of each legislative session, I have been able to elicit a solid consensus reaction of members. That reaction, in which I include myself, is that although the proposed amendments embody substantive policy judgments that are outside the scope of the Council's official competence, they also present some issues of draftsmanship, as well as some technical, non-policy oriented questions as to whether they constitute soundly conceived rules of civil procedure.

Without prejudging what the full Council might decide respecting any of the bill's ORCP amendments if it is afforded the opportunity to subject them to its normal scrutiny and deliberation, let me suggest a couple of examples of where they might be regarded as falling short simply as a matter of sound procedure. One example is proposed new section 54 F [§1, p. [5]], which would provide for a settlement conference on the court's own motion or request of a party. This proposal might

well be, in principle, an excellent idea, and is one that has attracted widespread support from, among other groups, the Section of Litigation of the Oregon State Bar. As presently drafted, however, this proposed section appears to assume the individual-judge assignment system generally used in federal court, but not generally used in Oregon trial courts. Specifically, where the existing language states: "Upon the request of the judge," it would no doubt occur to the trial judges or trial lawyers on the Council to ask: "What judge?" The vast majority of civil cases pending in Oregon trial courts normally have no judge assigned to them until just before trial. Thus, under established Oregon practice, it would be difficult to imagine what judge would take the initiative to order a settlement conference. A similar problem arises in connection with just who would be the "different judge" also referred to in the present wording of the proposed amendment. This does not mean that a good rule could not be devised to authorize judge-initiated and supervised settlement conferences, but the proposed language probably needs some reworking, such as by including reference to the "presiding judge," in order to mesh with Oregon practice.

My second example of a procedural proposal that many, including perhaps the Council, might conclude would be questionable simply as a matter of sound procedure, has to do with proposed new subsection 54 D(2) [§1, p. [4]]. The social purpose of this proposal is presumably to penalize harshly, and

thus hopefully deter frivolous initiation of civil litigation, a purpose no sensible person could disagree with. Read literally, however, the proposed language of this amendment requires the court in the subsequent proceeding to order the plaintiff to pay the defendant the full amount of the latter's attorney fees from the prior proceeding, regardless of whether any amount of attorney fees might have been already awarded to the defendant in the prior proceeding, a result I assume everyone would agree would be unintended overkill. To any who might respond that so literal a reading would be an absurdity, my counsel is to be extremely careful about literal readings, since many conscientious judges will feel bound by them despite an arguably absurd result, and that is the sort of thing that is productive of wasteful litigation. At the very least, this proposal should be reworded to make clear that no double-payment of attorney fees is intended. Another question, and here I should again emphasize that I am speaking only for myself, not the Council, in giving examples of some technical problems I see, is whether this retroactive award of attorney fees would be in addition to the sanctions that might also be sought under proposed section 17 D?

More fundamentally, I believe the Council, if given the chance to take a close look might well conclude that proposed subsection 54 D(2) would constitute ill-advised procedure judged by experienced civil practitioners regardless of how determined one is to deter frivolous litigation. For a plaintiff to refile a claim already dismissed on the merits should occur in only one

of three situations: one is a *pro se* plaintiff who doesn't know anything about claim preclusion; the second is a plaintiff with a grossly incompetent lawyer, and the third is the not unknown situation where whether the subsequently filed claim is indeed claim-barred by virtue of the prior dismissal is genuinely doubtful enough so that a competent plaintiff's attorney would be fully entitled, and might even be obligated, to litigate the question with a realistic hope the second court will determine the claim was not barred by the prior proceedings. Should that realistic, good faith hope not be realized, the court would be mandated to impose a perhaps devastating fee award on the plaintiff, possibly in addition to having to pay both his or her own attorney fees in the subsequent action, plus those of the defendant should the loser-pays rule become applicable under one of the proposed ORS amendments. In the case of a *pro se* plaintiff, it seems to me at least arguable that the subsequent court should at least have discretion not to penalize such a litigant with a potentially devastating fee award, especially since defendants in these circumstances will normally be able to obtain a dismissal of the subsequent case at a very early stage. In the case of the incompetent attorney, if there is to be any retroactive fee award, it might more appropriately be made against such attorney, not against the litigant-client who typically has no understanding of *res judicata*. Proposed subsection 54 D(2), however, unlike proposed section 17 D, does not authorize awards against attorneys, in the absence of which

judges might determine that they lack such authority. Finally, in the case of the good faith refiling of a claim which is arguably barred, but also arguably not barred, by a prior dismissal, the Council might well determine that any retroactive fee award should be discretionary, rather than mandatory; perhaps, upon reflection, a majority of these legislative subcommittees might agree with the conclusion as well.

If your reaction to these examples I have given--and more could be given if time permitted--is that these are all matters of procedural nitpicking and technical detail, your reaction would largely make the very point I am trying to convey. Sound and workable rules of procedure require, not only informed decisions on matters of substantive rights which only you as legislators can properly make, but also painstaking attention to matters of fairly intricate detail, matters precisely of the kind the Council was created to work on, subject of course to legislative override; matters that can best be attended to by trial lawyers and judges who work with the rules on a daily basis, in other words, by members of the Council who volunteer their time and efforts for this purpose. The wisest and fairest set of procedural rules will not do much good if they are ambiguously drafted, internally contradictory, inconsistent with one another or with other statutory laws.

While I can offer no scientific proof, my sense, based upon having tried cases in Oregon state courts for 20 years, is that the vast majority of civil trial lawyers and judges believe our

procedural rules function remarkably well, certainly on the civil side. I do not say this for guild-like self-protection. I am confident our State court Administrator could furnish objective data which indicate that Oregon state courts do a far better job of handling civil cases fairly, expeditiously and at minimal cost to litigants than is true of the courts in most other American jurisdictions.

Nevertheless, citizens not only in Oregon, but throughout the United States, have expressed dissatisfaction with the civil justice system. To the extent you legislators conclude this dissatisfaction is well grounded, you should improve the law. I am not here on the Council's behalf to dissuade you from that task.

What I have come here this afternoon on the Council's behalf to respectfully suggest is that you allow the Council to perform the job for which it is created by the 1977 Legislative Assembly. Experience in this state since the ORCP came into effect in 1980 has been that, with regard to the ongoing process of upgrading and amending them, the process works best when the Council is allowed to have, not the last word, which is clearly yours, but at least the first word. If the Council is accorded this opportunity, you can be assured that it will give to the ORCP amendments proposed in SB 385 its typically balanced, careful, and painstaking consideration, and will also, as it always has in the past, steer clear of matters that clearly implicate

substantive policy. The Legislature can then review and, if it wishes, revise the Council's work product.

There are really only two possible ways in which this legislature could facilitate the Council's performance of the job for which it was created by your predecessors. The first way is the one that is strongly preferred by the Council, and that is to delete §§1, 4, and 5 from SB 385 and refer those amendments to the Council for processing during the coming 1995-97 biennium. Those sections are readily excisable from the bill without significantly impacting the remaining sections relating to ORS amendments. Although those sections could readily be excised from the bill, it is not realistically possible for me this afternoon to advise you how to separate the purely procedural aspects of the proposed ORCP amendments set forth in those sections from those aspects that reflect substantive policy judgments. That analytical process is best done initially by the Council, subject, like everything the Council does, to your review.

The other way is to ask the Council to simply do its best during whatever time remains in this session, before the bill must be finalized, to confer and advise you with our comments and any suggested changes in language. Obviously, it is entirely within your authority to insist upon this way, but it is the one far less preferred by the Council since we do not do our best work in haste.

The Council functions best when it adheres to its statutory procedure, whereby proposed ORCP amendments are discussed and drafted, with the benefit of testimony, deliberated upon and refined over the course of the roughly 18 months of its biennial cycle between legislative sessions. This time frame allows for the assignment of proposed amendments to a Council subcommittee for intensive study, drafting and redrafting, and reporting back to the full Council for debate, and for hearing public testimony from lawyers and judges not on the Council, as well as from interested groups and organizations and from the public. That, plus the opportunity for legislative review and possible further revision in the session following the Council's promulgation of amendments, is the sort of deliberative process that is most conducive to achieving and maintaining our excellent civil procedure rules for the trial courts of this state. On behalf of the Council, it is that process which I most respectfully ask your subcommittees and this legislature to respect on this occasion, as your predecessors did some 18 years ago when they allowed the first Council to prepare the original ORCP in their entirety before exercising the necessary and proper power of legislative review and revision.

Thank you for your attention. I'll be happy to try to respond, Co-Chair Bryant and Co-Chair Parks, to any questions from you or any members of the subcommittees.

Attachment to Prepared Statement of John E. Hart to

Joint Senate and House Subcommittees on Civil Process, Feb. 20, 1995

Brief Description of Council on Court Procedures

1. History. From the date of statehood until the creation of the Council on Court Procedures by the 1977 Legislative Assembly, the rules of civil procedure applicable in the trial courts of Oregon were contained in a code of statutory enactments, similar to what obtained in most other American states. Beginning in the 1930's, and culminating in the 1970's, a growing concern emerged in the part of large segments of the Bench and Bar of Oregon that the time available to this state's biennial, citizen legislature was not adequate to the task of modernizing the civil trial court rules and ensuring that they kept current with changing needs. Although the procedural rules enacted by the legislature, and frequently amended, was referred to as a "code," they lacked at least one important virtue usually associated with a code, and that is a highly integrated and comprehensive assemblage of rules which could all be located in the same place in the statute books. Whether due to legislative inattention or otherwise, Oregon's statutory code of civil procedure came to be widely regarded as flawed and outmoded in several respects. One notable example was its failure to merge law and equity.

The Council grew out of the work of a special commission on judicial reform appointed by Governor Tom McCall. One of the recommendations of this Commission was that the legislature create what came to be called the Council on Court Procedures and delegate to this new entity, on a limited basis, a portion of its legislative authority over civil procedure. The possible alternative, of the legislature delegating its rule-making and rule-amending power to the Oregon Supreme Court, was rejected, in part because of concern that such an arrangement might violate the separation-of-powers provision of the Oregon Constitution.

The Council was created and given limited authority over rules of civil procedure by the 1977 Legislative Assembly. The initial Council worked on devising the original Oregon Rules of Civil Procedure ("ORCP") throughout 1978, in time to submit its work product to the 1979 Legislative Assembly. In accomplishing this task the Council drew heavily upon the Federal Rules of Civil Procedure, but also incorporated some important innovations, such as including provisions for "long-arm" jurisdiction over non-resident defendants as part of the rules of court, and retained some features of Oregon civil practice under the statutory code, such as "fact pleading" and some limitations upon pre-trial discovery, both of which were intended to reduce the costs of litigation. The 1979 Legislative Assembly approved the original ORCP, with some modifications, and they became effective January 1, 1980. Additional rules were formulated by the Council and reported to the 1981 Legislative Assembly, and these became effective on January 1, 1982.

2. Composition. The Council consists of 23 members, 1 of whom is a Justice of the Oregon Supreme Court appointed by that Court, 1 Judge of the Oregon Court of Appeals appointed by that Court, 6 Circuit Court judges appointed by the Executive Committee of the Circuit Judges Association, 2 District Court judges appointed by the Executive Committee of the District Judges Association, 1 public member appointed by the Oregon Supreme Court, and 12 practitioners appointed by the Board of Governors of the Oregon State. To ensure geographic diversity, at least 2 practitioner-members must be appointed from each of Oregon's five Congressional districts, and all are typically involved in an active civil trial practice. Members are appointed for terms of two or four years, are eligible for reappointment to one additional term, and serve without compensation. At the beginning of each biennium the Council elects its Chair and other officers. Professional and secretarial staff support to the Council is provided by an Executive Director and Executive Assistant, each of whom is compensated on a part-time basis.

3. Functioning. Each September following the conclusion of a legislative session, following the filling of vacancies in its membership, the Council begins a biennial cycle of monthly meetings that lead up to the December meeting before the beginning of a new session. At that December meeting, ORCP amendments that have been studied, discussed, debated and tentatively adopted are, after being published to the Bench, Bar and public, voted upon for promulgation. Any amendment that is promulgated is formerly reported to the President of the Senate and Speaker of the House. Unless the Legislature by statute abrogates or modifies them, ORCP amendments as thus promulgated become law on January 1 following adjournment of the legislative session. In addition to disapproving or modifying ORCP amendments promulgated by the Council, the Legislative Assembly may of course initiate and enact its own amendments by statute.

Some suggestions of needed or desirable ORCP amendments emanate from within the Council; many others are suggested to the Council by lawyers, judges, individual citizens, or various groups and organizations. The Council maintains an especially close working relationship with the Committee on Practice and Procedure of the Oregon State Bar, which over the years as been a valuable source of suggested amendments. Suggested amendments are normally assigned by the Chair to a subcommittee of the Council for intensive study, consultation with others having expert knowledge, and reporting back to the full Council with a preliminary recommendation. Depending upon the reaction of the full Council, preliminary recommendations are frequently referred back for further consideration and drafting work by the subcommittee. Agendas of Council meetings are published in advance, which often results in concerned individuals or groups appearing to testify before the Council during one of its public meetings. In addition, the Council makes special efforts to keep individuals and organizations known to have a particular interest in, or expertise concerning, any particular proposed amendment, fully informed about its deliberations and often invites their testimony.

Proposed amendments typically return to the full Council by way of a second report, recommendation and proposed draft of the pertinent subcommittee. Following an opportunity for any public testimony or written comments to be received and considered, the full Council will normally vote, in response to a subcommittee's second report and recommendation, whether to tentatively adopt the proposed amendment in question. The discussion preceding this vote often

prompts a few further revisions in drafting. A vote for adoption at this point is said to be tentative because any amendment thus adopted can be brought back for further consideration by the full Council or the relevant subcommittee until a vote is taken on final promulgation at the December meeting that ends the Council's biennial cycle. The Council frequently votes not to promulgate proposed amendments on the ground that, while they might make good sense if enacted by the legislature, they would affect substantive rights of litigants and would thus exceed the Council's statutory authority to "promulgate rules governing pleading, practice and procedure, . . . which shall not abridge, enlarge, or modify the substantive rights of any litigant." ORS 1.735.

4. The Council's Contribution to Oregon's Civil Procedure. The Council came into existence against a background and long tradition of legislative supremacy with respect to judicial procedure. The immediate background of its creation was an increasing belief on the part of many informed lawyers and judges that the Legislative Assembly operated under certain built-in handicaps in being solely charged with the difficult and time-consuming function of keeping this state's civil trial court rules abreast of changing times and altered circumstances. In particular, it had become clear to many that the relatively short, and increasingly hectic, biennial sessions of the legislature did not afford adequate time for legislators to give careful and sustained thought to the often highly technical task of civil rules amendment.

The creation of the Council, and the delegation to it of limited and provisional authority in the rules-amending process, appears in retrospect to have been a sensible compromise, a compromise that takes account of the dual character of civil procedure. By this is meant that the Legislative Assembly is able to retain the final authority that rightfully belongs to it over those aspects of civil procedure which implicate substantive public policy, while being able to rely upon the Council to keep the more technical, though in the long run no less important, aspects of the ORCP in good repair. In this partnership between the Legislative Assembly and the Council, the former assuredly occupies the senior position. This arrangement works best when the Legislature allows the full operation of the Council's deliberative process to run its course respecting all proposed ORCP amendments before undertaking to exercise the former's ultimate authority.

HOFFMAN, HART & WAGNER

Attorneys at Law

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February 22, 1995

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Gentlemen:

As things have turned out, I will personally attend the work session on Senate Bill 385 all day Friday, February 24, together with Maury Holland. The Council has been accorded two seats at a roundtable work session; it is interesting since the OADC, OTLA, and the proponents of the Senate Bill were each only accorded one seat. We will keep you posted.

Best personal regards,


John E. Hart

JEH:ikw
cc: Maury Holland (via facsimile)

NEIL R. BRYANT
DESCHUTES, JEFFERSON, WASCO & KLAMATH COUNTIES
DISTRICT 27



OREGON STATE SENATE
SALEM, OREGON
97310

REPLY TO ADDRESS
INDICATED:

Senate Chamber
Salem, OR 97310

P.O. Box 1151
Bend, OR 97709
(503) 382-4331

RECEIVED

DEC 30 1994

DUNN, CARNEY

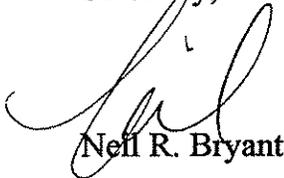
December 28, 1994

Thomas H. Tongue
Oregon Association of Defense Counsel
Suite 1500
851 S.W. Sixth Avenue
Portland, OR 97204

Dear Tom:

I enclose some proposed legislation dealing with tort reform. I would appreciate your written comments.

Sincerely,



Neil R. Bryant

NRB:kas
Enclosure
oadc.001/nrb/politics

From the legislative arena

OMA prepares a full legislative package

"We're not ready to drop the whole load in the press at this time."

The Oregon Medical Association is preparing legislation on a wide variety of subjects, "a bit more than we typically do," said Scott Gallant, government affairs director. Having John Kitzhaber, MD, in the governor's chair isn't the reason, he said, "We've had three or four legislative committee meetings this year and have met with various representatives from different groups, specialty and county societies."

Gallant would not reveal the legislative proposals, "We're not ready to drop the whole load in the press at this point."

However, *Oregon Health Forum* obtained a copy of OMA's draft legislation. It was prepared by the its legal counsel, Cooney & Crew.

Here are the major pieces of that draft package:

- Limit civil liability for malpractice to gross negligence for a physician, podiatrist or surgeon.
- Establish a comparative negligence standard that includes all participants in an event, not just the affected parties.
- Abolish tort causes of action for pregnancy or birth and prohibit claims for consequential damages.
- Give physicians access to Board of Medical Examiners investigatory materials prior to board or subcommittee appearances.
- Give hospitals the discretion to deny admitting privileges to nurse practitioners, but not necessarily on the same basis they deny privileges to other medical providers.
- Allow voluntary purchasing alliances for groups with 25 or more members.
- Give antitrust immunity to two or more physicians who form a cooperative and allow them to set prices for health care services, refuse to deal with competitors, acquire and maintain a monopoly in health care services and receive the full benefit of immunity under federal antitrust laws.
- Prohibit the Board of Direct Entry Midwifery from prescribing, administering medications, ordering lab tests and require two midwives on site for all out-of-hospital births.
- Abolish a requirement that medical associations offer continued education on workers' compensation.
- Make peer review activities and information confidential and inadmissible in court except for proceedings initiated by physicians to contest adverse actions by a health plan.

Phillips urges counties to protect their money

Sen. Paul Phillips (R-Tigard) told the Association of Oregon Counties on Nov. 17 he doesn't expect to see substantive changes during the 1995 session. "The intellectual power isn't there," said Phillips, who will chair the Senate Government Finance and Tax Policy Committee. He also warned county officials that revenue sharing money is in danger, "Get out there and protect it." There'll also be a restriction on agencies to increase their fees, Phillips said. "That bill will come through very quickly."

Pharmacists fight for access

Pharmacists never give up. Since 1987, they've tried enacting legislation giving patients freedom of access. Their chances look even dimmer this time because of a highly organized campaign led by the big HMOs. "We aren't giving up," said Chuck Gress, executive director, Oregon State Pharmacists Assn. "If our members can agree to the same terms and conditions as other pharmacies, people should have freedom of access."

AOI won't be going first

"There's potential in purchasing coops for small businesses."

The state's largest business group, AOI, isn't eager to take the first step to create voluntary purchasing alliances and will not seek legislation. Instead, AOI is waiting to see what state officials come up with, said Kevin Earls, health care lobbyist. Under current law, employers cannot band together solely to purchase insurance, but they can form Multiple Employer Welfare Arrangements known as MEWAs.

The Department of Consumer and Business Services (DCBS), in concert with Vickie Gates, health plan administrator, is spearheading an effort to change the law. The only question left unanswered is how many alliances should there be. Gates apparently favors a large statewide group that includes state employees (SEBB and BUBB), while DCBS officials lean toward smaller alliances.

"There's potential in purchasing coops for small businesses," said Gates. "The experiences in California and Florida indicate they can make a difference by offering administrative advantages to employers, giving more choice to employees and producing cost savings. Besides, it's one more way to strengthen the voluntary market."

**COUNCIL ON COURT PROCEDURES
 APPEAL PROCESS ADJUSTMENTS TO 1995-97 ANALYST RECOMMENDED BUDGET**

	General Fund	Lottery Funds	Other Funds		Federal Funds	Total Funds	Positions	FTE
			Incl. Lottery					
AGENCY REQUEST BUDGET	92,568	0	8,000		0	100,568	2	0.71
Analyst Changes	0	0	0		0	0	0	0.00
ANALYST RECOMMENDED BUDGET	<u>92,568</u>	<u>0</u>	<u>8,000</u>		<u>0</u>	<u>100,568</u>	<u>2</u>	<u>0.71</u>

APPEALS ADJUSTMENTS (BY PROGRAM UNIT)
 No Appeal Adjustments

PERS ADJUSTMENTS:

Program Unit 100: Administration
 Base:

	(3,208)					(3,208)		
TOTAL PERS ADJUSTMENTS	<u>(3,208)</u>	<u>0</u>	<u>0</u>		<u>0</u>	<u>(3,208)</u>	<u>0</u>	<u>0.00</u>
GOVERNOR'S RECOMMENDED BUDGET	<u>89,360</u>	<u>0</u>	<u>8,000</u>		<u>0</u>	<u>97,360</u>	<u>2</u>	<u>0.71</u>

OUTSTANDING ISSUES: None.

JOINT STATEMENT

DATE: January 19, 1995

TO: Oregon State Bar
Board of Governors
Public Affairs Committee

The OTLA and the OADC, through their members, represent opposite sides in civil disputes. Both agree that the present Oregon system for dispute resolution based on civil jury trials works well and should not be fundamentally changed. The much publicized problems of courts in other states do not exist in Oregon. Oregon dockets are kept current by the combined efforts of trial lawyers and the judiciary. This cooperative effort is reflected in the Council on Court Procedures which reviews, comments on and makes recommended changes in the Rules of Civil Procedure. Both the OTLA and the OADC support processing all proposed rule changes through the Council. Procedural rules interrelate and a balanced workable set of procedural rules is necessary for the efficient resolution of disputes.

Both the OTLA and the OADC are in favor of constructive dialogue on ways to improve the present system, as long as any changes do not impair the right of all citizens to have their civil disputes brought before a jury for resolution in a fair and efficient manner.

Chair
Senator Neal Bryant
Vice Chair
Senator Randy Miller

Members
Senator Ken Baker
Senator Jannett Hamby
Senator Peter Sorenson
Senator Dick Springer
Senator Shirley Stull



Staff
Bill Taylor,
M. Max Williams, II,
Co-Counsel
Diane Dussler
Dunika Snyder
Dar Woodrum

SENATE JUDICIARY COMMITTEE
\$401 State Capitol
Salem Oregon 97310
(503) 986-1640

January 25, 1995

Mr. John E. Hart
Hoffman, Hart and Wagner
Suite 2000
1000 SW Broadway
Portland, Oregon 97205

VIA UPS

Mr. Thomas Tongue
Dunn, Carney, Allen, Higgins & Tongue
Suite 1500
851 SW 6th Avenue
Portland, Oregon 97204

VIA UPS

Gentlemen:

Thank you for the promptness with which the OADC responded with comments on the early concept statements relating to tort reform issues that will likely be before the Senate Committee on Judiciary this legislative session.

I am enclosing for your immediate review the latest Legislative Counsel draft of two bills relating to tort reform. These bills were "dropped" today. The first deals with a number of changes to statutory attorney fees provisions and would amend several of the Oregon Rules of Civil Procedure. The second bill abolishes the private right of action for civil RICO claims.

We anticipate that the first public hearing before the committee on these bills will be on Thursday, February 2, 1995 at 3:30 PM. There will be a subsequent hearing on February 9, 1995 and additional work sessions following those hearings where the committee will hear testimony by invitation. Although we are aware that the Council on Court Procedures may not have sufficient time to review these proposed changes pursuant to its usual procedures, Senator Bryant is very anxious and committed to receiving any comments from the Council, even in an informal manner. After you have an opportunity to review these drafts, if you feel it would be worthwhile to meet informally and discuss the proposed changes, please call and I will arrange a meeting with Senator Bryant. We would be glad to meet with you before the date of the first hearing. To accommodate your schedule we would be willing to come to Portland and meet with you in the evening.

Please call me if you have any questions, or if I can be of further assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "M. Max Williams, II".

M. Max Williams, II
Co-Counsel

DraftMEMORANDUM

TO : Procedure and Practice Committee
FROM : RJN
DATE : January 31, 1995
SUBJECT : Meeting of the Tort Legislation Sub-Committee of
the Procedure and Practice Committee on January 30,
1995

Persons present were Dan Harris (by telephone), Richard Lane, Robert Neuberger, Denise Stern, Vicki Hopman Yates. Excused: Mark Clarke. Also attending: Robert Udziela, Oregon State Bar Board of Governors.

Bob Udziela informed us that the OSB Board of Governors was interested in thorough input from all relevant committees and sections of the Bar. That is, the Board would like to hear from the Practice and Procedure Committee in detail regarding legislative proposals even where other committees may have concurrent jurisdiction. The Board, however, is not looking for input from our committee with regard to the judicial selection proposed revisions. Only two bills out of a package that will ultimately include six or eight bills have been introduced. Bob encouraged the committee to advise the Board regarding the proposals in the December 6, 1994 draft of the Oregon Litigation Reform Proposals even though the proponents may make changes before the bills are actually introduced.

The sub-committee reviewed SB 385 regarding attorneys fees and sanctions. With regard to SB 386 (LC 1892) regarding ORICO, the committee proposed that the full committee appoint a sub-committee

of persons knowledgeable about RICO to study the proposals regarding RICO. The sub-committee members did not feel comfortable with their knowledge and experience regarding ORICO to comment on the proposals. If the full committee lacks sufficient members knowledgeable in RICO to study the proposals, we should ask for input from other members of the Bar. One name mentioned was John McGrory at Davis Wright Tremaine. We also discussed our member Scott Elliott who is knowledgeable about RICO.

Regarding the totality of the proposals expected to be introduced in the 1995 session, the sub-committee concluded that the Oregon Civil Justice System functions extraordinarily well. Trial dockets in most counties are current with less than a year from the time of filing to disposition. The Oregon Rules of Civil Procedure and the statutes governing the conductive cases and trials work well, efficiently and with reasonable cost to the litigants. Through the hard work of the trial bar, the Judiciary, and the Council on Court Procedures, the Oregon State Bar, previous sessions of the Legislature, this system has been improved. Some of the highly publicized anecdotal problems elsewhere either do not exist in Oregon or have previously been remedied.

Accordingly, the sub-committee does not believe that major changes are necessary or wise. The sub-committee does favor some of the proposals (especially if they can be amended) that would make clear that frivolous cases, defenses, and motions are not welcome. The sub-committee agreed that litigants and their lawyers should be accountable and reasonable for their conduct litigation. However, accountability and responsibility extend to society in

general and people who owe debts or have committed wrongs should not escape accountability and responsibility.

Many of the proposals of SB 385 are in the form of amendments to the Oregon Rules of Civil Procedure. The sub-committee opposes any amendment to these rules without matters previously being considered by the Council on Court Procedures. Bob Udziela, however, informed us that it was not likely that the Legislature would defer to the Council this session. Accordingly, the committee went on to consider the proposals of SB 385.

Offers of Compromise.

Section 1 of the bill would amend ORCP 54 in two ways. First, it would amend Rule 54D to provide that where a previously filed action was dismissed with prejudice and then refiled, the court must award attorneys fees incurred by the defendant in the action previously dismissed. The sub-committee did not feel this amendment is needed. Sufficient protections are currently exist and would be added in other amendments regarding frivolous filings and offers of compromise. However, the committee was not unalterably opposed to this proposal as long as it is not amended to cover actions dismissed without prejudice. However, it does need to be made reciprocal so that it would apply to both plaintiffs and defendants.

The bill would next amend Rule 54E to allow thirty days to respond to an offer of compromise. The response time could be extended by court order only for thirty days and only upon a showing that the adverse party had unreasonably resisted discovery during their initial thirty day period. A plaintiff who did not do

better than the offer of compromise would be responsible for attorneys fees and expert witness fees and other costs from the date of the offer of compromise.

The sub-committee was in favor of improving the effective use of offers of compromise but believes that amendments are necessary:

1) The proposal needs to be made reciprocal. A plaintiff should be able to make an offer of compromise making a defendant responsible for attorneys fees, costs and the like if the defendant does not do better at trial than the offer of compromise;

2) The restrictions upon the court granting extensions of time and the grounds for which the court can grant extensions should be deleted. The court should be able to exercise its discretion in determining the amount of time and the reasons for granting an extension;

3) Neither party should be responsible for expert witness fees; and

4) A cut off date for offers of compromise should be included. The sub-committee noted that the full committee has previously recommended to the Council on Court Procedures that the time for responding to an offer of compromise be fifteen days. At that time, some members of the committee were concerned that offers of compromise should not be made so close to trial as to prevent their effective use (i.e., offers should be made sufficiently before trial to allow for settlement before fees and expenses associated with immediate pre-trial preparation are incurred).

The bill would also add a new section to Rule 54 empowering the court to order settlement conferences. The sub-committee

supports this proposal but questions whether the amendment goes far enough. The proposal not make settlement conferences mandatory nor does it specifically authorize the court to compel representatives of parties or lienholders to attend settlement conferences.

Sanctions and Attorneys Fees.

Section 2 of the bill would amend ORS 20.105 to make an award of reasonable attorneys fees mandatory rather than discretionary. The sub-committee did not specifically consider this proposal. The full committee may wish to oppose the portion of the bill that would strike the existing language that allows the court to tailor the amount of the reasonable fees to be "appropriate in the circumstances."

Section 3 of the bill would amend ORS 20.125. The current statute gives the court the discretion to award costs against an attorney whose deliberate misconduct causes a mistrial. The amendments would require the court to assess not only costs and disbursements, but also reasonable attorneys fees. While the sub-committee did not feel that the deliberate or intentional cause of mistrials is a problem, the sub-committee does not oppose the proposed.

Section 4 would amend Rule 17 regarding sanctions. The proposal does not specifically track FRCP 11 but it sponsors claim that it is based upon the Federal Rule. The sub-committee approves of changes to the current sanctions rule, but believes that amendments are in order. Denise Stern, is studying the sanctions proposal for the Litigation Section's sub-committee and will report further to the Procedure and Practice Committee.

The sub-committee believed that the following amendments to the proposal are necessary:

1) The committee supports the proposed language requiring an attorney to exercise reasonable care in making inquiries to insure that the filing of any pleading or motion is justified. The committee opposes the language that the attorney certify that his or her determination was "based upon the persons best knowledge, information and belief. . . ." (emphasis added). A reasonableness standard should apply;

2) The sub-committee is concerned about sub-section C(4) which would allow an attorney or party to file a pleading but not certify that it was supported by evidence. This is a loop hole that could result in all filings not being certified as being supported by evidence based upon reasonable inquiry;

3) Sub-section D(1) contains a joint liability clause making all partners of a law firm jointly liable for the acts of any partners, associate, or employee. The sub-committee is not opposed to joint liability, but does not believe that lawyers should be subjected to a special standard joint liability. This is especially true in view of the fact that the proponents will be introducing amendments to the joint and several liability statute; and

4) Sub-section D(3) of the proposal gives a party twenty-one days after notice by the adverse party to amend or withdraw the pleading or motion. The sub-committee agrees with the mechanism but also believes that provisions such as contained in ORS 30.895(2) should be considered. That statute provides an exception to

liability for misuse of civil proceedings where a lawyer is required to file a lawsuit close to the statute of limitations. The statute allows a lawyer 120 days to investigate the case.

Summary Judgments.

Section 5 of the bill would make an award of attorneys fees, expert witness fees, and all cost contributable to discovery available for a prevailing a party who filed and won a summary judgment motion.

The sub-committee recommends that the entire proposal regarding summary judgments should be stricken. Alternatively, the provision should be made reciprocal so that a party who loses a summary judgment is responsible for the other side's attorneys fees and costs. References to an award for "expert witness fees" should be deleted. The sub-committee also favors deleting an award of "all costs attributable to discovery."

The committee was particularly concerned, as was the sub-committee of the Litigation Section, that the proposal would encourage the unnecessary filing of summary judgment motions.

Attorney Fee Awards in Small Actions.

Section 6 would provide an English Rule or loser pays rule for claims of \$20,000 or less. The sub-committee opposes this provision. Smaller claims should not be discriminated against. The proposal poses a particular threat of depriving ordinary citizens and businesses of access to justice. The sub-committee also believes that the proposed (and to be revised) amendments to Rule 54 regarding offers of compromise and to Rule 17 regarding sanctions will adequately protect parties.

The sub-committee opposes the repeal of 20.080 which allows for an award of attorneys fees and actions of less than \$4000, including counter claims (which is not included in the proposed rule). The sub-committee also opposed the repeal of ORS 20.098 which allows an award of attorneys fees in breach of warranty actions where the amount of controversy in \$2,500 or less.

Reciprocity of Attorney Fee Awards.

The bill contains 130 pages of amendments to 131 current statutes that provide for attorneys fees to a prevailing plaintiff. Tom Howser is studying the individual proposals for the Litigation Section Board. Dan Harris will collaborate with Tom on behalf of our sub-committee.

In general, the sub-committee was concerned about making remedial attorney fee statutes reciprocal on a wholesale fashion. The goals of this proposal are achieved with amendments to Rules 17 and 54.

Conclusion.

While the sub-committee feels that some of the proposals contained in SB 385 are meritorious, the sub-committee also believes that many of the proposals paint with too broad a brush. More precision is needed to prevent a host of adverse consequences. The lack of opportunity for deliberative consideration by the Council on Court Procedures is of concern. Much of SB 385 threatens to close the courthouse to middle class citizens and small businesses. The punishments and sanctions proposed by the bill are not in proportion to the limited and infrequent problems that concern the bill's proponents.

Denise L. Stern
Attorney-at-law
7430 S.E. Milwaukie Ave.
P.O. Box 82244
Portland, OR 97282-0244

February 1, 1995

Gregory R. Mowe
Stoel Rives Boley Jones & Grey
900 S.W. 5th Avenue
Portland, OR 97204-1268

RE: Revisions to ORCP 17

Dear Greg:

I have compared the proposed changes to ORCP 17 with FRCP 11 and Washington Civil Rule 11 (CR 11). In general, the proposed changes to ORCP 17 track the Federal Rule. However, there is at least one instance in which the proposed rule increases the burden of proof for the potential violator.

In the proposed rule, as well as under the current version, a party makes certain certifications to the court. The crux of the rule is contained in subsection C., the Certification provisions. In many respects, subsection C simply repeats the current standards. However, Subsection C also incorporates language from FRCP 11 and CR 11.

The current rule only applies to 'every pleading, motion and other paper...' The proposed rule would also apply to an attorney or party who submits an argument, i.e., the proposed rule would apply to oral assertions. This tracks FRCP 11 and CR 11.

Under the current rule, the attorney or party makes certain certificates based on 'the best of the knowledge, information and belief of the person'. The proposed rule is based on the person's 'best knowledge'. I do not have a clear idea what 'best knowledge' is and I would certainly not like to litigate that issue. The 'best knowledge' concept is unique to the proposed rule and would seem to impart a higher burden of proof. Also, under the proposed rule, the required investigation is an inquiry that is 'reasonable under the circumstances' as opposed to the current 'reasonable

inquiry'. I do not see a substantive difference in the phrases. The new terminology tracks FRCP 11 and CR 11.

Subsection C(2) of the proposed rule is identical to the present rule.

Subsection C(3) is based on FRCP 11 and specifically adds that 'claims, defenses, and other legal positions' are covered by the rule. It also changes the burden of certification from certifying that a position is warranted by a 'good faith' argument for the extension... of existing law to certifying that a position is warranted by a 'nonfrivolous' argument for the extension... of existing law. Both of these changes track FRCP 11. The difference between a burden of proof for a 'good faith' argument as opposed to a 'nonfrivolous argument' is confusing but seems negligible at best.

Subsection C(4) adds that factual allegations and other factual assertions must be supported by evidence. This is based on FRCP 11. The remainder of C(4) and (5) is very loosely based on FRCP 11. These subsections generally provide that a party or attorney can specifically identify allegation or assertions, or denials of factual assertions, that the attorney does not wish to certify. In effect, these provisions gut ORCP 17 by allowing an attorney to file a non-certified pleading.

The sanction provisions in the proposed rule are significantly different from the current rule. The proposed rule tracks FRCP 11. Under the proposed rule, the motion for sanctions must be served on the opposing party 21 days prior to the impositions of sanctions. During the 21 day period the opposing party may amend, withdraw or correct the pleading. If sanctions are awarded, the law firm is jointly liable for any sanction imposed unless joint liability would be unjust. A sanction may be awarded for attorneys fees and expenses incurred and to deter future conduct.

As we discussed in subcommittee, a reciprocal attorney fee provision may discourage a proliferation of unwarranted ORCP 17 motions.

If you have any questions, please do not hesitate to contact me.

Yours truly,

Denise L. Stern

cc: Robert Neuberger

TESTIMONY OF JOHN DILORENZO, JR.

before the *Zitgen, Dye (Portland Law Firm)*

Joint Senate / House Subcommittees on Civil Process

in Support of Senate Bill 385

February 2, 1995

Co-chair Bryant, Co-chair Parks, and members of the joint subcommittees, for the record, my name is John DiLorenzo. I am a Portland attorney and am appearing here today on behalf of the Oregon Litigation Reform Coalition in support of Senate Bill 385. The Oregon Litigation Reform Coalition was formed for the purpose of assembling separate coalitions from the private sector in support of various proposals which will be coming before you during this session of the legislature. As you will surely note, the coalition has assembled a broad and significant array of businesses and individuals who are supportive of the concepts contained within Senate Bill 385. Those individuals and organizations are scheduled to testify today and next Thursday in support of the bill.

Because they will have much to contribute by way of personal examples and their evaluation of the impact of the present litigation climate in Oregon upon their lives and businesses, I will focus my presentation on a description of the bill and will do my best to outline the rationale which underlies the major statutory changes proposed by Senate Bill 385. In addition, I hope my testimony will be useful as an overview to assist you in spotting particular issues which you may care to address in further hearings.

WHAT THE BILL DOES

Senate Bill 385 consists of a number of parts each of which have headings in bold print for ease of identification. The bill addresses offers of compromise and settlement beginning at page 1, sanctions for false or frivolous pleadings and other misconduct beginning at page 3, it provides for attorney fee awards in small actions (an access to justice provision) beginning at page 7, and addresses reciprocity of attorney fee awards or, what has been called a modified loser pay rule beginning at page 7.

In total, Senate Bill 385 is designed to streamline litigation, to encourage settlements of disputes at stages prior to trial and is further designed to enact a modified loser pay rule by providing an incentive for the prosecution of small claims which have merit and to address the extremely unfair and coercive impacts of Oregon's one way fee shifting statutes. One way fee shifting refers to the practice of allowing only those who have brought lawsuits an award of their attorney's fees if they prevail but not allowing an award of attorney's fees to defendants who successfully defend their claims.

OFFERS OF COMPROMISE, SETTLEMENT AND PREVIOUSLY

DISMISSED ACTIONS

The first portion of the bill concerns offers of compromise, settlement and previously dismissed actions. One of the purposes of this part is to discourage the initiation of claims which were previously dismissed on their merits. Some businesses and individuals have experienced situations where the very same claim

which was previously dismissed is filed by the same plaintiff upon retaining new counsel. Should a plaintiff refile a case which has already been dismissed, the court is directed to enter an order compensating the defendant for the attorney's fees which were incurred in the previous case.

This part also encourages early settlement of civil cases by allowing a defendant to make an offer of judgment prior to trial. If a plaintiff rejects the defendant's offer of judgment and does not improve his or her position at trial, any entitlement to attorney's fees which the plaintiff may have by way of contract or statute is cut off as of the date of the rejected offer and the defendant's entitlement to attorney's fees begins from the date of the rejected offer through trial. The purpose of this provision is twofold: (1) It encourages defendants to make real offers of settlement (there is no tactical advantage to make a low-ball offer), and (2) It encourages plaintiffs to focus upon their cases at earlier stages prior to trial and to take a hard look at the offers which are so made. The provision which is at page 3 beginning at line 6 of the printed bill is strikingly similar to Alaska Civil Rule 68. This rule which is attached at tab 2 of your materials was adopted in Alaska in 1959.

This concept is not new or radical. In fact, it was included in the report submitted in July of 1986 by Governor Goldschmidt's task force on liability. You will find in your materials at tab 3 excerpts from that report suggesting a very similar format for encouraging offers of compromise.

SANCTIONS FOR FALSE OR FRIVOLOUS PLEADINGS

In 1987, the legislature made some effort to curb the filing of frivolous lawsuits by allowing courts in their discretion to impose sanctions. However, the provisions are rarely utilized by the trial courts. Any practicing Oregon defense lawyer will likely tell you that the chances of gaining sanctions against parties who file frivolous lawsuits are close to nil under the current Oregon Rules of Civil Procedure.

Senate Bill 385 therefore proposes a modified form of the rule which controls frivolous cases filed in the federal court, Federal Rule of Civil Procedure 11. Beginning at page 4 of the bill, attorneys and parties who file or submit papers in court must make certain certifications that the allegations were made upon the person's best knowledge formed after making all inquiries that are reasonable under the circumstances. This means that depending upon the circumstances an attorney and party must first conduct some investigation prior to making allegations in a lawsuit. This provision parallels that in Federal Rule 11.

*FRCP 11
amended to
discretion*

The bill also permits the award of sanctions against parties or counsel who have made false certifications. Once again, this section begins with the federal rule, changes some discretionary language, and also provides as a measure of sanctions not only a sufficient amount to discourage repetition of the offending conduct but, in addition, a compensatory element, an award of the moving party's reasonable attorney's fees. Sanctions may not be imposed if within 21 days after the motion is served, the party or attorney

amends or otherwise withdraws the material which thereupon corrects the false certification.

I have provided in your materials at tab 4, a copy of Federal Rule 11, and at tab 11, a compendium of recently decided federal cases showing how Federal Rule 11 can effectively discourage frivolous lawsuits. In particular, the *Business Guides v. Chromatic* case stands for the proposition that the reasonableness of a counsel's inquiry is gauged by an objective standard. The *Danik* case shows how Rule 11 will compel sanctions where a plaintiff conducts no reasonable factual inquiry prior to filing the case. The other cases illustrate the way in which Rule 11 protects parties from allegations that their adversaries are totally unprepared to prove.

**ASSESSMENT OF ATTORNEY'S FEES UPON ENTRY OF
SUMMARY JUDGMENT**

The next portion of the bill beginning at page 6 provides for an assessment of attorney's fees upon entry of summary judgment. A successful motion for summary judgment which resolves all the claims and defenses of another party allows the moving party an award of attorney fees. The award of the fees can be avoided by the other party by withdrawing, amending or voluntarily dismissing the claims or defenses that are challenged in the motion for summary judgment within twenty days before the scheduled hearing on the motion. This provision encourages parties to resolve such matters privately.

/ / / /

MODIFIED LOSER PAY

The final portions of the bill beginning at page 7 provide for a modified user pay system. The concept consists of two sections: First, a section allowing attorney fee awards in small actions or what we have referred to as an access to justice rule; and secondly, a section providing for reciprocity of attorney fees awards where one party only is entitled to the awards under Oregon statutes.

The concept is referred to as "modified loser pay" because it does not impact the typical personal injury case where the amount at issue is over \$20,000; it does not affect a contract case where the amount at issue is in excess of \$20,000 and where the contract between the parties provides the mechanism for such an award. Some of the examples which have been discussed recently in the press, the *Pinto* case, and other typical negligence cases are just not impacted under this bill one way or the other.

The modified loser pay rule is designed to do two things: First, it is designed to encourage the filing of meritorious claims; second, it is designed to discourage the filing of non-meritorious claims; third, it recognizes that defendants as well as plaintiffs seek to vindicate important legal rights through the litigation of their claims. For every claim of right by a plaintiff there is a reciprocal and equivalent claim of right by a defendant. If all are truly equal under the law, a defendant should therefore have just as much of a right to be left unscathed following the successful completion of a case as should a

plaintiff.

The access to justice rule allows attorney's fees to the prevailing party in any common law contract or tort action where the amount pled as damages does not exceed \$20,000. There are many occasions when, a client will approach a lawyer with a contract claim in the \$12-20,000 range. Unless there is a contractual entitlement to an award of attorney fees, these claims are just not worth pursuing. That is because even though the plaintiff is in the right, a significant portion of her recovery will be eaten up by his attorney's fees. The other side of course knows this and so inequities occur in this range. Senate Bill 385 will correct these inequities by allowing the plaintiff with a small claim as much access to the court system as a plaintiff with a large claim.

The final portion of the bill provides for reciprocity of attorney fee awards where only one party is entitled under Oregon law to an attorney fee award. These types of laws are known as one way fee shifting laws. They allow the prevailing plaintiff to recover attorney's fees but do not allow the defendant to recover fees even if the defendant completely vindicates himself at trial.

Attached to your materials at tab 6 is a listing of those one way fee shifting laws currently on the books which are impacted by this bill.

It is important to note that the bill does not affect all one way fee shifting laws. For instance, this bill does not address the workers' compensation statutes. The bill does not address many provisions relied upon by the Bureau of Labor and Industries to

resolve wage claims. Where fee shifting statutes exist between units of government, the bill does not alter those provisions. The bill does, however, affect many other one way fee shifting statutes. These statutes can be divided roughly in thirds.

The first third relate to actions by the government against individuals and businesses. There is no reason why the government, upon prevailing, should be entitled to an award of its attorney's fees and yet a defendant who successfully defends a case against the government should be entitled to nothing. Changing these one way fee shifting statutes to two way statutes will eliminate the coercive effect a government plaintiff can have upon the private sector.

The next third pertain to statutes which relate to transactions of a commercial character. For instance, one statute allows the prevailing party attorney's fees where the defendant transports more than five coniferous trees without a permit. Another statute allows only a prevailing plaintiff/shareholder attorney's fees to enforce the right to examine certain books and records of a corporation. Another allows only the prevailing plaintiff attorney's fees in an action involving the sale of a horse that is drugged or tranquillized. There is no reason why defendants who vindicate their rights should not be as entitled to an award of attorney's fees in these circumstances as plaintiffs who vindicate theirs.

The final third consists of consumer legislation which involve one way fee provisions. Although one way fee shifting has been

justified in the past as a mechanism to encourage consumers to file claims, those who testify will tell you that the pendulum has shifted way too far. Because the prevailing defendant (who need not be a multi-national corporation, but, rather, be a barbershop or a florist shop owner) is entitled to no award upon prevailing, cases which are filed by plaintiffs have an inherent settlement value notwithstanding their merits. This is because the best defendant can ever do in such a case is to pay his or her counsel to defend the claim.

The two way fee shifting proposal contained within Senate Bill 385 is not dissimilar to Alaska's fee shifting model. Included in your materials at tab 7 is a copy of Alaska Civil Rule 82. The Alaska system of fee shifting provides that prevailing plaintiffs are entitled to attorney's fees generally as a percentage of the amount of their judgment. In addition, prevailing defendants may recover thirty percent of their actual attorney's fees after trial or twenty percent of their actual attorney's fees if there is no trial. The court in Alaska has discretion to increase the amounts under certain circumstances.

You should adopt the two way fee shifting proposal contained in Senate Bill 385 for a number of reasons. These reasons are not my invention; they are generally recognized and validated among a community of nationwide legal scholars.

ARGUMENTS IN FAVOR OF TWO-WAY FEE SHIFTING

1. Two-way fee shifting is fairer than one-way fee shifting

///

Two-way fee shifting is fairer than one-way fee shifting because two-way fee shifting recognizes that defendants, as well as plaintiffs, are seeking to vindicate important legal rights through litigation of claims. See Mark S. Stein, Is One-Way Fee Shifting Fairer Than Two-Fee Shifting?, 141 F.R.D. 351, 354-359 (1992). Stein argues litigation provides a forum for "the resolution of conflicting claims of entitlement or right." Id. at 355. He writes: "For every claim of right by a plaintiff there is a reciprocal and equivalent claim of right by a defendant." Id.

2. Two-way fee shifting reduces the tendency of attorney's fees to thwart the substantive goals of contract and tort law

The goal of contract and tort law should be to compensate genuine victims without charging innocent parties. See Gregory E. Maggs & Michael D. Weiss, Progress on Attorneys Fees: Expanding the 'Loser Pays' Rule in Texas, Hous. L. Rev. 1915, 1925 (1994). When a loser is not required to pay the winner's attorney's fees, the legal system thwarts this goal. Under the American Rule, a successful plaintiff sees his judgment substantially reduced by the amount he has to pay his lawyer. Similarly, a successful defendant's victory is only partial, having spent a large amount of money to defend himself against what ultimately was a meritless claim. As Maggs and Weiss write:

The English Rule, by contrast [to the American Rule], compensates genuine victims without charging innocent parties. If the loser of a private civil case paid the winner's fees, a prevailing plaintiff would keep the entire amount of any judgment won, and thus receive full compensation. Similarly, a defendant would not pay anything after successfully defending a lawsuit; the plaintiff bringing a meritless suit would have to pay all

of the legal cost and the defendant would walk away unscathed. Consequently, the English Rule does not distort the principles of contract and tort law like the American Rule.

3. No fee shifting encourages meritless litigation

No fee shifting encourages meritless litigation because, unlike two-way fee shifting, it does not increase the cost of losing. See Gregory E. Maggs & Michael D. Weiss, Progress on Attorneys Fees: Expanding the 'Loser Pays' Rule in Texas, Hous. L. Rev. 1915, 1926 (1994) (contrasting incentives and disincentives of British and American Rules); Steven Shavall, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for Allocation of Legal Cost, 11 J. Legal Stud. 55, 58-62 (1992) (demonstrating greater economic incentives to bring suits under the American Rule than British Rule). Two-way fee shifting thus gives plaintiffs cause to think twice before bringing a meritless lawsuit. For plaintiffs with contingent fee arrangements, the prospects of paying the other sides attorney's fees may be the only disincentive to bringing a meritless claim. Likewise, the possibility of having to pay the plaintiff's attorney's fees will dissuade many defendants from mounting meritless defenses.

4. One-way fee shifting encourages frivolous lawsuits by plaintiffs

Whereas no fee shifting does not provide disincentives to either plaintiffs or defendants, one-way fee shifting only incentivizes plaintiffs to bring meritless claims. See Gregory E. Maggs & Michael D. Weiss, Progress on Attorneys Fees: Expanding the 'Loser Pays' Rule in Texas, Hous. L. Rev. 1915, 1926-1227

(1994) (contrasting incentives and disincentives provided by two-way and one-way fee shifting); Steven Shavall, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for Allocation of Legal Cost, 11 J. Legal Stud. 55, 58-62 (1992) (demonstrating that prevailing plaintiff rules have higher economic incentives to bring suits than either the American Rule or the British Rule).

5. Two-way fee shifting encourages the litigation of meritorious claims, especially small ones

Two-way fee shifting encourages the litigation of meritorious claims generally because plaintiffs who believe in their claims have an added incentive to pursue them--they get to keep all they recover. Likewise, an innocent defendant is more likely to maintain his defense in spite of his legal costs, knowing such costs are recoverable from the plaintiff. See Gregory E. Maggs & Michael D. Weiss, Progress on Attorneys Fees: Expanding the 'Loser Pays' Rule in Texas, Hous. L. Rev. 1915, 1926-1227 (1994) (discussing incentives of two-way fee shifting).

Moreover, two-way fee shifting benefits plaintiffs whose claims are small. In noncontingent fee arrangements, generally a greater proportion of smaller claim as compared to a larger claim will be consumed by attorney's fees. Also, two-way fee shifting provides no disincentive to those who can least afford to pay for an attorney. Id.

6. Two-way fee shifting will encourage the use of alternative methods of financing legal costs

In countries that have adopted two-way fee shifting, alternative methods of financing legal costs have developed: employer supplied legal insurance; privately purchased legal insurance; and prepaid legal service plans. Although there is some use of these alternatives in the United States, adoption of two-way shifting should increase their availability here, which would be of great benefit to less wealthy individuals. This has been the experience in Great Britain and Europe. Id

CONCLUSION

You will hear much testimony over the next several weeks concerning this bill. The proposal presents a host of issues for you to resolve, many of which, in the final analysis, will have to be determined by your own views of fairness and basic philosophy. I hope Senate Bill 385 embraces those views. I urge your favorable consideration of Senate Bill 385.

STOEL RIVES BOLEY JONES & GREY

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February 2, 1995

BY FAX

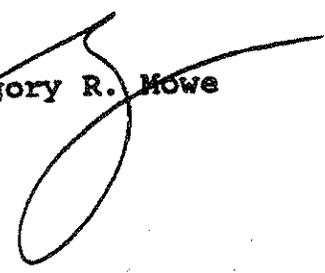
Mr. Timothy Helfrich
Yturri, Rose, Burnham,
Bentz & Helfrich
PO Box "S"
89 SW Third Avenue
Ontario, OR 97914

Re: Legislative Subcommittee

Dear Tim:

As promised in my January 27 letter, I enclose draft comments of individual subcommittee members on aspects of SB 385. Tom Howser has been ill, and I have not yet received his input. I will attempt to incorporate the enclosures, together with subcommittee feedback and any other constructive comments, into a single memorandum for Bob Oleson's use not later than the middle of next week.

Very truly yours,


Gregory R. Mowe

GRM/dlc
Enclosure
cc w/enc.:

- Thomas Howser
- Jane Aiken
- Angel Lopez
- Denise Stern
- Bob Weaver
- Dennis Rawlinson
- Barrie Herbold
- Bob Udziela
- Bob Oleson
- Renee Rothauge
- David Wu

Denise L. Stern
Attorney-at-law
7430 S.E. Milwaukie Ave.
P.O. Box 82244
Portland, OR 97282-0244

February 1, 1995

Gregory R. Mowe
Stoel Rives Roley Jones & Grey
900 S.W. 5th Avenue
Portland, OR 97204-1268

RE: Revisions to ORCP 17

Dear Greg:

I have compared the proposed changes to ORCP 17 with FRCP 11 and Washington Civil Rule 11 (CR 11). In general, the proposed changes to ORCP 17 track the Federal Rule. However, there is at least one instance in which the proposed rule increases the burden of proof for the potential violator.

In the proposed rule, as well as under the current version, a party makes certain certifications to the court. The crux of the rule is contained in subsection C., the Certification provisions. In many respects, subsection C simply repeats the current standards. However, Subsection C also incorporates language from FRCP 11 and CR 11.

The current rule only applies to 'every pleading, motion and other paper...' The proposed rule would also apply to an attorney or party who submits an argument, i.e., the proposed rule would apply to oral assertions. This tracks FRCP 11 and CR 11.

Under the current rule, the attorney or party makes certain certificates based on 'the best of the knowledge, information and belief of the person'. The proposed rule is based on the person's 'best knowledge'. I do not have a clear idea what 'best knowledge' is and I would certainly not like to litigate that issue. The 'best knowledge' concept is unique to the proposed rule and would seem to impart a higher burden of proof. Also, under the proposed rule, the required investigation is an inquiry that is 'reasonable under the circumstances' as opposed to the current 'reasonable

inquiry'. I do not see a substantive difference in the phrases. The new terminology tracks FRCP 11 and CR 11.

Subsection C(2) of the proposed rule is identical to the present rule.

Subsection C(3) is based on FRCP 11 and specifically adds that 'claims, defenses, and other legal positions' are covered by the rule. It also changes the burden of certification from certifying that a position is warranted by a 'good faith' argument for the extension... of existing law to certifying that a position is warranted by a 'nonfrivolous' argument for the extension... of existing law. Both of these changes track FRCP 11. The difference between a burden of proof for a 'good faith' argument as opposed to a 'nonfrivolous argument' is confusing but seems negligible at best.

Subsection C(4) adds that factual allegations and other factual assertions must be supported by evidence. This is based on FRCP 11. The remainder of C(4) and (5) is very loosely based on FRCP 11. These subsections generally provide that a party or attorney can specifically identify allegation or assertions, or denials of factual assertions, that the attorney does not wish to certify. In effect, these provisions gut ORCP 17 by allowing an attorney to file a non-certified pleading.

The sanction provisions in the proposed rule are significantly different from the current rule. The proposed rule tracks FRCP 11. Under the proposed rule, the motion for sanctions must be served on the opposing party 21 days prior to the impositions of sanctions. During the 21 day period the opposing party may amend, withdraw or correct the pleading. If sanctions are awarded, the law firm is jointly liable for any sanction imposed unless joint liability would be unjust. A sanction may be awarded for attorneys fees and expenses incurred and to deter future conduct.

As we discussed in subcommittee, a reciprocal attorney fee provision may discourage a proliferation of unwarranted ORCP 17 motions.

If you have any questions, please do not hesitate to contact me.

Yours truly,

Denise L. Stern

cc: Robert Neuberger

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PLEASE REPLY TO PORTLAND OFFICE

Voice Mail Extension 3129

February 1, 1995

Gregory Mowe, Esq.
Stoel Rives Boley Jones & Grey
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Portland, Oregon 97204

VIA FACSIMILE
(503) 220-2480

Re: Judicial Administration

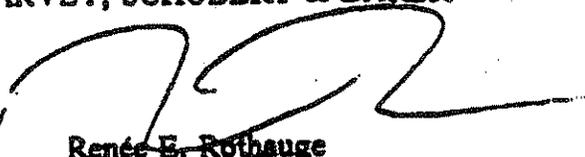
Dear Greg:

Attached is a draft policy statement relating to the proposed amendment of ORCP 47 to be considered by the Judicial Administration Committee. If I can be of assistance, do not hesitate to call.

Very truly yours,

GARVEY, SCHUBERT & BARER

By



Renée E. Rothauge

RER/abd
Enclosure

To:

From: Judicial Administration Committee's Legislative Subcommittee

Re: Analysis of Proposed Legislation Relating to Summary Judgment Motions and Settlement Conferences

Section 5 of Senate Bill 385¹ would amend ORCP 47 to allow the court to award costs and fees to a party who successfully prevails on a summary judgment motion. Specifically, "the court shall enter judgment against the party who did not prevail for reasonable attorney fees, expert witness fees and all costs attributable to discovery in the action". A party prevails under the proposed legislation if "the summary judgment adjudicates all claims and defenses of the party in favor of the party."

The underlying rationale of the sweeping changes proposed in the Lawyer Litigant Accountability Act is to truncate "frivolous law suits". The proposed changes to ORCP 47 will not address the filing of frivolous lawsuits because there is no root connection between frivolous lawsuits and the summary judgment process. There are numerous reasons a summary judgment motion may be granted and a successful summary judgment motion does not necessarily mean that a party's case or claims were frivolous.

More troubling than the fact that this amendment does not really address the problem at issue, is that there may be unintended adverse effects upon the judicial system and costs to litigants as a result of the amendment. This amendment will probably encourage the filing of summary judgment motions. There is no down side for a party who files a summary judgment motion. If the party prevails, it obtains attorney fees and recovery for items that may not have been otherwise recoverable including expert witness fees and costs incurred during discovery. If the party who files a summary judgment motion loses, it is not penalized for trying.

This amendment would be more consistent with the spirit of this legislative reform, if costs were taxed to the moving party who does not prevail. In this way, the practice of filing frivolous summary judgment motions, in order to recover the costs of discovery and attorney fees, would be inhibited.

Also, this amendment could have the effect of increasing litigation costs for litigants since it could become a regular practice for all parties to a suit to file for summary judgment in light of the real economic benefit to be gained if one prevails.

Finally, this amendment poses an access to justice issue. The group of litigants with the most to lose under the amendment would be individuals who file suits against large corporations. Corporations have the resources to wage expensive legal battles and do so. If a

¹ Senate Bill 385 is one portion of the comprehensive legislative package being introduced to the Legislature commonly known as the Lawyer Litigant Accountability Act.

corporations prevails on a summary judgment motion against an individual, the individual risks losing more than his or her claims. A corporation's bill for experts, discovery and its attorneys fees could financially cripple the average wage earning citizen. For that reason, this amendment is bad policy. The judicial system must remain accessible to all and should not unfairly punish a citizen for seeking resolution for his or her problem within the court system.

Mandatory Settlement Conferences

We are in favor of the provisions in Senate Bill 385 for mandatory settlement conferences. We hope and expect they will have some impact in encouraging settlement at appropriate times and in appropriate cases.

STOEL RIVES BOLEY JONES & GREY

MEMORANDUM

January 31, 1995

TO: FILE

FROM: GREGORY R. MOWE

CLIENT: Professional Activities

MATTER: OSB Litigation Section Executive Committee

RE: Analysis of Section 1 of Senate Bill 385

Section 1 of SB 385 proposes several amendments to ORCP 54. The first proposed amendment adds a new Section ORCP 54D(2), which provides as follows:

"If a plaintiff who previously filed an action that was dismissed with prejudice subsequently commences an action based upon or including the same claim against the same defendant, the court shall enter an order requiring the payment of all attorneys fees incurred by the defendant in the action previously dismissed."

Since a dismissal with prejudice operates as a bar to a further action on the same claim, the intended operation of this amendment is not clear. In any event, the proposed amendment imposes a substantive liability for attorneys fees which might not otherwise exist (*i.e.*, if the prior action did not entitle the prevailing party to attorneys fees). Since not all dismissals are the result of dilatory conduct on the part of the plaintiff, we recommend some room for trial court discretion. Thus, the proposed amendment might be modified to read

"If a plaintiff who previously filed an action that was involuntarily dismissed subsequently commences an action based upon or including the same claim against the same defendant, the court shall enter an order requiring payment of all attorneys

fees incurred by the defendant in the action previously dismissed, unless the court finds exceptional circumstances mitigating against such an award."

A second major proposed change to ORCP 54 is in the offer of compromise language contained in ORCP 54E. Initially, the proposed language moves up the latest date of an offer of compromise from 10 days prior to trial to 30 days prior to trial. We have no substantive objection to the earlier deadline (ORS 35.346(2)(a) currently provides for a 30 day pretrial offer in condemnation actions). However, the amendment will have the effect of reducing a defendant's flexibility in timing of offers.

The proposed amendment to ORCP 54E allows the offer to be accepted within 30 days after it is made. This change may create an internal inconsistency in the rule, which currently requires that an offer be accepted and filed in court within three days of service. Allowing an offer to remain open for 30 days may be contrary to a goal of reducing litigation expense. An intermediate period of 10 or 15 days might be a reasonable compromise.

The most significant substantive amendment to ORCP 54E is a provision granting a defendant recovery for reasonable attorneys fees and reasonable expert witness fees incurred after the date of the offer if the claimant does not recover a judgment more favorable than the offer. The proposed change with respect to attorneys fees should be clarified as to whether or not attorneys fees may be recovered by a defendant in a case in which a plaintiff would not be entitled to attorneys fees. The provision for expert witness fees is problematic, as it would appear to be nonreciprocal (*i.e.*, allowing expert witness fees only to a defendant and not to plaintiffs), and because recoverable costs are traditionally dealt with on a systematic and consistent basis by the Council on Court Procedures.

If the intent of the proposed legislation is to shift a defendant's attorneys fees onto a nonsettling plaintiff in a case in which attorneys fees would not otherwise be awarded, we suggest that the rule be made reciprocal (and neutral as between plaintiffs and defendants) by allowing a claimant to make an offer of compromise by way of a pretrial demand, with the same potential consequences for a defendant if the offer is not bettered at trial.

The final proposed change to ORCP 54 is a new Section F providing for settlement conferences at any time at

the request of any party or on the court's motion. We support this proposed amendment.

GRM/dlc

STOEL RIVES BOLEY JONES & GREY

MEMORANDUM

February 2, 1995

TO: FILE

FROM: GREGORY R. MOWE

CLIENT: Professional Activities

MATTER: OSB Litigation Section Executive Committee

RE: SB 385, Attorney Fee Reciprocity

Sections 6-138 of draft SB 385 all modify statutory attorneys fee award provisions. The major modification is to adopt a "loser pays" rule on attorneys fees, with certain exceptions.

A number of the proposed changes are unobjectionable. However, in many cases the proposed amendments provide reciprocal attorneys fees under statutes now providing remedies and attorneys fees to plaintiffs otherwise subject to economic or social disadvantage. An archetypal example is ORS 346.630 (Act § 65), which currently allows a blind person to recover compensatory damages or \$200, plus attorneys fees, from a landlord who refuses to rent a dwelling unit on the basis of possession of a guide dog.

Other examples of varying inequality in economic bargaining position include consumer breach of warranty claims for less than \$2,500 (ORS 20.098, proposed to be repealed under § 7 of Act), persons subject to unlawful discrimination (§§ 11 and 15 of proposed Act), purchasers of securities (§§ 24-25), corporate shareholders (§§ 32-35), purchasers of consumer goods which are wrongfully repossessed (§ 38), borrowers impacted by lender's violation of escrow requirements (§ 41), residential tenants (§ 49), persons whose communications have been unlawfully intercepted (§ 55), financial institution customer whose records are wrongfully disclosed (§ 57), low income tenant (§ 60), physically impaired person whose assistance animal is stolen or attacked (§ 66), physically impaired tenant (§ 67), consumer suing automobile manufacturer under Oregon's "lemon law" (§ 94), consumer suing for unlawful trade practices (§ 96), consumer suing for unlawful collection practice (§ 97),

consumer suing for discrimination by creditor (§ 103), consumer suing automobile dealer for nondisclosure of prior sale (§ 104), franchisee suing franchisor for statutory fraud (§ 106), employee suing for unpaid wages (§ 109-111), insured suing insurer (§ 129-131), party injured by gross negligence or willful misconduct of public utility, railroad, air carrier, or motor carrier (§ 132), telephone customers damaged by various statutory violations (§ 133-34), and purchaser of vehicle subject to odometer tampering (§ 137-38).

While distinctions can be drawn among the above classes of plaintiffs, it is also clear that the legislative purpose in most instances was to promote remedies for consumers, employees, handicapped persons, and others through potential recovery of attorneys fees. In many cases, the statutes also provide treble damages or minimum statutory penalties, which provides additional evidence of legislative intent to deter or vindicate abuses of such individuals.

If applied broadly to the extent proposed in SB 385, the "loser pays" principal will operate to deter access to the judicial system. The same inequality in resources and bargaining power which initially influenced the legislature to adopt a statutory attorneys fee provision will now operate to place disparate economic risk upon consumers, employees and the other purported beneficiaries of statutory protection.

GRM/dlc

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February 6, 1995

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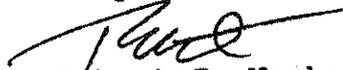
Dear Friends:

We are now scheduled to meet with Senator Bryant and Max Williams on Tuesday, February 7, 1995 beginning at 5:30p.m. at the Senate Republican Caucus lobby area by the elevators on the second floor of the Senate Wing.

Bob Oleson is checking with Chip Lazenby to see about moving our meeting with Chip. Bob is also trying to see if he can have Chip appear at our next regularly scheduled meeting on February 18, 1995. If we are able to meet with Chip tomorrow, I will send another fax.

However, I ask that everyone be in the Republican Caucus lobby area no later than 5:00p.m. tomorrow so that we will have time to discuss our presentation to Senator Bryant.

Very truly yours,



Robert J. Neuberger

RJN:ds

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Oregon Association
of Defense Counsel

February 9, 1995

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Senator Neil Bryant, Chairman
Senate Judiciary Committee
S401 State Capitol
Salem, Oregon 97310

Dear Senator Bryant:

On behalf of the OADC, this letter is sent to you as a representative of the committee hearing Senate Bill 385. Attached is a description of the OADC and a general statement adopted by the OADC Board which addresses issues contained in Senate Bill 385. It is the position of the OADC Board that matters pertaining to changes in the Oregon Rules of Civil Procedure (ORCP) should, pursuant to existing Oregon statute, ORS 1.725 through 1.750, be processed through the Council on Court Procedures. SB 385 proposes changes in the ORCP and as a matter of policy the OADC opposes legislative action on ORCP changes without prior review and recommendation by the Council.

Addressing SB 385 on the merits, the OADC expresses concerns with the following provisions of the first draft:

1. Offers of Compromise.

The OADC Board is supportive of the stated purpose to encourage defendants to make offers of settlement and to encourage plaintiffs to evaluate their cases prior to trial. The Board believes, however, that the proposal would not achieve the stated purposes, and may discourage settlement of cases. All trial lawyers know that the facts on which claims or defenses are made can and do change while an action is pending. For instance, a plaintiff's general back pain may be first diagnosed as a herniated disc after a lawsuit is filed. Likewise, a condition thought to be serious may be re-evaluated to a less serious condition as time progresses. The proposal does not allow for changes in circumstances after an offer is made.

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Under the proposal, as written, defendants would be motivated to make nominal offers of compromise immediately after every suit is filed. Defendants then would be disinclined to settle, believing that they may be able to recover attorney fees if the plaintiff does not prevail. In other words, cases may well be tried for issues related to attorney fees rather than the merits.

Oregon trial procedure does not incorporate a number of the time-consuming and expensive provisions contained in the Federal Rules of Civil Procedure, in particular, interrogatories. Nor does Oregon permit, as Washington does, depositions of expert witnesses prior to trial. As a result, Oregon's system does not require full disclosure prior to trial by either party of all of their evidence. The OADC would expect plaintiffs who receive such an offer of compromise to then send a letter in return asking the defendant to identify all witnesses, exhibits, etc. so that the offer can be evaluated. There would be no corresponding duty on the part of the plaintiff to make a similar disclosure. The courts could justifiably hold that a defendant had "unreasonably resisted efforts to obtain discovery" if a defendant did not fully respond to a plaintiff lawyer's request for all evidence so as to evaluate a settlement offer.

The OADC is concerned that while the statute as drafted benefits defendants only, that in later legislative sessions, substantial efforts will be made to make the statute reciprocal. The OADC believes that rights to attorney fees has a likelihood of discouraging settlements, or at least making cases more difficult to settle. At present, 95% of civil cases are resolved short of trial. If that percentage were to drop materially, the burden on the court system would be dramatically increased with delays and costs.

2. Mandatory Settlement Conferences.

The OADC Board supports the concept of mandatory settlement conferences, but believes that this concept has been implemented as far as practical in the circuit courts of the state at present. Those judicial districts that do not have

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mandatory settlement conferences do not because they do not have the judicial resources to conduct the conferences. Mandating judicial settlement conferences would strain already scarce judicial resources. Presently, between 95% and 98% of civil cases are disposed of short of trial. Mandatory settlement conferences, if requested by one side, may result in some additional settlements, but there is a concern by the OADC that it may come at a high price in judicial resources unless additional resources are made available through the judicial budget. Parties presently have available private mediation services at no cost to taxpayers.

3. False or Frivolous Pleadings.

ORS 20.105 now provides that courts may award reasonable attorney fees for frivolous claims or defenses. In the experience of the OADC Board members, this statute has been very seldom exercised because the problem does not exist. The OADC challenges the proponents to provide examples of situations where a court refused to exercise its discretion to award attorney fees under this statute. The proposed change seems to imply that the judiciary is not doing its job. The OADC Board believes that the judiciary has done its job and that the reason that there are few, if any, instances of awards under the statute is that there is little basis for asserting that frivolous claims or defenses are a problem in this jurisdiction.

Section 4 of SB 385 would expand upon the present Rule 11 of the Federal Rules of Civil Procedure regarding the effect of signing pleadings, motions or other papers and representations to the court. The OADC Board challenges the proponents to show material instances of abuses that are not adequately addressed under present Oregon law. The Oregon law in this area is ORCP 17. The OADC Board supports retention of the existing Oregon rule.

Claims for sanctions take judicial time and cost the litigants legal expense. Such claims lengthen the time to resolve cases and make cases harder to settle. The OADC believes that abuses in

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other jurisdictions are not present in Oregon and that the present Oregon system works and should be maintained.

4. Attorney Fees to Prevailing Party in Summary Judgment Actions.

The OADC Board supports summary judgment as an efficient means of resolving bona fide disputes. Many times disputes are solely questions of law and are submitted to the court on cross-motions for summary judgment. This is a recognized and effective way of getting a decision in areas where the law is in dispute. To provide attorney fees to the prevailing party who happens to resolve an action by summary judgment as opposed to trial, does not make sense. Presently, it is hard to get Oregon judges to grant motions for summary judgment. Defense attorneys believe that judges would be more reluctant to grant them if an attorney fee award was added to the consequences of a motion being allowed. If such a motion was not opposed or if what was done in opposition was frivolous, there is presently means to address that concern through ORS 20.105.

5. Award Attorney Fees to Prevailing Parties in all Contract and Tort Cases Seeking Less Than \$20,000.

This concept, on the surface, is attractive. Experience shows, however, that small cases can be just as expensive to process as larger cases. Small cases are now processed in many counties through court annexed arbitration to speedy, efficient results. To add attorney fees in these cases will incline the litigants to want to try the cases rather than settle them and would discourage settlement. Few small cases are now tried. If more were tried, there would be a heavy increase in the court workload and the entire docket would be affected. The availability of attorney fees would promote the filing of more small cases and increase case filings. The OADC opposes the proposal.

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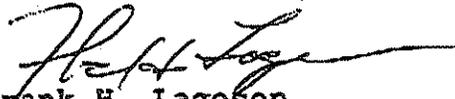
6. Modified Loser-Pay Rule.

It would be helpful if the proponents of this measure would explain why it is that claims against insurance companies are not included within the Bill. If the concept is truly to make the loser pay, then claimants against insurance companies who can presently recover attorney fees under 742.061 should have attorney fees awarded against them if they lose. The OADC Board inquires as to why that and other provisions presently providing for attorney fees to one party and not the other have been omitted.

In general, the OADC Board is against the adoption of the so-called English Rule for the reasons set forth in the article by Professor Herbert Kritzer in the November, 1992 American Bar Association Journal. A copy of that article is attached for your reference.

In summary, the OADC Board is in favor of maintaining access to justice and the present system of resolving civil disputes, utilizing jury trials. The OADC does not believe that adoption of a "loser pays" system is in the best interest of the public as a whole.

Respectfully submitted,


Frank H. Lagesen,
President

OADC

The Oregon Association of Defense Counsel ("OADC") is a voluntary group of approximately 500 lawyers throughout the State of Oregon, who primarily defend civil damage lawsuits brought against private citizens of Oregon, private businesses, professionals, and public bodies, some of whom are self-insured, while others are insured by private insurance companies.

This involvement of OADC in the legislative process results from a long-standing commitment of the OADC and its members to support or oppose legislation affecting the judicial system. Our objective has and continues to be that no legislation should be passed unless it will generally improve the judicial process, and not unreasonably increase the economic burden our citizens have to bear.

Neither the OADC, nor its members who will appear on our behalf, are paid by any client, insurance company, or otherwise to present information and testify before the legislature. In a number of instances, the OADC has and will continue to oppose ill-conceived legislation, even if it would generate additional lawsuits and therefore additional business for OADC members.

The OADC believes that legislation, especially that dealing with the judicial system, should be balanced and not benefiting a particular interest group to the detriment of the general welfare.

OADC members believe that the legislative process, especially as it relates to the judicial system, should not be a political one, nor one which is influenced by which group can spend the most money or make the most noise. Rather, it should be influenced by common sense, reasonable analysis, and the effect such decisions have upon all the citizens of Oregon.

OADC STATEMENT

DATE: February 9, 1995

TO: Joint Judiciary Committee Members

The OADC, through its members, represents defendants in civil disputes. The OADC believes that the present Oregon system for dispute resolution based on civil jury trials works well and should not be fundamentally changed. The much publicized problems of courts in other states do not exist in Oregon. Oregon dockets are kept current by the combined efforts of trial lawyers and the judiciary. This cooperative effort is reflected in the Council on Court Procedures which reviews, comments on and makes recommended changes in the Oregon Rules of Civil Procedure. The OADC supports processing all proposed rule changes through the Council. Procedural rules interrelate and a balanced workable set of procedural rules is necessary for the efficient resolution of disputes.

The OADC is in favor of constructive dialogue on ways to improve the present system, as long as any changes do not impair the right of all citizens to have their civil disputes resolved in a fair and efficient manner.

L E G A L F E E S

b y h e r b e r t m . k r i t z e r

Vice President Dan Quayle is not the first critic of the American legal system to look to England in search of reforms.

A cornerstone of the package of proposals to change the U.S. legal system being espoused by the President's Council on Competitiveness, which Quayle chairs, is adoption of the principle that fees and costs of litigation should be shifted to the loser—known as the English rule.

With his proposal, Quayle joins the line of critics who periodically have advocated a more "English" approach as a means of reining in the litigation excesses they perceive under the American rule, which requires each side to cover its own legal fees and costs.

Some proponents of the English rule—technically termed "cost- (or fee-) shifting or "indemnity for costs"—justify their support on grounds of fairness, while others view it as a vehicle for discouraging frivolous or questionable litigation.

Opponents charge that the English rule would inhibit individuals with meritorious claims from seeking compensation.

Surprisingly, however, neither side in the American debate over the English rule has bothered to consider how cost-shifting functions in jurisdictions that embrace it.

Even a minimal investigation into the working of the rule in the English legal system (which serves England and Wales; Scotland and Northern Ireland have separate legal systems) would reveal that many litigants are shielded from either the costs or the benefits, or both, that the cost-shifting principle theoretically creates.

These realities of the English rule raise key issues that must be considered in debates over whether the rule should be imported to the American civil justice system.

The theory of the English rule is uncomplicated: Whichever side prevails in a legal action is entitled to recover its reasonable litigation expense—court costs, legal fees and other expenses, such as expert witness fees—from the losing side.

In England, the loser pays the winner's legal costs even in settlements, regardless of whether a formal action was filed; the typical settlement agreement includes a statement as to what costs will be paid.

The application of the cost-shifting principle is much more complicated than the simple phrase "loser pays" implies. While most defendants, who tend to be institutional (either as named defendants or as insurers of defendants), are genuinely

at risk to pay costs if they lose, this is not true for plaintiffs, especially individuals.

The variation in applying the rule is closely linked to the mechanisms English plaintiffs use to finance litigation. One result is that, in many situations, a successful defendant will not be able to recover its litigation costs.

Only a fraction of plaintiffs in England actually confront a straight-forward cost-shifting situation. Those plaintiffs who are "privately funded" must pay their own solicitors (often on account, as actions progress) and are at risk for having to pay their opponents' solicitors if actions are unsuccessful. If the litigation is successful, privately funded plaintiffs are entitled to recover most of their costs from the losing sides.

When barristers are used in cases, the cost-shifting rule applies to their fees, as well. While contingent (or percentage) fees are not formalized in England, there is an informal quasi-contingent fee system under which an unsuccessful plaintiff's solicitor does not seek a fee from his or her own client, although the client still must expect to pay the winner's costs.

It is generally accepted that the English rule discourages privately funded parties from bringing meritorious claims. Patrick Devlin, a distinguished English judge, has observed, "Everyone knows, every lawyer particularly knows, that for the ordinary citizen unqualified for Legal Aid a lawsuit is quite out of the question."

(The leading civil procedure text for practice in Ontario, the Canadian province with a cost-shifting regime most similar to England's, asserts, "Our costs system means that in litigation the 'downside risk' [the costs of losing] is always substantial and its undoubted effect is to discourage much litigation including some that should go forward.")

In fact, at least in court actions involving personal injury, only about 40 percent of English plaintiffs are subject to the downside risk of the English rule, according to a 1986 study conducted for the Lord Chancellor's Department, the management arm of the English judiciary. The majority of plaintiffs avoid that risk through one of three means:

First, persons whose incomes and assets fall within the appropriate guidelines are eligible to have their legal costs paid by Legal Aid, a program funded by the government and administered by a board appointed by the Lord Chancellor's Department. Some Legal Aid participants are required to

SEARCHING FOR WINNERS IN A LOSER PAYS SYSTEM



The English rule appeals to its supporters as a mechanism for dealing with what some have described as an overly litigious American society.

pay part of their costs, but most pay little or nothing. An estimated 28 percent of personal injury plaintiffs receive legal aid.

Litigants who receive legal aid are not subject, except in rare cases, to the risks of the English rule. Outside of matrimonial cases, most litigants receiving civil legal aid are plaintiffs confronting institutional defendants, which cannot recover legal expenses even if they prevail (the justification is that these parties are better able to bear the costs than is the Legal Aid fund).

Second, other litigants avoid the downside of the English rule through their trade unions. Generally, unions provide both legal representation for their members and absorb litigation costs. Typically, unions limit funding to litigation

related to accident claims by their members. Most often, those claims are work-related, although many unions provide funding for injuries occurring outside the work setting.

About 29 percent of accident cases in England are pursued by solicitors retained by unions. If a claim is unsuccessful, the union pays both sides' legal costs; if the claim is successful, the claimant's union-retained solicitor is paid by the defendant.

Solicitors retained by the unions are generally regarded as extremely effective, in no small part because they do not have to worry about skittish clients who fear paying out substantial sums if their cases are unsuccessful.

The third method of avoiding the risks of the English rule is legal expense insurance. At present, only about 2 percent of all cases are pursued by persons with such insurance. Nonetheless, insurance makes a significant difference in how solicitors handle cases, primarily because clients need not be concerned about costs.

The division of the English legal profession into solicitors and barristers helps to explain how plaintiffs react to being at actual risk for litigation costs.

In England, solicitors are responsible for most of the pretrial preparation of cases, while barristers are responsible for trying cases. Barristers typically do not become involved in cases until trial dates are approaching.

Although some 40 percent of personal injury litigants are privately funded, it is the perception of barristers that they rarely deal with privately funded plaintiffs. This can only mean that either these types of litigants are more likely to reach settlements earlier or that they are more likely to abandon their cases if settlements are not reached.

While early settlements may be the result of generous offers, it is more likely that plaintiffs are inclined to accept whatever is offered to avoid the risk of cost-shifting.

To quote Judge Devlin again, the unassisted litigant "must take what is offered to him and be glad that he has got something."

Research on negotiation and settlement in England supports Devlin. Repeat player defendants take advantage of the risk aversion of privately funded, one shot plaintiffs by engaging in hard bargaining; defendants either refuse to make offers or make offers considerably

under the likely value of the case.

Further support for this conclusion is provided by a mid-1980s study of settlement negotiations in 220 High Court cases by Timothy Swanson of the economics department at University College in London. In only 53 percent of the cases studied in which plaintiffs were privately funded did defendants make settlement offers, compared to 6 percent of the cases with Legal Aid plaintiffs and 90 percent of the cases financed by unions.

These findings suggest that defendants use plaintiff concerns about costs as a strategic bargaining tool.

(A second study, unpublished, by Paul Fenn of the Centre for Socio-Legal Studies at Wolfson College of Oxford University, suggests that the tendency may be stronger in cases that already have evolved into litigation. Fenn's study indicates that the likelihood of an offer being made to privately funded claimants not yet in litigation was only slightly lower than for financial assisted claimants.)

Transplanting the English rule to the United States raises a number of important issues closely related to underlying differences between the two legal systems:

► Would an Americanized English rule include provisions to mitigate the loser-pays principle for some segments of the population?

England's extensive Legal Aid system provides a shield for one segment of its population, trade union funding covers another segment, and private legal expense insurance offers at least the potential of a shield for other segments.

In the United States, however, legal assistance is not generally available from either government or private sources for contingent fee cases, to which a cost-shifting rule would apply.

Moreover, the hardship imposed on American plaintiffs by the English rule would be compounded by the fact that the United States lacks the comprehensive social insurance system that provides English victims of injuries with extensive compensation outside the tort system.

► Are the disincentives of the English rule really so great if a potential plaintiff has a strong case? Vice President Quayle has argued that a loser-pays rule actually would enable persons to pursue strong claims that are not financially viable under the usual American contingent fee arrangement.

To evaluate that contention, im-

ine a person of moderate means who has suffered a loss of \$1,000. You, as his attorney, advise him that his case is very strong, virtually a sure winner at trial.

Under the English rule, you would explain that if your client wins, the defendant would have to pay your client's legal costs. You also would inform your client that, in the unlikely (perhaps one chance in 10) event that the other side won the case, your client would have to pay the other side's legal costs amounting to, say, \$5,000.

It is hard to imagine a typical risk-averse, one-shot plaintiff willing to risk \$5,000 to recover a \$1,000 loss, even at highly favorable odds. If the amount at stake were \$10,000 or \$25,000, most middle-income individuals still would be reluctant to put \$5,000 to \$10,000 on the line to pursue even a strong case.

► How would the English rule apply to cases decided prior to trial?

Under the rule, costs follow the event; that is, at any point at which some aspect of a case is decided, the costs associated with that particular decision are assessed to the loser. Quayle's proposal would apply this principle to discovery motions. Should the rule also apply to other pre-trial maneuvers typically made by defendants, such as demurrers, motions to dismiss or motions for summary judgment (which are largely unsuccessful)?

► Would the English rule extend to all reasonable costs incurred in prosecuting or defending a suit, including expenses for such items as expert witness fees, day-in-the-life videos and accident reconstruction models?

Under the American rule, only court fees are generally considered costs, while jurisdictions following the English rule typically include all three elements.

A striking characteristic of the American bar is its entrepreneurial spirit. There is nothing comparable in the English legal profession, which historically has been reluctant to seek out or develop new areas of practice or causes of action.

Particularly for routine cases with smaller damage amounts at issue, in which liability could be assessed with a degree of certainty, one might expect the American plaintiff bar to develop some type of mutual insurance system that would protect litigants from the downside risk associated with a case.

Under a reasonably pure fee-shifting system such as England's, the costs of legal expense insurance for individuals are generally quite modest because insurance is provided only against the costs of losing. These insurance systems employ case-screening procedures that effectively remove the doubtful cases.

If the English rule were adopted in the United States, similar schemes might be developed, perhaps including post-incident plans based on some percentage of the recovery.

► But what if it were the contingent fee lawyer, not his or her plaintiff client, who was at risk for costs? This could occur either through statutory requirements or by simply incorporating the risk for the other side's costs into standard contingent fee retainer agreements.

While the President's Council on Competitiveness has not floated such a proposal, it has been suggested in other quarters.

This type of cost-shifting arrangement probably would discourage speculative litigation that advances unique legal theories or new causes of action, thus dampening the entrepreneurial tendencies of the plaintiff bar. At the other extreme, the impact on more routine cases would depend on whether lawyers screened out weak cases.

If a significant proportion of cases filed are "frivolous," then putting the lawyers bringing them at risk for the other side's legal costs should reduce the frequency of such cases, because defendants who strongly believe they would win at trial would be less inclined to settle, and plaintiff lawyers would be reluctant to risk pursuing cases to trial.

On the other hand, the ability to recover costs as well as damages from defendants should encourage plaintiff lawyers to take on the kinds of smaller cases that are not as attractive under the contingent fee system.

Since routine cases far outnumber the more speculative cases, this type of modified English rule would almost certainly increase the amount of litigation.

A ctually, this type of modified English rule potentially could work to the financial benefit of plaintiff lawyers.

Under this system, lawyers could distinguish between the commission, (the percentage of the recovery they receive from their clients), which would cover the risks and costs of handling cases, and an hourly fee



To opponents,
the rule is a
nightmare that
threatens to
deny many victims
their rightful
compensation
and put many
lawyers into
financial
crisis.

they would receive from losing parties in the cases.

There should not necessarily be a reduction in the commission paid out of a client's recovery simply because the defendant is required to pay the winning lawyer a reasonable hourly fee. The combination of the commission and the fee could cover an extended package of services provided by the lawyer to the plaintiff, including paying the defendant's costs on behalf of the plaintiff in a losing case and absorbing the plaintiff's expenses.

Critics might argue that this would constitute a windfall for plaintiff lawyers, but that would occur only rarely, particularly if cost-shifting were simply a part of the negotiated settlement in cases that do not go to trial.

Since going to trial is a money-losing proposition in most contingent-fee cases, combining some level of fee-shifting with a percentage commission probably would represent a fair fee in most tried cases. The potential for excessive fees would exist only for the small segment of very large cases, in which fee amounts are already considerable.

Assuming that contingent fee lawyers would act in a risk-neutral fashion, this Americanized English rule would favor smaller, routine causes of action that are not currently economically viable for most plaintiff lawyers at the expense of more speculative cases, in which the amounts at risk are large and the probability of success much harder to predict.

One of the most complex issues arising from the possible implementation of a form of the English rule in this country involves the process of setting amounts of legal costs to be paid by losing parties.

While legal fees and costs are now determined privately between lawyers and their clients, greater consideration would have to be given under a cost-shifting principle to the underlying reasonableness of those

fee arrangements.

Should there be a single fee rate for particular types of legal services, or should rates vary depending on the experience and skills of lawyers, or the nature of the cases?

In its proposal, President Bush's Council on Competitiveness seeks to finesse one aspect of the costs equation by making one side's liability equal to its own expenditure of time. In other words, if party A lost the case, its liability to party B would be limited to the amount of time that party A spent on the case, multiplied at some hourly rate.

This seemingly simple solution is fraught with difficulties: What constitutes the time spent on the case? Should it include time spent in settlement negotiations? How should time spent by support staff be calculated (and what if a lawyer did work that could have been done by a paralegal)?

Significant litigation over fee-shifting standards would be inevitable to resolve these issues.

Another question: Who would hear disputes over fees to be shifted?

Judges in England do not handle routine disputes over fees; rather, they are handled by taxing masters or registrars (roughly equivalent to magistrates or court commissioners

in the United States).

However, American courts are generally not structured to include that type of intermediary process. As a result, judges would likely experience a significant impact from tackling the extensive litigation that would arise over setting even routine legal fees and costs.

Establishing standards for legal work in litigation, and for the fees that can be charged, may have potential benefits, even in the absence of a fee-shifting system. However, such standards cannot exist without substantial costs, both to the system and to litigants themselves.

Viewed from afar, the English rule appeals to its supporters as a mechanism for dealing with what some have described as an overly litigious American society. To its opponents, the rule is a nightmare that threatens to deny many victims their rightful compensation and put many lawyers into financial crisis.

The truth is that these hopes and fears about the English rule have some validity.

Supporters and opponents of the rule must look beyond simple images and analyses as they grapple with the complexities that such a fundamental change would bring to the American justice system.



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...FROM
DOWN
UNDER**

Lawyers from Australia will be convening with North American colleagues next January (10-17) at the Chateau Whistler Resort, Canada. The conference is on *PROFESSIONAL & BUSINESS DEVELOPMENT STRATEGIES FOR LAWYERS* and will be addressed by speakers from the USA, Canada and Australia.

Seize this opportunity to expand your practice. For details, contact Michael Horton on Ph: 61-2-929-7094; Fax: 61-2-925-0039 or write to Lex Tech Pty Ltd at level 20, Miller St, North Sydney, NSW, 2060 AUSTRALIA.

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M E M O R A N D U M

TO : SPECIAL JOINT SUBCOMMITTEE OF THE SENATE AND HOUSE
JUDICIARY COMMITTEES

FROM : OREGON STATE BAR PROCEDURE & PRACTICE COMMITTEE

RE : TORT LEGISLATION - SB 385

DATE : February 19, 1995

The Procedure and Practice Committee is a committee of the Oregon State Bar that has been charged with the responsibility of studying and making recommendations regarding procedures governing civil cases in Oregon. Under the guidance of the Bar's Board of Governors Public Affairs Committee, this committee is responsible for appearing before legislative committees regarding recommended statutory changes that affect procedural rights, statutes that affect the evidence code, uniform trial court rules, and local court rules. The Chair of the Senate Judiciary Committee has specifically requested that the Procedure and Practice Committee study and report on the legislative proposals pending before the Special Joint Subcommittee of the Senate and House Judiciary Committees on Civil Process.

The Procedure and Practice Committee is composed of lawyers from diverse areas of practice, geographic location, gender, and length of practice. We appreciate the special invitation extended by the Joint Subcommittee and the opportunity to report our findings.

SB 385

We oppose SB 385 as being unnecessary and detrimental to the civil rules and procedures presently in place. However, as requested by the Subcommittee, IF SB 385 is to be passed, we offer the following analysis, in hopes that any rules that are enacted operate properly and avoid unintended consequences. Our committee's purpose is not to criticize the proponents or drafters of the SB 385. We hope that the Joint Subcommittee and the proponents of SB 385 will accept our analysis in the spirit in which they are offered.

Notwithstanding our overall opposition to SB 385, we support the concept of strengthening the sanctions regarding frivolous suits, defenses, motions, and appeals; and the enactment of a rule regarding settlement conferences. We are opposed to the remaining provisions of SB 385 for the reasons stated below.

Oregon has an enviable record in successfully dealing with, and discouraging, frivolous filings. Many of the publicized problems found in other states do not exist in Oregon. Nonetheless, the Procedure and Practice Committee believes that the proposed amendments to Rule 17 (SB 385, Section 4) would make it clearer to lawyers and litigants alike, that frivolous lawsuits, defenses, motions and appeals are unwelcome and will not be tolerated in Oregon.

We believe that these issues should first be considered by the Council on Court Procedures who have the benefit of expertise of a cross section of the state judiciary, as well as members from

private business and legal practitioners. Because of the diverse backgrounds represented, the Council is well equipped to deal with these complicated procedural issues. Referral to, and thorough consideration by the Council is particularly important to preventing unintended consequences.

FRIVOLOUS PLEADINGS

The Procedure and Practice Committee supports the philosophy and intent of the amendments to ORCP 17C: tough sanctions for frivolous lawsuits, defenses, motions, and appeals (SB 385, Section 4). Our committee, however, offers the following suggestions and amendments:

1. Subsection C(1) of the amendment (i.e. SB 385, §4 C(1); "Certifications to Court") currently provides that: "certifications are based on the person's best knowledge, information, and belief, formed after making all inquiries that are reasonable under the circumstances." It is our concern that the modifier "best" in the amendment will present problems of enforcement and interpretation. It appears to create strict liability. The proposed Subsection C(1) goes on to use the standard of "reasonable under the circumstances" test, which is found throughout the law. The committee recommends that the word "best" be stricken from SB 385, §4 C(1), page four, line 33 and be replaced by the phrase "reasonable knowledge, information and belief, formed after making a reasonable inquiry under the circumstances". This standard will allow the parties, the lawyers, and the court to

use the benefit of well-developed case law and experience regarding "reasonableness";

2. As drafted, SB 385, §4, Subsection C(4) creates a dangerous loophole to the general requirement that a lawyer or party certify that a pleading is properly grounded in fact and law. As currently proposed, the subsection would permit a party or attorney to state that they are not willing to certify that a particular assertion is supported by evidence, but that the assertion will ultimately be supported by evidence after further investigation and discovery. We are concerned that this subsection could lead to an abuse, in the form of regular use and overuse of subsection C(4). That is, the loophole will swallow the rule. Accordingly, the subsection should be deleted. One possible solution is to incorporate the language of ORS 30.895(2). That statute provides an exemption to liability for misuse of civil proceedings where a party is required to file a pleading because of time limitations. This statute gives a party and lawyer 120 days to investigate and then either re-plead or withdraw the pleading without incurring sanctions;
3. SB 385, §4 Subsection D(1) ("Sanctions") contains a joint liability clause. While the Procedure and Practice Committee is not opposed to joint liability, lawyers should not be subjected to a special standard. The Joint Subcommittee is considering other legislation regarding vicarious liability and joint and several liability. Whatever standard the

legislature adopts for society in general, should apply in Rule 17 (SB 385 .54);

4. One of the great concerns regarding stiffer standards and penalties for frivolous pleadings, historically, has been the fear that such laws would lead to unnecessary and frivolous motions for sanctions. Such filings would clog the dockets of the courts, resulting in less time for litigants with meritorious cases and slow the resolution of all cases. A reciprocal attorney fee amendment may discourage the proliferation of unwarranted Rule 17 motions.
5. Currently, before ORCP Rule 21, 23 and 36 through 46 motions are filed, the moving party is required to meet and confer with the other party in hopes that the issues can be solved without court intervention. (UTCR 5.010) We suggest that along with the meet and confer requirement, ORCP 17 D (3 or 5) be amended to require service upon the opposing attorney, of a statement of particular facts and specific points and authorities in support of any future sanction motion. If a sanction motion is later filed with the court, the moving party may not raise new issues or facts which were not addressed in the statement of particular facts and specific points and authorities.

OFFERS OF COMPROMISE

We are unanimously opposed to the attorney fee provisions of SB 385. However, it is our belief that IF changes are made to enact the right to attorney fees in all or most civil matters, the

place to make such changes is in ORCP 54 E. The reason for this belief is that attorney fees should only be awarded after ALL parties have had an opportunity to conduct discovery on the issues presented in the lawsuit. Generally, personal injury suits are not filed until close to the running of the statute of limitations, two years after the injury occurred. In contract cases, the law allows the filing of a lawsuit anytime within six years after the breach. If the loser pay statutes are enacted, the attorney fees incurred by the Plaintiff for up to six years before an action has been filed against the Defendant will be considered recoverable under the loser pay provisions. It is our belief that §1 of SB 385 will not promote early settlements. In contrast, it will promote the early and continued expenditure of attorney's fees by one or more of the parties.

IF the legislature intends to enact an attorney fee provision to ORCP 54 E, the following amendments are necessary to prevent unwanted consequences. Some of the amendments are consistent with statements made by SB 385 proponents on February 2, 1995. Other amendments are intended to give the courts adequate room to tailor application of amended Rule 54 to the parties and their conduct. These amendments reflect a distinction between frivolous and meritorious cases. Rule 17 will deal harshly with, and impose severe sanctions against litigants and lawyers who file frivolous court papers. Such harshness is not appropriate when dealing with meritorious cases. The amendments proposed below are intended to

assure that the remedies imposed are appropriate to the circumstances:

1. The proposal (SB 385, §1, E) should be made reciprocal. Where a plaintiff makes an offer of compromise, a defendant rejects the offer, and the plaintiff obtains a judgment more favorable than the offer, defendant should be liable to the plaintiff in the same manner that a plaintiff who does not do better than a defendant's offer of compromise;
2. The restrictions upon the court granting extensions of time, and the grounds for which the court can grant extensions, should be deleted. The court should be able to exercise its reasonable discretion in determining the amount of time and the reasons for granting an extension for a party to respond to an offer of compromise;
3. No party should be responsible for a prevailing party's reasonable expert witness fees. To enact such a rule would promote the early involvement of experts which will not necessarily promote settlement, but will increase litigation costs and delay;
4. Any offer of compromise that has fee shifting implications should be allowed only after both sides have adequate information to make a reasonable evaluation of the case;
5. A cut-off date for offers of compromise should be included to prevent last-minute offers of compromise falling on the eve of trial. That is, an offer of compromise should be made sufficiently before trial to allow for settlement before fees

and expenses associated with immediate pretrial preparation are incurred. We, therefore, recommend that an offer of compromise not be allowed to be made later than that which would prevent the opposing party from making a timely response, well in advance of trial. Accordingly, we suggest that no offer of compromise shall be made within 30 days before trial and the time to respond to an offer of compromise be shortened to 14 days. We agree that the three day response time in the current ORCP 54 E is too short. However, 14 days rather than the proposed 30 days, is sufficient to afford a party the opportunity to evaluate and respond to the offer;

6. The proponents of SB 385 testified that they model their proposal upon Alaskan law. They also testified that they did not oppose caps on attorney fees. Accordingly, IF the legislature is going to amend the ORCP 54 E to allow for recovery of attorney fees, we recommend amendments to SB 385 based upon Alaska Rule 82(a) and (b) regarding caps on attorney fees as well as factors that the court should consider in determining the amount of attorney fees. In addition, we recommend that additional factors be added to those listed in the Alaska Rule of Civil Procedure, 82(b)(3). The factors listed in Alaska Rule 82(b)(3) are as follows:

- "(A) the complexity of the litigation;
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorney's efforts to minimize fees;
- (F) the reasonableness of the claims and defenses pursued by each side;

- (G) vexatious or bad faith conduct;
- (H) the relationship between the amount of work performed and the significance of the matters at stake;
- (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
- (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and
- (K) other equitable factors deemed relevant."

Our suggested additional factors are as follows:

- a. The factors contained in the statement for attorney fees in the Oregon Uniform Trial Court Rules;
- b. The parties' conduct that gave rise to the subject of the litigation. In other words, the court should be able to consider that a party committed a crime or similar bad act in fixing the amount of the attorney fees (e.g., drunk drivers and defendants who sexually molested their victims should not be entitled to the same attorney fees as a typical prevailing defendant); and
- c. The conduct of the parties with respect to the litigation, both before and after suit was filed. That is, the court should consider whether the non-prevailing party was cooperative, acted professionally, and acted reasonably. For example, the court should be able to consider whether a non-

prevailing party unnecessarily prolonged the trial or conducted vexatious discovery. The court should also be able to consider whether the party negotiated in good faith. That is, a party that was willing to settle consistent with the settlement judge's recommendations should not face as heavy an award, if any, of attorney fees as a party that did not.

Notwithstanding these guidelines, we do not believe that an award of attorney fees, is appropriate in every case. Nor do we believe that an attorney fee cap on attorney fees will solve the effect of the current bill in every case;

7. As currently drafted, the offer of compromise proposals apply to all civil cases. The legislature should expressly exempt family law and class action cases from the attorney fee amendments of ORCP 54 E; and
8. We also recommend the deletion of the last sentence added to Rule 54 E. (SB 385, Section 1 E). We agree that the amount of attorney fees should not be considered in determining whether a party received a judgment more favorable than their offer of compromise. However, this is already the law in Oregon. In fact, Oregon law currently allows a party making an offer of compromise to state whether or not the amount offered includes costs, disbursements, and attorney fees. We recommend that this useful feature of Oregon law not be affected. This is

best accomplished by deleting the last sentence that the proponents would add to Rule 54 E.

SETTLEMENT CONFERENCES

The committee supports the adoption of ORCP 54 regarding settlement conferences. We are concerned, however, that the proposal does not go far enough. The proposal could be improved by giving the court authority to order that institutional or corporate parties, have the person or persons actually available who are responsible for deciding settlement issues. It would also be helpful to give the court authority to compel attendance at the settlement conferences, of lienholders such as workers' compensation carriers and health insurers, at the parties' request.

ENGLISH RULE - LOSER PAYS

We understand the frustrations of people who feel that they are the victims of a frivolous claim or defense. However, historically the English Rule (ie. loser pays) creates many problems and fails to solve the problems its proponents intend. In 1980, the Florida Medical Association convinced its state legislature to adopt the English Rule by arguing that it would discourage the filing of cases and that it was fair to require the losing party to make the winner whole. Five years later, the Florida Medical Association returned to the state legislature asking that the statute be repealed because the English Rule had been so detrimental. Litigation costs had risen. The Florida Legislature complied with the request and repealed the English Rule statute in 1985.

Even England is unhappy with the rule. Respected conservative and pro-business commentators have urged repeal in Britain because the rule is a drain on public assistance programs and perpetuates big government programs such as legal aid and the welfare state. In England, families with annual income of \$45,000 qualify for legal aid and are thus protected from personal liability under the English Rule. In the United States, legal aid is not available in personal injury claims. Individuals with annual incomes of over \$7,200 and families with incomes over \$14,500 are not eligible for legal aid.

We have been unable to find any evidence to support the view that the adoption of the English Rule would fare any better in Oregon regardless of whether it is limited to small cases or adopted as a part of ORCP 54.

Section 6 of SB 385 is particularly unnecessary in cases under \$20,000. In most Oregon counties, such claims are diverted into mandatory arbitration programs. Further, some counties are utilizing court annexed mediation to resolve these small cases without the need for either arbitration or trial. Thus, the courts are making great strides in achieving the goals that the proponents seek. In addition, the litigants with the assistance of their attorneys are increasingly using voluntary private mediators for claim resolution, both before and after the claim has been filed. Private mediations are particularly effective, in part, because the parties have a vested interest in reaching a resolution, as they are incurring a shared cost of the mediator.

In conclusion, Sections 6 and 7 of SB 385 regarding attorney-fee awards in small actions are not necessary. The amendments to Rule 17 will adequately serve the intended purpose of Sections 6 and 7. In addition, small cases already contain the greatest built-in incentives to settle. That is, the amount in controversy is small and the risk of incurring significant attorney fees and litigation expenses on each party's behalf, is great. Thus, the parties already have a significant incentive to settle. In fact, over 90% of such cases which are filed, settle. Further, a significant number of such small claims are settled before a lawsuit is filed. These built-in incentives exist even where a party is represented on a contingent fee basis. For example, a party that has suffered property damage already stands the risk of incurring significant legal expenses which are not contingent. The plaintiff is responsible for its own litigation costs regardless of the outcome of the case. Most of these costs cannot be recovered from the defendant, even with a successful verdict. Such a plaintiff also runs the risk of not being compensated for the loss it has already suffered. Thus, a plaintiff who has retained counsel on a contingent fee, is still the real party in interest both legally and practically. Small cases need the least extra incentive of any type of case to be settled. The additional requirement of settlement conferences will also encourage earlier settlements without the need for adoption of the English Rule.

We also oppose Section 7, which would repeal ORS 20.080 and 20.098.

RECIPROCITY OF STATUTORY ATTORNEY-FEE AWARDS

The adoption of Sections 8 through 138 amending 130 separate attorney-fee statutes should be analyzed on a case-by-case basis. The proponents of SB 385 categorized the existing attorney-fee statutes into three categories:

1. Statutes that currently award attorney fees in favor of the government when it is a prevailing party;
2. Statutes that allow the award of attorney fees in favor of a particular type of business in specified cases; and
3. Statutes providing for an award of attorney fee to consumers, crime victims, and certain disadvantaged persons in specific cases.

We have great concern about a wholesale making of the third class of statutes reciprocal. Each of these statutes were passed to level the playing field regarding a disadvantaged group of persons, or to make a particularly culpable class of wrongdoers in a particular case liable for attorney fees.

We are also concerned that a wholesale and indiscriminate amendment of statutes that provide a right of attorney fees to various individuals, will have unintended and unwanted consequences. For example, some of the statutes currently provide for an award of attorney fees against a criminal and in favor of the victim of a crime. Making statutes reciprocal would place the legislature and the State in the curious position of appearing to support criminal and other reprehensible conduct.

MISCELLANEOUS ATTORNEY-FEE PROVISIONS

As previously discussed, the amendments to Rules 17 will more than adequately clamp down on the rare frivolous filing, and will promote the fair and efficient resolution of meritorious cases. SB 385 contains a number of amendments to specific statutes and rules that become redundant and dangerous once Rule 17 has been amended. Accordingly, the Procedure and Practice Committee recommends that these miscellaneous provisions contained in SB 385 §1 subsection D(2) §2, and §3 either not be adopted or that they be severely limited.

A. Previously-Filed Actions

Section 1, subsection D(2) of SB 385 would amend Rule 54 D by adding a new provision to cover lawsuits that have been filed after the same subject matter had previously been the subject of the lawsuit that had been dismissed on its merits and with prejudice. The members of our committee have been unable to find any real-life examples of this problem, and believe it to be a rare occurrence. The only example that we could imagine is a situation that could come back to haunt well-intended business litigants. Under the doctrines of issue and claim preclusion, parties sometimes later find out that a settlement or judgment in an earlier case precludes suit in a related matter. The doctrines of issue and claim preclusion (also known as res judicata and collateral estoppel) are quite complicated. The proposed rule would set an unnecessary trap for litigants who are acting in good faith.

B. The Willful Disobedient Statute

Section 2 of the bill would amend ORS 20.105 to make an award of attorney fees in certain limited circumstances mandatory instead of discretionary. Section 2 would also delete an important limitation in the law that the court should award reasonable attorney fees that are "appropriate in the circumstances." The committee vigorously opposes the amendment that would delete the language "appropriate in the circumstances." Instead of amending ORS 20.105 as proposed, the joint subcommittee may want apply amended Rule 17, revised by our proposals.

C. Summary Judgments

Section 5 of SB 385 would amend ORCP 47 to make an award of attorney fees, expert witness fees, and all costs attributable to discovery available for a prevailing party who filed or won a summary judgment motion. We recommend that the entire proposal regarding summary judgments be stricken. The issue will more than adequately be taken care of by the amendments to Rule 17.

Summary judgments are just one of the many ways in which a case can be brought to a conclusion. Singling out summary judgments will have a deleterious effect on the civil justice system. Litigants and lawyers would be wrongly motivated to file motions for summary judgment, the vast majority of which will be denied, and many of which may be frivolous. These additional filings will impose a significant burden on the available time of the courts, resulting in delay in the court's other dockets. Such a flood of summary judgment motions is not to be encouraged, and

will cost the courts and parties much in the way of added delay and expense. In a close case, a court may deny a motion for fear of burdening a reasonable party with attorney fees. The denial of a motion for summary judgment is generally not reviewable on appeal.

In the last ten years, the bench and bar have strived to educate one another about the appropriate and inappropriate uses of summary judgment. Those efforts have largely been successful. The proposed amendments contained in SB 385 will unnecessarily increase litigation costs, delay, and likely encourage the filing of unnecessary and frivolous pleadings. We do not believe that summary judgments deserve this encouragement. We therefore oppose the amendments in Section 5 of SB 385. However, IF the joint subcommittee intends to enact ORCP 47 I, the proposal should be made reciprocal so that a party who files but loses a motion for summary judgment, will be responsible for the opposing party's attorney fees and costs.

We also strongly urge you to delete the ability of the court to award "expert witness fees" and "all costs attributable to discovery." Providing expert fee awards is especially unwarranted in light of the provisions of ORCP 47 E. ORCP 47 E allows a party's attorney who is opposing a motion for summary judgment to submit an attorney affidavit setting forth what the attorney believes his/her expert would say in response to the motion for summary judgment. This attorney affidavit obviates the need for an affidavit from the actual expert. In such a case, expert fees should not be awarded.

CONCLUSION REGARDING SB 385

We unanimously oppose SB 385. While we agree with the goals of discouraging frivolous filings and encouraging speedier resolution of lawsuits, we are concerned that many of the provisions of SB 385 paint with too broad a brush. Notwithstanding our opposition, and pursuant to the request of the subcommittee, we have analyzed SB 385. However, the points that we have made in our analysis do not cure the fundamental defects in SB 385.

SB 385 will result in significant clogging of court dockets. The courts' time would be diverted from other necessary duties, such as criminal cases and meritorious civil cases. Oregonians currently enjoy perhaps the speediest civil docket in the country. The ability of the courts to push cases to trial is perhaps the single most effective encouragement towards settlement. A delay in the time between filing and trial creates a delay between the time of filing and settlement. These delays will cause significant costs, not only to the litigants but also the courts and the public. We are particularly sensitive to these concerns because additional court time will be required to deal with criminal cases in view of the passage of Measures 10, 11 and 14.

Chair
Senator Neil Bryant
Vice Chair
Senator Randy Miller

Members
Senator Ken Baker
Senator Jannett Hamby
Senator Peter Sorenson
Senator Dick Springer
Senator Shirley Stull



Staff
Bill Taylor,
M. Max Williams, II,
Co-Counsel
Diane Dussler
Danika Snyder
Dar Woodrum

SENATE JUDICIARY COMMITTEE

S401 State Capitol
Salem Oregon 97310
(503) 986-1640

AGENDA

**Senate Subcommittee on Civil Process
House Subcommittee on Civil Process
Work Session on Senate Bill 385 and 386
February 20, 1995
3:30 PM**

Post-It Fax Note		7671	
To	Henry Hildebrand	Date	2/17
Co/Dept		From	M. Williams
Phone #		Co.	
Fax #	946-1564	Phone #	986-1640
		Fax #	986-1699
		# of pages	1

3:30 PM

I. Open work session on SB 385

1. Testimony of Attorney General Kulongoski (15 Minutes)
2. Testimony of the Oregon State Bar Committee on Civil Practice and Procedure (20 Minutes)
3. Testimony of the Council on Court Procedures (20 Minutes)
4. Testimony of the Oregon Association of Defense Counsel (10 Minutes)
5. Testimony of Professor Edward Brunett (5 Minutes)
6. Testimony of the Honorable Donald Londer (5 Minutes)

II. Open work session on SB 386

STOEL RIVES BOLEY JONES & GREY

M E M O R A N D U M

February 21, 1995

TO: LITIGATION SECTION LEGISLATIVE SUBCOMMITTEE MEMBERS
FROM: GREGORY R. MOWE *GRM*
RE: Senate Bill 385

Enclosed please find a copy of the Litigation Section Report as presented to the Joint Judiciary Committee on February 20.

GRM:kw
Attachment

OREGON STATE BAR LITIGATION SECTION REPORT

ON

SENATE BILL 385

A. Introduction and Overview.

SB 385 significantly modifies existing Oregon substantive and procedural law relating to awards of attorneys fees, sanctions, summary judgment, offers of compromise and previously dismissed actions. The Litigation Section generally opposes the Bill as drafted, reflected in the specific comments which follow. The Section also offers the following overview of the issues raised by Senate Bill 385:

1. The Oregon Civil Justice System functions reasonably well. Oregon civil filings have not increased dramatically in recent years, and cases move promptly to resolution (generally within one year of filing). An increasing number of civil disputes are settled through court and private mediation.
2. The Council on Court Procedures is uniquely qualified to consider and propose changes in procedural rules. As reflected by the specific comments below, the Section believes that Senate Bill 385, as currently drafted, may have unintended consequences in many instances of increasing rather than decreasing litigation activity and costs. Deliberative review of the proposed legislation by the Council on Court Procedures would reduce the likelihood of such inadvertent impacts.
3. SB 385 contains some positive ideas. Modification of the sanctions provisions of ORCP 17 to more closely comply with Fed R Civ P 11 is in general a reasonable approach to attorney misconduct. The proposed amendment to amend ORCP 54 to authorize a court to order settlement conference is a positive change.
4. Some of the provisions of the Bill, primarily the proposed amendment to ORCP 47, relating to summary judgments, could well have an unintended effect of encouraging the proliferation of litigation. Summary judgments are not appropriate to resolve factual disputes and are rarely granted in Oregon state courts. However, the opportunity for fee shifting in a case in which attorneys fees are not otherwise recoverable would encourage the filing of summary judgment motions even with a low probability of success.
5. The provisions of the Bill providing for reciprocal attorneys fees raise significant issues of access to justice. The Section has no objection to attorney fee reciprocity in a

number of instances, but does have substantial concern about amendment of the statutes providing attorney fees and other remedies to consumers, employees and other individual subject to comparative economic or social disadvantage. While reciprocal fee shifting may deter some frivolous litigation, it will also chill meritorious litigation. Low and middle income consumers will be understandably reluctant to pursue even the most meritorious claim if there is even a slight risk of financial ruin through an open-ended liability for a corporate defendant's attorneys fees. Concerns for deterring frivolous litigation can more equitably be addressed through amendments to ORCP 17.

6. Notwithstanding our Section's general opposition to "loser pays" legislation, it is our belief that if changes are to be made with respect to attorney fee shifting, the appropriate place to make such changes is in ORCP 54E. Any amendment to ORCP 54E to provide fee shifting, however, should be made reciprocal to allow either party to invoke an offer of compromise, and should be tempered by an attorney fee cap or judicial discretion to limit fee awards.

7. To the extent that SB 385 seeks to encourage settlement and reduce litigation expense, the Section believes that amendments to ORCP 54 are more likely to accomplish such result than a general "loser pays" rule. The reason for this is that ORCP 54, if amended, will require a settlement offer as a condition for an award of attorneys' fees. A general "loser pays" rule, on the other hand, may actually make settlement more difficult, as the impact of a potential award of attorneys' fees tends to drive the parties' settlement positions farther apart. Additionally, in those instances in which the parties have a disparity in economic bargaining position (as in the case of a consumer and an insurance company or financial institution), the economic risk of an adverse attorneys' fee award tends to increase over the course of the litigation. The economically stronger party could thus rationally delay a settlement offer, or make none at all, in order to maximize its economic leverage.

B. Specific Comments.

1. Section 1.

Section 1 of SB 385 proposes several amendments to ORCP 54. The first amendment, to ORCP 54D(2), requires payment of attorneys fees upon refiling of a claim previously dismissed with prejudice. Since a dismissal with prejudice normally operates as a bar to a further action on this same claim, the intended operation of this amendment is not clear. The Section does not oppose this amendment, but would oppose any extension of mandatory attorneys fees to dismissals without prejudice,

since not all dismissals are the result of dilatory conduct on the part of a plaintiff.

The second major proposed change to ORCP 54 is in the offer of compromise language contained in ORCP 54E. The most significant substantive amendment to ORCP 54E is a provision granting a defendant recovery of reasonable attorneys fees and reasonable expert witness fees incurred after the date of an offer if the claimant does not recover a judgment more favorable than the offer. The Section interprets the proposed amendment to allow an award of attorneys fees to a defendant even in cases in which attorneys fees would not otherwise be recoverable by either party.

We believe ORCP 54E, as amended, will adversely impact access to our courts by Oregon citizens, and about fairness of the non-reciprocal aspect of the Bill as currently drafted, in that a defendant can trigger fee shifting in a non-attorneys fee case against a plaintiff which fails to accept a reasonable settlement offer, but a plaintiff would not have the same opportunity. The Section also believes that the practical benefits of the amendment to ORCP 54E would be enhanced by allowing a claimant as well as a defendant the opportunity to make an offer of compromise. A claimant's offer would simply be in the form of a mirror image of a defendant's offer (i.e., an offer to accept an entry of judgment in favor of the claimant and against the defendant for a specific amount), with the same potential for fee shifting if the defendant failed to obtain a more favorable judgment at trial.

The Section also believes that attorney fee liability should be tempered in order to discourage over-lawyering of cases, and to lessen the likelihood of catastrophic impact on a lower or middle class litigant who in good faith fails to improve on a settlement offer. In this regard, the protections of Alaska Rule 82(a) and (b) appears to be reasonable (presumptive award of 20 or 30 percent of actual attorneys' fees, subject to variation by Court upon consideration of a number of factors, including efforts to minimize fees, reasonableness of claims and defense pursued by each side, and vexatious or bad faith conduct).

The Section opposes recovery of expert witness fees under ORCP 54E. Such fees are not usually considered recoverable costs, and we see no reason to single out such fees for non-uniform treatment under a single procedural rule.

SB 385 also moves up the latest date of an offer of compromise from 10 days prior to trial to 30 days prior to trial. The Section has no substantive objection to an earlier deadline, but does note that it may reduce a defendant's flexibility in timing of offers. The proposed amendment also

allows the offer to be accepted within 30 days after the time it was made. This change creates an internal inconsistency in the rule, which currently requires that an offer be accepted and filed in court within three days of service. Allowing an offer to remain open for 30 days (particularly if the offer is made 30 days prior to trial) may also be contrary to a goal of reducing litigation expense. An intermediate period of ten to 15 days would appear to be a reasonable compromise, at least for offers made late in the litigation.

The final proposed change to ORCP 54 is a new Section F providing for settlement conferences at any time at the request of any party or on the court's motion. The Section supports this proposed amendment.

2. Section 2.

Section 2 amends ORS 20.105 to provide a mandatory award of attorneys fees as a sanction for bad faith claims. The Section does not oppose this amendment.

3. Section 3.

Section 3 amends ORS 20.125 to require imposition of attorneys fees against an attorney who causes a mistrial through deliberate misconduct. The Section does not oppose this amendment.

4. Section 4.

Section 4 amends ORCP 17. Many of the proposed changes track with Fed R Civ P 11. The Section does not oppose the proposed change, but believes that certain further amendments are in order. First, some consideration should be given to the special circumstance in which an attorney is required to file a civil action immediately prior to expiration of a statute of limitations. ORS 30.895(2), relating to wrongful use of civil proceedings, permits a 120 day period for further investigation and evaluation of a claim if the lawsuit was filed within 60 days of running of the statute of limitations. This situation could be addressed by modifying the proposed text of ORCP 17D(3) to allow a period of time greater than 21 days (perhaps 60 or 90 days) for amendment or withdrawal of a pleading if the pleading was initially filed within 60 days of running of the statute of limitations.

Second, the Section has some concern that the sanction procedure of proposed ORCP 17D will encourage proliferation of sanction motions. Although Oregon state and federal courts have generally been successful in maintaining civility among litigants, sanctions litigation under current Fed R Civ P 11 has proliferated and assumed a life of its own

in many federal courts. A reciprocal attorneys fee provision on sanction motions would tend to discourage casual filing of such motions.

Third, the Section is concerned about two aspects of certification of pleadings under proposed ORCP 17C. A requirement that certifications be based on "best" knowledge, information and belief presents problems of enforcement and interpretation. On the other hand, subsection C(4) creates a loophole which allows a party or an attorney to avoid certification entirely. This loophole could easily swallow the rule. A possible solution would be to replace the word "best" with the word "reasonable" in subsection C(1), and delete the certification exception from subsection C(4). Harshness remaining in subsection C(4) could be moderated by amending the first sentence to read as follows:

"A party or attorney certifies that the allegations and other factual assertions in the pleading, motion or other paper are supported by evidence, including reasonable inferences therefrom."

5. Section 5.

Section 5 of SB 385 would amend ORCP 47. It requires a court to award costs, attorneys fees, and expert witness fees for a party which prevails on summary judgment against all claims or defenses of the other party. The Section opposes this amendment.

As a policy matter, the proposed changes to ORCP 47 bear at most a tenuous relationship to the filing of frivolous lawsuits. Summary judgment motions are generally granted on narrow legal grounds, and are not the appropriate forum for resolving factual disputes. Negligence and other tort claims, even those greatly exaggerated, are generally unlikely candidates for summary judgment.

The Section is more troubled by the likely practical impact of this amendment. The amendment will in all probability have the unintended adverse effect of clogging the judicial system and increasing costs of litigation. The reason for this is that summary judgment will represent an opportunity for fee shifting in cases not otherwise subject to attorneys fee or expert fee liability. There will be no downside for a party which files a summary judgment motion. If the party prevails, it shifts attorneys and expert fees which would not otherwise be recoverable. If the party loses, it is not penalized for trying. A reasonably predictable result will be that expensive and time consuming summary judgment motions will be filed in all but the most frivolous cases. Given the

frequent pronouncements of the Oregon appellate courts that summary judgment is not a favored procedure and is not an appropriate forum for resolving contested issues of fact, the most likely result will be to increase litigation costs for all litigants.

The proposed amendment also raises an access to justice issue. The group of litigants most at risk would be individuals filing lawsuits (or defending lawsuits) against corporations or insurance companies. If a corporation prevails on a summary judgment motion against an individual, the individual risks losing more than his or her claims. Given the financial risk to a litigant of modest resources, summary judgment procedure could become a club by which litigants of modest means are intimidated from pursuing even valid claims or defenses.

Finally, if the Legislature nevertheless determines to amend the summary judgment rule to provide for attorneys fees to a prevailing party, the amendment should in fairness be made reciprocal to allow costs and attorneys fees to a party which successfully defeats a summary judgment motion. Such a further amendment would discourage automatic filing of summary judgment motions in every case.

6. Sections 6 and 7.

Section 6 provides for attorneys fee awards to the prevailing party in claims of \$20,000 or less. The Section opposes this provision. Any form of "loser pays" rule hampers equal access to courts, because it creates greater risk on lower and middle class persons who cannot risk a major loss, even if they have a reasonable claim or defense. The amended Rule 54 provisions regarding offers of compromise offer an alternative deterrent to frivolous cases (i.e., a defendant in a frivolous action can make a nominal offer upon receipt of a complaint, thus triggering a potential attorneys fee liability). The Section also opposes this amendment because it runs counter to other legislative efforts to resolve small claims in forums other than the courts, such as mediation, arbitration and small claims court.

The Section opposes repeal of ORS 20.098, a consumer protection statute which provides an award of attorneys fees to a successful claimant on a breach of warranty action where the amount in controversy is \$2,500 or less. The statute operates to remedy an imbalance in resources between consumers and manufacturers. Adoption of a reciprocal attorneys fee rule for such cases would restore the imbalance.

7. Sections 8-138.

Sections 8-138 modify statutory attorneys fee award provisions to create a "loser pays" rule. The Section strongly opposes wholesale adoption of such amendments.

While a number of the proposed amendments are unobjectionable (in that the Section can discern no strong policy reason for a one way attorneys fee provision), it is also clear that a significant number of the affected statutes provide remedies in consumer actions, employee actions, and actions by handicapped and other disadvantaged persons. The statutes represent a considered legislative decision to "level the playing field" between major business and institutional interests and low and middle income citizens. A loser pays rule will create a substantially greater economic risk for low and middle income citizens and will thus adversely affect access to justice in our state.

While there may be some reasonable room for debate as to which statutes reflect prior legislative policy remedying an imbalance in bargaining position between low and middle income citizens, on the one hand, and businesses, insurance companies and institutions, on the other hand, the Section opposes the following proposed amendments:

Section 11	ORS 20.107	Unlawful Discrimination
Section 12	ORS 30.075	Wrongful Death Claims
Section 15	ORS 30.580	Discrimination in Accommodations
Section 19	ORS 30.860	Discrimination - Foreign Governments
Section 21	ORS 30.864	Student Records Disclosure
Section 23	ORS 30.960	Liquor Liability
Section 24	ORS 59.115	Securities Law Violation
Section 25	ORS 59.127	Securities Law Violation
Section 27	ORS 59.670	Funeral Homes and Bonding Companies
Section 29	ORS 59.925	Mortgage Brokers
Section 30	ORS 62.335	Claims Against Coops by Shareholders

Section 31	ORS 62.440	Claims Against Coops by Shareholders
Section 32	ORS 65.207	Corporate Meeting Demands
Section 33	ORS 65.224	Corporate Record Keeping Violations
Section 35	ORS 70.415	Actions Against Limited Partnerships
Section 36	ORS 74.A3050	Action Against Bank for Delayed Transfer
Section 37	ORS 74A.4040	Bank Payments
Section 38	ORS 79.5070	Consumer Goods
Section 39	ORS 83.650	Consumer Purchases
Section 40	ORS 86.260	Lender's Consumer Trust Accounts
Section 41	ORS 86.265	Mortgage Lender Liability
Section 46	ORS 87.725	Agriculture Produce Liens
Section 47	ORS 87.772	Grain Producer's Lien
Section 48	ORS 87.865	Employee Benefit Plans
Section 49	ORS 90.710	Landlord Tenant
Section 57	ORS 192.590	Public Record Act Violations
Section 60	ORS 307.525	Low Income Housing
Section 65	ORS 346.630	Rental Discrimination - Blind People
Section 66	ORS 346.687	Theft or Injury to Assistance Animal
Section 67	ORS 346.690	Rental Discrimination - Blind People
Section 68	ORS 431.905	Toxic Household Substance
Section 71	ORS 462.110	Premises Liability - Racetracks
Section 89	ORS 618.516	Consumer Protection Seals
Section 92	ORS 646.140	Consumer Protection UTPA

Section 93	ORS 646.240	Consumer Protection UTPA
Section 94	ORS 646.359	Consumer Protection UTPA
Section 95	ORS 646.632	Consumer Protection UTPA
Section 96	ORS 646.638	Consumer Protection UTPA
Section 97	ORS 646.641	Unlawful Debt Collections
Section 98	ORS 646.642	Consumer Protection
Section 100	ORS 646.770	Consumer Protection
Section 101	ORS 646.775	Consumer Protection
Section 102	ORS 646.780	Consumer Protection
Section 103	ORS 646.865	Consumer Protection Debt
Section 104	ORS 646.876	Consumer Protection
Section 105	ORS 648.135	Consumer Protection
Section 106	ORS 650.020	Consumer Protection Franchises
Section 109	ORS 652.200	Wage Claims
Section 110	ORS 652.230	Wage Claims
Section 111	ORS 653.055	Wage Claims
Section 112	ORS 653.285	Employee's Equipment
Section 113	ORS 656.052	Employment
Section 114	ORS 658.220	Farm Labor
Section 115	ORS 658.415	Farm Labor
Section 116	ORS 659.160	Discrimination in Education
Section 117	ORS 659.165	Discrimination
Section 119	ORS 671.578	Consumer Protection/Professional Licenses
Section 120	ORS 671.705	Consumer Protection/Professional Licenses

Section 121	ORS 692.180	Consumer Protection/Funeral Parlors
Section 123	ORS 697.792	Debt Consolidation
Section 124	ORS 701.067	Licensed Contractors
Section 125	ORS 722.116	Inspection of Financial Records
Section 126	ORS 722.118	Inspection of Financial Records
Section 127	ORS 731.314	Consumer Protection/Insurance
Section 128	ORS 731.737	Consumer Protection/Insurance
Section 129	ORS 746.300	Consumer Protection/Insurance
Section 130	ORS 746.350	Consumer Protection/Insurance
Section 131	ORS 746.680	Consumer Protection/Insurance
Section 132	ORS 756.185	Consumer Protection Public Utilities
Section 133	ORS 759.720	Consumer Protection Communications Companies
Section 134	ORS 759.900	Consumer Protection Communications Companies
Section 135	ORS 760.540	Consumer Protection Communications Companies
Section 136	ORS 774.210	Consumer Protection Public Utilities
Section 137	ORS 815.410	Consumer Protection Odometer Tampering
Section 138	ORS 815.415	Consumer Protection Odometer Tampering

Finally, the Section notes that SB 385 as currently drafted does not propose an amendment to ORS 742.061, which provides reasonable attorneys' fees to an insured claimant suing his/her insurance carrier for failure to pay a claim within six months. This is also clearly a consumer protection statute, and the Section would oppose a "loser pays" amendment.

GRM/dlc

Chair
Senator Neil Bryant
Vice Chair
Senator Randy Miller

Members
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Senator Jennette Hamby
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Senator Shirley Stull



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FAX #

986-1005

Staff
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M. Max Williams, II,
Co-Counsel

Diane Dussler
Dar Woodrum

MEMORANDUM

TO: SB 385 Work Group Participants
FROM: M. Max Williams II
Counsel, Senate Judiciary Committee
SUBJECT: Draft Memo to Legislative Counsel
DATE: February 28, 1995

Thank you again for your participation at the work group meeting on Friday.

I have attached for your review a draft memo to Legislative Counsel, asking them to prepare, for discussion purposes, amendments to SB 385. I appreciate those of you who provided me with your notes.

Please feel free to edit this if you think there is something that is unclear or incorrect. On several issues, we were not able to discuss them in detail, or we failed to bring them to closure with the work group. On these I made a judgment call for purposes of keeping things rolling.

If you have comments, feel free to jot them on the draft and fax it back. I'd prefer a written note, but if you don't have time to do that, always feel free to call me to discuss. My plan is to provide this to LC tomorrow afternoon, so they can begin work on the amendments.

Until we have a final "concept" memo to go to LC, I'd appreciate it if you would keep this draft to yourselves. No reason to get people all excited over something that may be my drafting error. On behalf of myself, and Senator Bryant, thank you again for your assistance.

cc: Senator Bryant

M E M O R A N D U M

TO : MAX WILLIAMS
FROM : ROBERT J. NEUBERGER
RE : POSSIBLE AMENDMENTS FOR SB 385 BASED UPON THE WORK
GROUP MEETING OF 2-24-95
DATE : 3-1-95

Max, I have your draft memorandum of 2-28-95. I offer the following comments:

Section I, Previously Dismissed Actions

The words "for costs and disbursements" should be stricken from page two, line 44 of the bill.

Section I, English Rule, ORCP 54D

There was no agreement regarding alternative #1 or alternative #2. In fact, all of the participants except for Mr. DiLorenzo are opposed to loser pays. Therefore, the first alternative should be an amendment striking any language regarding proposed 54Z out of SB 385.

One additional limiting factor that was considered was the provision from the contract with America that would provide that no party receiving fees under an offer of compromise could receive more than the other party pays in attorney fees.

With respect to the second paragraph on the top of page three of your memorandum, in addition to the Alaska factors, legislative counsel should also add the factors listed in the Practice and Procedure Committee's report: the factors set forth in UTCR; the

parties' conduct that gave rise to the subject of the litigation; and the conduct of the parties with respect to the litigation, both before and after suit was filed. Also, caps along the lines of those contained in Alaska Rule 82 need to be included as part of this alternative.

With regard to alternative #2, the proposal was not "objectively unreasonable," but a higher standard. The proposal was that attorney fees would only be awarded where the offending party's conduct is clearly unreasonable, constituting conscious indifference and disregard of the rights of others.

At the top of page two of your memorandum, you state, "leave ORCP 54E as it is." My notes reflect that, while we agreed to have a separate section for the offensive use of attorney fees (54Z), the existing Rule 54E would be amended to make it reciprocal so that a plaintiff could cut off a defendant's rights to costs and disbursements and attorney fees under a statute or contract.

Section II Regarding ORS 20.105

We agreed to the proposal to substitute "shall" for "may, in its discretion" as proposed by the bill. However, we agreed to not delete the current language of the statute "appropriate in the circumstances." In other words, that language would remain in the statute.

With respect to overruling Mattiza v. Foster, one suggestion was to delete from page three, line 42, "or solely for oppressive reasons." Also, the word "and" would be added so that line 42 would read "bad faith and wantonly."

Section IV Regarding ORCP 17

I disagree with your statement regarding Section C(1). Lines 33 and 34 on page four of the bill should be replaced with the following language: "The person's reasonable knowledge, information and belief, formed after making a reasonable inquiry under the circumstances."

The importing of the language from ORS 30.895(2) should probably be accompanied by a provision that the court may shorten or lengthen the time.

The joint liability language of proposed D(1) [page five, lines 13-15] should be stricken.

Your discussion of the 21-day safe harbor provision of D(3) needs to make it clear that the particular facts and specific points must be set forth in detail.

Section V Regarding Summary Judgment

We seem to be in agreement that all of proposed 47I would be deleted. There was no agreement that SB 608 could simply be imported in its place. You fail to mention that the consensus was that the matter should be referred by the legislature to the Council on Court Procedures for the Council's thorough consideration. There was some discussion about amending ORCP 47 at this time to simply make it clear that, in determining whether a material question of fact exists, should be decided using Oregon's directed verdict standard. There was no agreement that the remainder of SB 608 would be enacted at this time.

xc: Members of the Work Group

p

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Vice Chair
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Staff
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M. Max Williams, II,
Co-Counsel

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Members
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MEMORANDUM

TO: SB 385 Work Group Participants

FROM: M. Max Williams II
Co-Counsel, Senate Judiciary Committee *mw*

SUBJECT: Memo re: Proposed Amendments

DATE: March 1, 1995

Thank you again for your assistance and comments. There have been several revisions to the memorandum, based on comments on the last draft. I realize that this may not include every concept which we discussed in the work group meeting. However, I have tried to include those concepts where I believe a consensus was reached that we should submit the concept to Legislative Counsel for proposed amendments.

The fact that there may have been consensus on a proposed amendment in no way means that the parties have agreed to these amendments in final form, or that any compromise was reached. I know that some of you are concerned that this document, or the work product of Friday's meeting, might be described as such.

Please call me if you have any questions or comments. Thank you again. I look forward to discussing the actual language of the amendments with you in the near future.

cc: Senator Bryant
Representative Parks
Ms. Holly Robinson

MEMORANDUM

TO: David Heyndrickx
Legislative Counsel

FROM: M. Max Williams II
Counsel, Senate Judiciary Committee 

SUBJECT: Amendments for SB 385

DATE: February 28, 1995

The following outlines proposed amendments for SB 385. I am requesting that legislative counsel prepare these amendments. The amendments are the product of a work group which met to examine SB 385. I am asking that you prepare a separate amendment (-1, -2, etc.) for each of the sections, so they may be treated individually. On several of the concepts, more than one possibility was discussed by the work group. In order to further facilitate the decision making process, I am asking you to prepare amendments for both possibilities. You will note that some of the amendments are quite specific, while others are more general. On the "concept" amendments, I am asking for your drafting assistance in helping determine the most appropriate language to accomplish the task. Please don't hesitate to call me with any questions or suggestions.

Thank you in advance for your assistance.

1. **Section 1, beginning on page 3, line 2 (dealing with ORCP 54(d)(2)):**
 - o Make the section party neutral (change plaintiff to party).
 - o Change the "shall" to "may"
 - o Change the attorney fees award to the attorney fees expended in the second action (getting the first action dismissed)
 - o Provide that the court may enter an order requiring a payment of any unsatisfied portion of a judgment in the action previously dismissed.
 - o Make sure language includes "counterclaim" or "crossclaim" from previously dismissed action.
 - o Provide that this section does not, in any way, allow for the revival of a claim.

2. Section 1, Page 3, beginning at line 6 (relating to offers of compromise):

- o Leave ORCP 54E as it is.
- o Create new ORCP 54 section (54Z) with the following provisions.
- o Make the rule reciprocal (party neutral)
- o Offer cannot be made until 120 days after service of the complaint.
- o Offer must be preceded by a __ (14) day notice of intent to make a Rule 54Z offer.
- o Offer must be accompanied by a disclosure packet containing a list of the material evidence to be presented at trial (Material witnesses and a witness statement). Such disclosure is not a waiver of privilege or work product or to be used for discovery purposes. Subject to protection of settlement discussions
- o Offer to remain open for 30 days, unless extended by court order.
- o Parties may make multiple offers under the rule, but the last offer controls for purposes of calculating attorney fees.
- o The attorney fees accrue from the date of the last offer.
- o Last offer under the rule must be at least 30 days before trial.
- o Would not apply to domestic relations cases or to class action cases or eminent domain cases.
- o ALTERNATIVE #1 (offer method): 54Z triggers a settlement conference requirement. A party would at the time a settlement conference demand, indicate that it is a 54Z conference. This would give the non-offering party a chance to prepare. The parties in counties of less than 75,000 people would not be required to do it this way -- allow local rule to determine the method.
- o ALTERNATIVE #1 (Attorney Fees): 54Z creates a strict liability standard. This means that if a party does not improve his or her position relative to the offer, after there has been this "full disclosure", that party would be liable for the attorney fees of the offering party.
 - o Fees under this scenario would include the following caps:
 - o No net recovery against a losing plaintiff (If plaintiff got \$0 from the jury, there would be no attorney fees.

o Attorney fees would be limited to difference between a party's final offer and the final judgment. (Offered \$125,000 -- jury awarded \$100,000, so fees would be capped at actual fees, not to exceed the \$25,000 gap).

o The court could review other factors in determining the reasonable amount of the fees. See Alaska Rule 82 (3) for the factors the court should consider in determining the amount of the fee. (Attached).

o ALTERNATIVE #2 (Attorney Fees): 54Z would only awarded if the court found the conduct of the party that rejected the better offer was "objectively unreasonable" in the settlement negotiations. There would be no capping of the fees in this case.

NOTE: There was a discussion about the standard being a "notch above unreasonableness" in order to trigger the fees. I'm not sure how you define this "notch above" standard. Its something less than bad faith -- does not require an "evil" or "malicious" purpose, but is worse than being objectively unreasonable. If you would like to discuss this with me, I'd be happy to try and explain it. However, for drafting purposes, please go ahead and prepare the amendments with the "objectively unreasonable" standard.

o ALTERNATIVE # 3 (Attorney Fees) (See above). Please draft a version of the amendment which would follow alternative # 2 but would include this "notch above reasonableness" standard. See "gross negligence" as it is defined in ORS 30.115 for possible usage.

3. Section 1, beginning on page 3, line 29 (dealing with mandatory settlement conferences):

Strike [Upon the request of the judge or a party, a different judge shall preside at the conference.]

Insert "If a settlement conference is requested, a judge other than the trial judge shall preside at the settlement conference."

4. Section 2, beginning on page 3, line 35 (dealing with ORS 20.105):

Language which would overrule Mattiza v. Foster, 311 Or 1 (1990) (attached). Eliminating the requirement that a judge must find "the party taking the meritless position has done so with an improper purpose". Mattiza at 10. Allowing for the court to provide attorney fees if the position taken is meritless.

Page 3, line 42 delete *[or solely for oppressive reasons.]*

5. Section 3, page 4, beginning on line 7, after "fees incurred" insert "as a result of the misconduct".

6. Section 4, beginning on page 4, line 10 (dealing with ORCP 17):

o On page 4, line 33, delete [*best knowledge, information and belief, formed after making all inquiries that are reasonable under the circumstances.*] and insert "reasonable knowledge, information and belief, formed after making a reasonable inquiry under the circumstances".

o On page 4, delete from line 42 through line 2 on page 5. In its place, incorporate the language from ORS 30.895(2) to accomplish this task.

o Provide that the loser of a sanctions motions will be required to pay the winners attorney fees for the sanctions motion.

o Make sure (looking at Federal Rule 11) that the 21 day safe harbor requires that the party moving for sanctions is required to serve the motion, with supporting points and authorities, on the non-moving party. The facts and specific points must be set forth in detail. It should be only on the issues raised that a party be awarded sanctions -- and attorney fees.

7. Section 5, Page 7 (relating to summary judgment):

o Delete all new text from line 11 through line 22.

o **NOTE:** The work group discussed SB 608 (dealing with summary judgment) being referred to the Council on Court Procedures for further study. One recommendation has been that the Committee adopt SB 608 with its current language, with an effective date of January 1, 1998. This would ensure that the Council was prepared to make recommendations to the next legislature. If you have another recommendation for effecting this, please advise.

8. Section 6 (dealing with Attorney Fee Awards in Small Actions):

Strike all of Section 6.

Prepare amendments which reflect the following:

o Require mandatory arbitration for all claims \$25,000 or under. (See ORS 36.400)

o Require that an appellant from mandatory arbitration which does not improve its position in a trial de novo is required to pay the attorney fees of the opposing party.

o The attorney fees which may be awarded are:

If the defendant is an unsuccessful appellant the plaintiff shall be awarded reasonable attorney fees, not to exceed 20% of the plaintiff's recovery at the trial de novo, but not less than \$500.

If the plaintiff is the unsuccessful appellant, the defendant shall be awarded reasonable attorney fees, not to exceed 10% of the prayer at the commencement at the trial de novo, but not less than \$500.

o If either party is otherwise entitled to attorney fees by contract, or statute, those provisions will prevail over this provision.

o Allow that a parties, by agreement, with a claim in excess of \$25,000 may "opt in" to the provision above, but will be bound to the attorney fees provisions.

o The court may look to "all of the attorney fees" incurred by a party, not just those after the arbitration award or the appeal.

9. Prevailing Party Statutes: These will be dealt with in a later amendment request.

MEMORANDUM

TO: MAX WILLIAMS

FROM: DON CORSON

RE: YOUR 2/28 DRAFT MEMORANDUM ON AMENDMENTS FOR SB 385

DATE: 3/2/95

I appreciated your circulating a copy of your draft memo. I had hoped to talk with you personally yesterday in Salem, but the timing didn't work out. A few thoughts are offered below. Also, yesterday I was told that there may be another work group meeting on SB 385 next week. I regret that my trial schedule will prevent me from attending. I have briefed OTLA President Michael Adler on the previous discussion, and he would be available if there is another work session.

Regarding your memo on possible SB 385 amendments (aside from my opposition to a number of them):

#2: Section 1, page 3, beginning at line 6 (relating to offers of compromise):

It was my impression that the strongest view of the work group was to tie the 54Z offers to settlement conferences (except allowing smaller population counties to do otherwise, by local rule). I respectfully suggest that this should be in the draft amendments, and not be considered an "alternative." Also, I believe the work group was unanimous in concluding that there should be no Rule 54Z offer before 120 days after the filing of the complaint.

My notes also indicate that Rule 54Z should not be applicable to condemnation cases; I trust you could check with Greg Mowe about that.

Additionally, my notes indicate that there would be other factors besides those set forth in the Alaska rule that should be considered (under that alternative).

Finally, on this section, my notes indicate that the discussion on "alternative #2" on attorney fees was for a standard higher than unreasonableness. I don't know if there was ever consensus on the formulation, but "grossly negligent" was one suggestion put forward.

#4. Section 2, beginning on page 3, line 35 (dealing with ORS 20.105):

One specific suggestion I thought the work group agreed to was to have lines 38-39 read in relevant part: "the court shall award reasonable attorney fees appropriate in the circumstances"

#7. Section 5, page 7 (relating to summary judgment)

I was uncomfortable with the suggestion that SB 608 be enacted, effective January 1, 1998. It was my sense that although the work group was open to some changes in Rule 47, that the group preferred to have the entire matter sent to the Council on Court Procedures, and that the way to do this was to provide direction to the Council to incorporate a directed verdict standard in determining if there was a genuine issue of material fact.

#8. Section 6 (dealing with Attorney Fee Awards in Small Actions)

There was a suggestion that a party should be able to separately appeal an award of attorney fees in arbitration, or their amount, without the loser-pay elements.

cc: work group participants

Chair
Senator Neil Bryant
Vice Chair
Senator Randy Miller

Members
Senator Ken Baker
Senator Jeannette Hanby
Senator Peter Sorenson
Senator Dick Springer
Senator Shirley Stull



Staff
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MEMORANDUM

TO: SB 385 Work Group Participants

FROM: M. Max Williams II
Co-Counsel, Senate Judiciary Committee *MW*

SUBJECT: Work Group Meeting - Tuesday, March 7, 1995 at 2:30 PM

DATE: March 3, 1995

Do to some scheduling conflicts we have had to move the meeting on Tuesday from 11:00 AM to 2:30 PM. I will notify you on Monday as to location of the meeting. Sorry for any inconvenience that this has caused. Please call me if you have any questions.

cc: Senator Bryant
Representative Parks
Ms. Holly Robinson

986 1426
24

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MEMORANDUM

TO: SB 385 Work Group Participants

FROM: M. Max Williams II
Co-Counsel, Senate Judiciary Committee 

SUBJECT: Work Group Meeting - Tuesday, March 7, 1995 at 11:00 AM.

DATE: March 3, 1995

There has been some discussion about reconvening the work group to further discuss SB 385 amendments. As of this time, I still do not have amendments back from legislative counsel relating to our previous meeting. I hope to have those Monday morning. They may, however, not be complete. I think the first work session on 385 will be a higher level discussion among the committee members. Since this is the first time they have to discuss this matter among themselves, and on the record, I do not believe there will be much "detail." Thus, I think it may be premature to meet further regarding the areas we covered in our last meeting. That meeting might better take place the following week.

My recommendation would be for those interested members of the work group to come together on Tuesday, March 7, 1995 at 11:00 AM to discuss the Sections 8 through 132 of the bill (relating to the "prevailing party" attorney fees on those individual statutes.) I would like to think we could complete the task by 3:00 PM. We should plan on working through the lunch hour. (Bring your own brown bag.)

Please call me to confirm your attendance. I will hope to have arranged a location for the meeting sometime Monday morning. We may end up doing it at the capitol. I understand that the press of business may not allow for each of you to attend. If you can't attend, please feel free to submit any additional thoughts you have not already shared.

cc: Senator Bryant
Representative Parks
Ms. Holly Robinson

DRAFT**MEMORANDUM**

March 8, 1995

TO: OREGON STATE BAR PROCEDURE & PRACTICE COMMITTEE
FROM: Vivian Raits Solomon
RE: SENATE BILL 608
FILE: 14056-36

Senate Bill 608 would amend ORCP 47C by adding a second clause providing that in the alternative to the existing procedure for granting summary judgment, the court shall grant summary judgment if:

" * * * the opposing affidavits and supporting documentation submitted by the adverse party fail to set forth specific facts supported by admissible evidence adequate to avoid the granting of a motion for directed verdict in a trial of the matter."

For the reasons set forth below, this proposed amendment to ORCP 47C is unnecessary, and it potentially conflicts with other sections of ORCP 47.

1. Improperly Allows Discovery

The proposed amendment could be used by the moving party to conduct discovery which is otherwise not allowed under Oregon law. A party could file a poorly supported motion for summary judgment, which would prevail under this alternative clause unless the opposing party's response came up to the new standard. Motions for summary judgment are specifically not intended to be used as discovery devices. ORCP 47E (first sentence).

2. Changes Existing Law Regarding Burden of Proof

Currently, an opposing affidavit is only required if the moving party's motion is supported with affidavits. Bevan v. Garrett, 284 Or 293, 586 P2d 1119 (1978). The proposed alternative clause could have the effect of modifying the burden of proof, which is currently on the moving party to show the absence of a genuine issue of material fact. If the movant fails to meet the burden of showing the absence of a genuine issue of material fact, no defense is required. The alternative clause could shift the burden on the respondent to show that a fact issue exists before the moving party has established the absence of material fact issues.

3. Conflicts with ORCP 47E

ORCP 47E allows an attorney affidavit in lieu of expert opinion. Such an attorney affidavit would not be sufficient to avoid the granting of a motion for directed verdict at trial.

4. Clause is Potentially Unnecessary

Oregon law already provides that "* * * a party against whom an adequately supported motion for summary judgment is made must, to defeat it, specify some evidence which could be produced if the case were to go to trial." Engelking v. Boyce, 278 Or 237, 241-242, 563 P2d 703 (1977). An opposing party cannot defeat a properly supported motion for summary judgment merely by making "bare assertions." Millspaugh v. Port of Portland, 65 Or App 389, 394, 671 P2d 743 (1984) pet rev den 296 Or 411 (1984).

5. ORCP 47 Modeled after Fed R Civ P 56

There are only two differences between ORCP 47 and Fed R Civ P 56: ORCP 47E allows attorney affidavits in lieu of expert opinion, and the Oregon rule omits a provision requiring federal courts to enter an order specifying facts deemed established at trial. Fed R Civ P 56(d). Because the Oregon rule was patterned on the federal rule, Oregon courts will give "considerable weight" to federal decisions under Fed R Civ P 56. Garrison v. Cook, 280 Or 205, 209, 570 P2d 646 (1977). The purpose of enacting the federal rule was to overrule the doctrine that well-pleaded claims and defenses were invulnerable to attack by motion for summary judgment. Wright, Miller & Kane, Federal Practice and Procedure: Civil Second, § 2739 (1983). Under federal law, the party opposing summary judgment does not have the right to withhold evidence until trial. Walker v. Hoffman, 583 F2d 1073, 1075 (9th Cir 1978), cert denied, 439 US 1127 (1979). There is no reason peculiar to Oregon law why Oregon litigants and courts should be deprived of this substantial body of federal decisional law.

6. Alternative Suggestion

I do not know what prompted the proposed amendment. In my view, the rule is appropriate as written and no alternative clause is necessary. Bill Sime suggested that the new language in Senate Bill 608 be deleted and that instead the following language be added:

"For the purpose of this rule, a genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party."

This language does not present any of the problems set forth above, other than to probably preclude citing federal law as authoritative precedent.

VRS


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MEMORANDUM

TO: SB 385 Work Group Members

FROM: M. Max Williams II
Co-Counsel, Senate Judiciary Committee

SUBJECT: Meeting -- Monday, March 13, 1995 at 10:00 AM.

DATE: March 9, 1995

We have scheduled a work group meeting for 10:00 AM on Monday, March 13, 1995. Please come prepared to discuss the draft amendments to SB 385 that were prepared by legislative counsel. (-2 through -12 amendments). I would like your assistance in catching any technical problems in the amendments, along with making any substantive changes necessary to give the amendments their intended effect.

If you can, please review the language of H.R. 988 which passed the US House of Representatives, and includes a very similar reciprocal offer proposal to the one we have proposed as Rule 54F. I'd like to discuss their approach and see if there is anything that we can learn from it. (Information is available on LEXIS).

Additionally, I am asking each of the participants in the work group to make a list of those 130 statutory sections that you really are interested in, and conversely, those that you don't really care about. I looking for a method to focus the group on those key statutes which should be object of our attention. I am not sure we are going to get to those statutes on Monday, but if time allows, we will try to get to these issues.

As always, thanks again for your assistance in this process. Please call me if you have any questions.

cc. Senator Bryant
Representative Parks
Ms. Holly Robinson

SB 385-13

**PROPOSED AMENDMENTS TO
SENATE BILL 385**

On page 73 of the printed bill, insert:

Section 142.

(1) In determining whether to award attorney fees to a party pursuant to any statute or rule that gives the court discretion whether to award attorney fees to such party, the court shall consider the following factors:

- (a) the nature of the parties' conduct including whether any of the parties engaged in reckless, willful, malicious, bad faith, or illegal conduct in connection with the transactions or occurrences that form the basis of the litigation;
- (b) the reasonableness of the claims and defenses asserted by the parties;
- (c) the extent to which an award or denial of attorney fees would deter others from asserting good faith claims or defenses in similar cases; *which award or denial will discourage ~~any~~ parties to asserting non-meritorious claims and defenses*
- (d) the reasonableness of the conduct of the parties and their attorneys after commencement of the action;
- (e) the reasonableness of the parties' conduct regarding settlement;
- (f) the extent to which the award or denial of attorney's fees would further the purpose of the statute or rule that confirms the right of attorney's fees;
- delete* (g) the ability of the opposing party to satisfy an award of attorney fees; and
- (h) such other factors as the court may deem *equitable* appropriate under the circumstances of the case.

(2) If the court makes a determination to award attorney fees to a party pursuant to a statute or rule that gives the court discretion whether to award attorney fees, the court may award all or part of the attorney fees claimed by the requesting party, but in determining the amount of the award of attorney fees, the court shall consider the factors in Section (1) of this statute, and in addition, the court shall consider the following factors:

SB 385-13

- (a) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (b) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (c) the fee customarily charged in the locality for similar legal services;
 - (d) the amount involved and the results obtained;
 - (e) the time limitations imposed by the client or by the circumstances;
 - (f) the nature and length of the professional relationship with the client;
 - (g) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (h) whether the fee is fixed or contingent.
- (3) Nothing in Section (2) of this statute shall authorize the court to enter an award of attorney fees in an amount that is in excess of a reasonable fee.
- (4) In the review of a judgment or order granting or denying a claim for attorney fees based on any statute that gives the court the discretion whether to award attorney fees, the standard of review is abuse of discretion *and not de novo.*
- (5) In the review of the amount of any award of attorney fees, the standard of review is abuse of discretion.

M E M O R A N D U M

TO : SB 385 Work Group
FROM : RJN
DATE : March 15, 1995
SUBJECT : Proposed Addition to ORCP 47C

=====

The court shall grant summary judgment if, based upon the record properly before it viewed in the light most favorable to the non-moving party, a reasonable person could not return a verdict for the non-moving party.

Proposed Amendment of ORCP 47 C to Incorporate "Directed Verdict Standard"

C. Motion and Proceedings Thereon. The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The judgment sought [*Summary judgment*] shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law [, on the state of the evidence disclosed by any depositions, admissions, and affidavits on file, the moving party would at trial be entitled to a directed verdict.] A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. [*Partial summary judgment shall likewise be rendered as to any material issue respecting which, on the state of the evidence thus disclosed, the moving party would at trial be entitled to have such issue withdrawn from the jury.*]

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Chair
Senator Neil Bryant
Vice Chair
Senator Randy Miller

Members
Senator Ken Baker
Senator Jeannette Hanby
Senator Peter Sorenson
Senator Dick Springer
Senator Shirley Stull

**SENATE JUDICIARY COMMITTEE**

5401 State Capitol
Salem Oregon 97310
(503) 986-1640

Staff
Bill Taylor
M. Max Williams, II
Co-Counsel

Diane Dusler
Dar Woodrum

FAX # 986-1005

MEMORANDUM

TO: SB 385 Work Group Participants

FROM: M. Max Williams II
Counsel, Senate Judiciary Committee 

SUBJECT: Draft Memo to Legislative Counsel

DATE: February 28, 1995

Thank you again for your participation at the work group meeting on Friday.

I have attached for your review a draft memo to Legislative Counsel, asking them to prepare, for discussion purposes, amendments to SB 385. I appreciate those of you who provided me with your notes.

Please feel free to edit this if you think there is something that is unclear or incorrect. On several issues, we were not able to discuss them in detail, or we failed to bring them to closure with the work group. On these I made a judgment call for purposes of keeping things rolling.

If you have comments, feel free to jot them on the draft and fax it back. I'd prefer a written note, but if you don't have time to do that, always feel free to call me to discuss. My plan is to provide this to LC tomorrow afternoon, so they can begin work on the amendments.

Until we have a final "concept" memo to go to LC, I'd appreciate it if you would keep this draft to yourselves. No reason to get people all excited over something that may be my drafting error. On behalf of myself, and Senator Bryant, thank you again for your assistance.

cc: Senator Bryant

MEMORANDUM

DRAFT

TO: David Hendrickx
Legislative Counsel

FROM: M. Max Williams II
Counsel, Senate Judiciary Committee

SUBJECT: Amendments for SB 385

DATE: February 28, 1995

The following outlines proposed amendments for SB 385. I am requesting that legislative counsel prepare these amendments. The amendments are the product of a work group which met to examine SB 385. I am asking that you prepare a separate amendment (-1, -2, etc.) for each of the sections, so they may be treated individually. On several of the concepts, more than one possibility was discussed by the work group. In order to further facilitate the decision making process, I am asking you to prepare amendments for both possibilities. You will note that some of the amendments are quite specific, while others are more general. On the "concept" amendments, I am asking for your drafting assistance in helping determine the most appropriate language to accomplish the task. Please don't hesitate to call me with any questions or suggestions.

Thank you in advance for your assistance.

- I. **Section 1, beginning on page 3, line 2 (dealing with ORCP 54(d)(2)):**
 - o Make the section party neutral (change plaintiff to party).
 - o Change the "shall" to "may"
 - o Change the attorney fees award to the attorney fees expended in the second action (getting the first action dismissed)
 - o Provide that the court may enter an order requiring a payment of any unsatisfied portion of a judgment in the action previously dismissed.
 - o Make sure language includes "counterclaim" or "crossclaim" from previously dismissed action.
 - o Provide that this section does not, in any way, allow for the revival of a claim.

DRAFT

2. Section 1, Page 3, beginning at line 6 (relating to offers of compromise):

- o Leave ORCP 54E as it is.
- o Create new ORCP 54 section (54Z) with the following provisions:
 - o Make the rule reciprocal (party neutral)
 - o Offer must be preceded by a __ (14) day notice of intent to make a Rule 54Z offer.
 - o Offer must be accompanied by a disclosure packet containing a list of the material evidence to be presented at trial (Material witnesses and a witness statement). Such disclosure is not a waiver of privilege or work product or to be used for discovery purposes. Subject to protection of settlement discussions.
 - o Offer to remain open for 30 days, unless extended by court order.
 - o Parties may make multiple offers under the rule, but the last offer controls for purposes of calculating attorney fees.
 - o The attorney fees accrue from the date of the last offer.
 - o Last offer under the rule must be at least 30 days before trial.
 - o Would not apply to domestic relations cases or to class action cases.
 - o ALTERNATIVE #1 (offer method): 54Z triggers a settlement conference requirement. A party would at the time a settlement conference demand, indicate that it is a 54Z conference. This would give the non-offering party a chance to prepare. The parties in counties of less than 75,000 people would not be required to do it this way -- allow local rule to determine the method.
 - o ALTERNATIVE #1 (Attorney Fees): 54Z creates a strict liability standard. This means that if a party does not improve his or her position relative to the offer, after there has been this "full disclosure", that party would be liable for the attorney fees of the offering party.
 - o Fees under this scenario would include the following caps:
 - o No net recovery against a losing plaintiff (If plaintiff got \$0 from the jury, there would be no attorney fees.

DRAFT

o Attorney fees would be limited to difference between a party's final offer and the final judgment. (Offered \$125,000 -- jury awarded \$100,000, so fees would be capped at actual fees, not to exceed the \$25,000 gap).

o The court could review other factors in determining the reasonable amount of the fees. See Alaska Rule 82 (3) for the factors the court should consider in determining the amount of the fee. (Attached).

o ALTERNATIVE #2 (Attorney Fees): 54Z would only awarded if the court found the conduct of the party that rejected the better offer was "objectively unreasonable" in the settlement negotiations. There would be no capping of the fees in this case.

NOTE: There was a discussion about the standard being a "notch above unreasonableness" in order to trigger the fees. I'm not sure how you define this "notch above" standard. Its something less than bad faith -- does not require an "evil" or "malicious" purpose, but is worse than being objectively unreasonable. If you would like to discuss this with me, I'd be happy to try and explain it. However, for drafting purposes, please go ahead and prepare the amendments with the "objectively unreasonable" standard.

3. Section 1, beginning on page 3, line 29 (dealing with mandatory settlement conferences):

Strike [*Upon the request of the judge or a party, a different judge shall preside at the conference.*]

Insert "If a settlement conference is requested, a judge other than the trial judge shall preside at the settlement conference."

4. Section 2, beginning on page 3, line 35 (dealing with ORS 20.105):

Language which would overrule Mattiza v. Foster, 311 Or 1 (1990) (attached). Eliminating the requirement that a judge must find "the party taking the meritless position has done so with an improper purpose". Mattiza at 10. Allowing for the court to provide attorney fees if the position taken is meritless.

5. Section 3, page 4, beginning on line 7, after "fees incurred" insert "as a result of the misconduct".

6. Section 4, beginning on page 4, line 10 (dealing with ORCP 17):

o On page 4, line 33, delete [*best*] and insert "reasonable".

DRAFT

o On page 4, delete from line 42 through line 2 on page 5. In its place, incorporate the language from ORS 30.895(2) to accomplish this task.

o Provide that the loser of a sanctions motions will be required to pay the winners attorney fees for the sanctions motion.

o Make sure (looking at Federal Rule 11) that the 21 day safe harbor requires that the party moving for sanctions is required to serve the motion, with supporting points and authorities, on the non-moving party. It should be only on the issues raised that a party be awarded sanctions -- and attorney fees.

7. Section 5, Page 7 (relating to summary judgment):

o Delete all new text from line 11 through line 22.

o **NOTE:** The work group discussed SB 608 (dealing with summary judgment) being referred to the Council on Court Procedures for further study. One recommendation has been that the Committee adopt SB 608 with its current language, with an effective date of January 1, 1998. This would ensure that the Council was prepared to make recommendations to the next legislature. If you have another recommendation for effecting this, please advise.

8. Section 6 (dealing with Attorney Fee Awards in Small Actions):

Strike all of Section 6.

Prepare amendments which reflect the following:

o Require mandatory arbitration for all claims \$25,000 or under. (See ORS 36.400)

o Require that an appellant from mandatory arbitration which does not improve its position in a trial de novo is required to pay the attorney fees of the opposing party.

o The attorney fees which may be awarded are:

If the defendant is an unsuccessful appellant the plaintiff shall be awarded reasonable attorney fees, not to exceed 20% of the plaintiff's recovery at the trial de novo, but not less than \$500.

If the plaintiff is the unsuccessful appellant, the defendant shall be awarded reasonable attorney fees, not to exceed 10% of the prayer at the commencement at the trial de novo, but not less than \$500.

DRAFT

o If either party is otherwise entitled to attorney fees by contract, or statute, those provisions will prevail over this provision.

o Allow that a parties, by agreement, with a claim in excess of \$25,000 may "opt in" to the provision above, but will be bound to the attorney fees provisions.

o The court may look to "all of the attorney fees" incurred by a party, not just those after the arbitration award or the appeal.

9. Prevailing Party Statutes: These will be dealt with in a later amendment request.

January 19, 1995

BY FAX (503-986-1699)

Mr. M. Max Williams, II, Co-Counsel
Senate Judiciary Committee
Capitol
Salem, Oregon

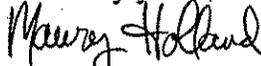
Dear Mr. Williams:

I have learned from Bob Oleson that the Senate Judiciary Committee will fairly soon begin consideration of a package of proposed statutory amendments along with some related amendments to the Oregon Rules of Civil Procedure (ORCP). I have not yet been able to contact John Hart, Chair of the Council on Court Procedures, but am confident that he would like the Council to have an opportunity to review any proposed ORCP amendments, if that would be agreeable to Senator Bryant, and presumably prepare comments upon them for submission to the Judiciary Committee through your good offices.

When these proposals are in the bill form in which the Committee will consider them, I would very much appreciate your forwarding a copy of the proposed amendments to me so that I can make prompt distribution of them to Council members and work with John on the logistics of developing comments within what I understand from Bob will likely be a rather short turn-around time. Although the Council's comments are likely to be limited to proposed ORCP amendments, I suggest that these could be more usefully prepared if members also have before them the related proposed statutory amendments which, according to my information, are part of an integrated package. These materials can be either faxed to me at 503-346-1564 or mailed to me at the address shown below.

With thanks for your anticipated assistance,

Sincerely yours,



Maury Holland
Executive Director

Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403-1221
(Tel. 503-346-3834)

bcc: John Hart
Bob Oleson

*Maury: This had to be sent
by mail because we couldn't
reach Salem by fax or phone.
They are in the upgrading the
system. 6.*

January 25, 1995

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES
FROM: Maury Holland, Executive Director *M.J.H.*
RE: Important Legislative Update

PLEASE NOTE REQUEST FOR RESPONSE ON PAGE 2

John Hart has directed me to get the enclosed two items out to all members as soon as possible. One of them, the January 20 letter to John from Tom Tongue, speaks for itself. Note in particular the statement: "[t]he future of the Council may be at stake here."

I received the two enclosed items under covering letter from John in which he asks that I canvass the Council's members as to their willingness to attend a special meeting for the purpose of formulating the Council's position on, or recommendations regarding, a legislative package that is reported to include some pretty major proposed ORCP amendments. (I have asked for copies of the proposed ORCP amendments, as well as related statutory amendments, but have not yet received them, as they are apparently not yet in formal "bill form.")

Late on the afternoon of January 24, I learned some additional facts from the ever vigilant Bob Oleson. Two hearings have been scheduled on the bill that will combine proposed statutory and ORCP amendments before the Senate Judiciary Committee, for February 2 and February 9. The time has not yet been set, but the likelihood is in the afternoons. Fortunately, my teaching schedule permits me to "cover" both of these hearings, and will do so, if for no other reason than to show the flag. John will have to decide whether he can attend either or both of these hearings, or designate one or more other members to attend in his place.

The obvious problem is that, of course, I cannot speak on behalf of the Council at either of these hearings until the Council decides on what response it wishes to make, if any, and I suppose the same thing goes even for John. John will presumably decide fairly soon on whether to call a special meeting, when and where, and so forth, and Gilma and I will help with the logistics. When and if the Council formulates a collegial response, it would be far more effective if the resulting testimony before Senate Judiciary were presented by John or some member designated by him, rather than by me, although I'll be on hand to render all possible assistance to whoever appears.

In addition to the hearings scheduled for February 2 and 9, Senator Bryant, Chair of the Senate Judiciary Committee, has said that he would be willing to hold a third hearing a bit later, probably on February 16, "if that should be necessary," by which I assume is meant necessary for the Council to have time to get its act together and then place formal testimony into the record. Furthermore, and this is critically important to note, he has indicated that he, along with committee staff, would be willing to take time out of a busy legislative session to attend a special meeting of the Council if one were held. This special meeting would presumably be in addition to the hearing at which the committee would hear formal testimony on the Council's behalf. Bob Oleson told me that Sen. Bryant would be willing to come to OSB headquarters for this purpose, although Bob also suggested that it might be more appropriate and considerate on the Council's part if those members who can attend the meeting were willing to hold it in the State Capitol.

I wish I had the text of the proposals to include with this mailing, but don't, and didn't want to hold up on letting all of you know what seems to be going on. Naturally, I'll get the text out as soon as I can get my hands on it.

In the meantime, so that I can gather the information John has asked for, **please let me know as soon as possible:**

- 1) whether you favor or oppose a special meeting of the Council for this purpose, 2) whether you are willing to do your best to attend (I realize I cannot fairly ask for anything more definite than that at this stage), 3) whether you have a strong preference as between meeting at OSB headquarters or at the State Capitol if the latter would better accommodate the legislative people, and 4) what dates and times would be possible or best for you during the period February 10 through 27, and in particular, is your preference for a Saturday morning meeting on February 11, 18, or 25?

Kindly phone your response to Gilma at 346-3990 (you may leave a detailed message on her voice mail if she is temporarily unavailable) or to me at 346-3834, or fax it to either of us at 346-1564. It goes without saying that you can contact John directly if you prefer to, but I believe he is in the midst of some trials just now and would like Gilma and me to provide the collection point.

Encs.

OADC

Oregon Association
of Defense Counsel

January 20, 1995

Association Office

SANDRA E. KELLER
Association Manager
825 N.E. 20th Avenue, Suite 120
Portland, Oregon 97232
236-8454
FAX 236-4722

SENT VIA FACSIMILE AND REGULAR MAIL
(Fax No. 222-2301)

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224-6640
FAX 224-7324

John E. Hart
Hoffman, Hart & Wagner
Suite 2000
1000 S.W. Broadway
Portland, Oregon 97205

Dear John:

I am writing you in your capacity as Chair of the Council on Court Procedures. I am the OADC Board member charged with monitoring legislation for the 1995 session. On December 27th Senator Neil Bryant, the Chairman of the Senate Judiciary Committee, requested that the OADC comment on a number of proposals. A copy of what he forwarded to us is enclosed. In general, our response was to the effect that all matters involving amendments of ORCP should be first processed through the Council on Court Procedures. I have had discussions with Max Williams, counsel for the Senate Judiciary Committee about the importance of having the Council on Court Procedures involved in these matters and have referred him to the statutes setting up the Council. He has talked to Senator Bryant and reports back that the Senator would involve the Council on these matters if the Council is willing to respond quickly. I believe Senator Bryant feels caught in a political dilemma wherein certain forces have prevailed on the Legislature to give a hearing to these measures and while he personally may want to have all of them run through the Council that is not possible in this session.

Enclosed is a joint statement that the OTLA and the OADC submitted to the Public Affairs Committee of the Board of Governors of the Oregon State Bar on January 19, 1995. It is my understanding that that Committee is recommending to the Board of Governors that the Oregon State Bar adopt that statement and authorize its lobbyists to ask the Legislature to route all ORCP amendments through the Council.

I know that the Council wants to do its work between sessions. Frankly, I think the future of

01/24/95 11:35
01/20/95 16:42

☎503 222 2301
☎503 224 7324

HOFF HART & WAG
DUNN CARNEY →→→ HOFFMAN HART

☑004
☑003

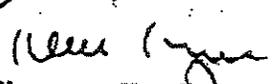
the Council may be at stake here. If the Council is unwilling to take up these matters for the limited purpose of commenting on them during this session, then the Legislature will proceed to deal with them. In other words, I think the Council needs to decide whether it wants to aboard the train or be left at the station.

The OADC Board believes the Council should be the entity through which all procedural rule changes are funneled. We are hopeful that you will recognize the extra-ordinary circumstances that presently exist and poll your committee members on their willingness to participate. I expect that the level of participation will be reduced to commenting on proposals. You may wish to talk directly to Max Williams regarding the expectations of the Senate Judiciary Committee on a time for a response. I understand from talking to him that he would like a response within two weeks of submission of bills. I pointed out to him that the statute requires two weeks' notice of agendas for meetings and a two week response would be not possible. Mr. Williams' telephone number is 986-1476 and his fax number is 986-1699.

At an OADC Board meeting earlier this week, Dave Miller assured the Board that he could persuade you to ask the Council to provide comments on these proposals. We hope that you will do so and that the Council will agree to participate.

Again, it is the OADC's goal to provide a precedent under which the Council is the vehicle through which these measures must pass, not just in this session, but in future sessions. The Oregon Trial Lawyers have agreed to that principle by their participation in the joint statement.

Very truly yours,


Thomas H. Tongue

THT/kno

Enclosures

cc: Frank H. Lagesen
OADC Board Members

THT/OADC.025

JOINT STATEMENT

DATE: January 19, 1995
TO: Oregon State Bar
Board of Governors
Public Affairs Committee

The OTLA and the OADC, through their members, represent opposite sides in civil disputes. Both agree that the present Oregon system for dispute resolution based on civil jury trials works well and should not be fundamentally changed. The much publicized problems of courts in other states do not exist in Oregon. Oregon dockets are kept current by the combined efforts of trial lawyers and the judiciary. This cooperative effort is reflected in the Council on Court Procedures which reviews, comments on and makes recommended changes in the Rules of Civil Procedure. Both the OTLA and the OADC support processing all proposed rule changes through the Council. Procedural rules interrelate and a balanced workable set of procedural rules is necessary for the efficient resolution of disputes.

Both the OTLA and the OADC are in favor of constructive dialogue on ways to improve the present system, as long as any changes do not impair the right of all citizens to have their civil disputes brought before a jury for resolution in a fair and efficient manner.

January 26, 1995

TO: Maury Holland

FROM: Gilma Henthorne

RE: HB 2335

Milt Jones with the HOUSE JUDICIARY COMMITTEE called you to find out whether or not you have any opinion or position on HB 2335, which would substitute an affidavit or a statement signed under penalty of perjury for the usual notary statement in civil proceedings.

He said that a hearing is coming up very shortly regarding this bill (he did not give a date).

Milt Jones's phone number is 986-1489.

H3

6-11: Sec. 1 17 - 9 verification,

Karen Hightower 986-5500

Let her know what council position terms are to be.

January 27, 1995

BY FAX

To: John Hart, Chair, Council on Court Procedures

From: Maury Holland *M. J. H.*

Re: HB 2335

This is written and will be faxed out about 9:00 a.m., Monday, Jan. 30 as backup in case we cannot make telephone contact over the weekend. Milt Jones, staffer of House Judiciary, called to find out what "the Council" position would be on HB 2335, which is sponsored by Chair of House Judiciary, Rep. Del Parks. The gist of HB 2335 is that it would amend ORCP at every point, such as R. 47, where they require or permit submission of an affidavit, so that in lieu of a notarized affidavit, the document could be submitted in the form of a "certification" or "verification," by which is meant a recitation that the signatory signs subject to pains and penalties for perjury, but with no jurat or other notarial attestation. Jones says that Rep. Parks is sponsoring this bill because he thinks there are occasions "in the field" where a notary is not available and this leads to delay and inconvenience.

Naturally, I told Jones that I could not give him the Council's position on this bill because it had not formulated one, indeed hadn't even been informed of this proposal. I also told him that I would contact the Council's leadership pronto to see if it thought this was important enough issue for Council to try to formulate some collegial opinion about in time for the hearing on this bill, now scheduled for Wednesday, Feb. 1 at 10:00 a.m. (Incidentally, while writing this I was just interrupted by a call from Bill Gaylord about the "special meeting," which he favors with reservations. I asked for his off-the-cuff reaction to HB 2335. He said he thought it is pretty bad and probably important enough for the Council to oppose, at least on the merits and leaving aside the politics, if the logistical problems of eliciting a collective view this quickly can be solved.

I guess the questions are these:

1. In your quick judgment, is this important enough for us to try to obtain a collective Council opinion?
2. Since a special meeting seems out of the question before the Feb. 1 hearing, do you want Gilma and me to try to contact as many Council members as possible by phone or fax in the hopes of eliciting a collective opinion?
3. Will you present whatever the Council's opinion turns out to be in testimony at the Feb. 1 hearing, designate another member to do so, or assign me to do it. I have a class to teach on Wed. morning, but am willing to reschedule and testify in Salem if: 1. you think the issue is important enough, 2. a Council position can be developed in time, with Gilma and me manning the phones, faxes, etc., 3. you are unable or prefer not to testify and do not deputize a Council member in your stead.

P.S: As I finished this I reached Mike Phillips by phone. His initial reaction was that this is at least a moderately questionable proposal that he could almost certainly oppose were it to come before the Council in the ordinary course. He said he was undecided about whether the Council as a body should try to formulate a view and present it in testimony on Wednesday, but added he would give the matter more thought over the weekend.

cc: Mike Phillips (by fax)

BY FAX

January 30, 1995

To: John Hart

Fm: Maury Holland *M.H.*

Re: Telling the Legislature to "Stuff It"

Gilma recalled and retrieved from the files the attached letter that Ron Marceau sent to the 1989 legislature, asking in effect that it respect the role of the Council by insisting that all proposed ORCP amendments be first referred to the latter before the legislature agrees to consider any such amendments. My guess, from talking with Bob Oleson and Tom Tongue, is that a letter from you along these lines to the current legislature would be politically very unwise. For one thing, my recollection is that the leadership of the '89 legislature was much more inclined to be friendly toward the Council than is the present one. Nonetheless, perhaps the theme of Ron's letter should be woven in discreetly to any testimony that might be presented by you or others on the Council's behalf.

P. 21

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†LL.M. in Taxation

March 9, 1989

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

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

RE: Council on Court Procedures

The Council on Court Procedures is aware that about 10 bills have been submitted to the legislature by various groups to revise the Oregon Rules of Civil Procedure in one way or another. This is reminiscent of the situation prior to the establishment of the Council in 1978 by the 1977 legislature, i.e. competing groups were pushing and pulling on the legislature to revise Oregon civil court rules to suit their particular interest. The Council has directed that I write to remind of the Council's role lest the bad old days return.

The Council was established in 1978 because procedural revision was becoming bogged down in legislative tugs of war between groups with different axes to grind. In establishing the Council, the legislature made the following findings:

- Prompt and efficient administration of justice in the state courts required civil procedure laws which met the needs of litigants and the court system, and
- There wasn't any coordinated system for reviewing civil procedure laws, and

The Honorable John Kitzhaber and
The Honorable Vera Katz
March 9, 1989
Page 2

- The Council on Court Procedures was established to review civil procedure laws, and
- The Council on Court Procedures would review civil procedure laws and proposals advanced by all interested persons. (ORS 1.725)

The Council is a 23-person body created by statute and comprised of judges, lawyers, one law teacher and one public member. The lawyer members on the Council are representative of the civil trial practice in Oregon, i.e. both plaintiffs personal injury attorneys and insurance defense attorneys are members of the Council.

The Council has statutory authority to enact civil procedure rules each biennium which become law unless changed by the legislative assembly. The Council has submitted 11 rule changes to the legislative assembly this biennium.

Most of the ten bills which propose changes to the civil procedure rules have not been first submitted to the Council on Court Procedures. The Council's very strong experience and belief is that revision of civil procedure rules can be a very complicated process. Individual rule changes often have ramifications beyond the change itself which are not immediately foreseen. The hustle and bustle of a legislative session is definitely not the best environment for changing Oregon civil court procedures. The Council cannot effectively fulfill its statutory role if civil procedure changes are not first presented to it.

Accordingly, the Council suggests that the best way for the legislature to respond to proposed civil procedure changes is to first ask whether the proposal has been submitted to the Council on Court Procedures. If it has and if the Council has not reacted in the way desired by the proposer, then the legislature should act as it sees fit on the proposal.

But if the proposal has not been submitted first to the Council on Court Procedures and if there are no circumstances that require immediate legislative action, the legislature should not consider the proposal. To consider the proposal would simply encourage special interest groups to bypass the legislatively established process for civil procedure revision.

Please understand that the Council is not trying to suggest that civil procedure is the exclusive turf of the Council

The Honorable John Kitzhaber and
The Honorable Vera Katz
March 9, 1989
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on Court Procedures. The Council is only suggesting that the role and function of the Council as established by the 1977 legislature is the best way to handle civil procedure revision.

Sincerely,



R. L. MARCEAU
CHAIRER, COUNCIL ON COURT PROCEDURES

RLM:dlh

cc: Senator Joyce E. Cohen, Senate Judiciary Chair
Representative Tom L. Mason, House Judiciary Chair
Representative Judith Bauman, House Judiciary Civil
Subcommittee Chair
Catherine Webber, Counsel, Senate Judiciary
Committee
Bill Taylor, Counsel, House Judiciary Committee
Members of the Council on Court Procedures
Bob Oleson, Oregon State Bar

COUNCIL ON COURT PROCEDURES

University of Oregon
School of Law
Eugene, Oregon 97403-1221

Telephone: (503) 346-3990
Facsimile: (503) 346-1564

January 31, 1995

To: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES
From: Maury Holland, Executive Director *M. J. H.*
Re: Legislative Update #2; 1. LC 1892 2.LC 117

1. The "Tort Reform" Package/LC 1892. Enclosed are pages 1-12 of LC 1892 that would amend ORCP 17, 47 and 54. The remaining 88 pages of this draft bill would amend the ORS at several places, mostly having to do with attorney fees awards. After a hasty and preliminary look at them, I don't see anything in the proposed ORS amendments that would impact upon or damage the ORCP.

John Hart has appointed a small, ad hoc subcommittee of members to help him deal with LC 1892 and any other matters that might come up during this session, with Gilma and me providing staff support. No decision has yet been made by John concerning special meetings of the Council with Sen. Bryant and his staff. John might or might not decide upon some method, other than a special meeting, for garnering views and suggestions of all members regarding LC 1892, and possibly other matters. I am providing you with the ORCP portion of LC 1892 because I believe it likely that, at some point and in some manner, John or the ad hoc committee will want to give all Council members the chance to provide their views.

2. LC 117. The text of this draft bill arrived under the enclosed covering letter from Rep. Kate Brown this afternoon. I have replied that the Council does not submit bills, although it does sometimes offer testimony or other commentary on bills sponsored or submitted by others. I suggested to her, as one possibility, that she defer action in this session and allow the Council to take her proposed ORCP-36 D under consideration in the coming biennium with a view toward promulgating an appropriate amendment should it conclude it would represent sound procedural policy. My hunch, however, is that, since the Council obviously will not be submitting a bill along these lines in this or any session, she will go ahead and sponsor something on the order of LC 117.

Time is short because of, among other things, the deadline on filing bills, the date of which I don't yet know but will soon find out. My letter to Rep. Brown stated that I would do my best

"Legislative Update #2" to CCP 1/31/95

Page Two

to gather comments from as many Council members as possible, perhaps along with suggested alternative language, and forward to her whatever I could gather. Time is so pressing that I have not even cleared this request to you with John Hart, who is really immersed in trials, but have assumed this is how he would want this handled.

I have no opinion on whether proposed 36 D represents good public policy or sound procedural policy in the narrower sense. The Council's concern is presumably with the latter only. Generally speaking, I hate to see the ORCP getting cluttered with special provisions applicable only to specific, relatively narrow substantive contexts. But if enough legislators are convinced this protection is important and urgent enough, they will probably enact something like LC-117 regardless of what the Council thinks, and rightly so I suppose.

In the narrower senses of draftsmanship and sound procedure, LC-117 seems to me pretty bad and in need of a lot of work. The mini-trial it calls for, with its requirement that certain "specific facts" be "proved," strikes me as a nightmare. Also, why would any plaintiff informally agree to provide protected information if it could not be discovered without a court order that presumably would not be readily granted? This seems to me far different from Rule 44 physical or mental exams, where my understanding is that orders are most often stipulated, in large part because lawyers know they are routinely granted or would be if they were not stipulated.

But enough of what I think! **If any reactions, suggestions or possible alternative language occur to you, please mail or fax the same to me as soon as possible (FAX 503-346-1564).** I realize this is not the best way for the Council to perform its assigned function, but being consulted in this way is better than having legislators plunge ahead and the Council being afforded no opportunity to be heard at all. Please trust me to synthesize whatever I receive from Council members (unless John prefers to designate some member to do it) for forwarding to Rep. Brown, so that any damage to Rule 36 can be prevented or at least minimized. Naturally, I shall distribute copies of what is sent to her to all Council members.

D R A F T

SUMMARY

Requires plaintiff who previously dismissed action with prejudice and who refiles action to pay all attorney fees incurred by defendants in dismissed action. Allows defendant to recover certain attorney fees and expert witness expenses from plaintiff if defendant offers to allow judgment be taken against defendant and plaintiff fails to obtain more favorable judgment than offered. Allows settlement conference at any time.

Requires award of attorney fees for certain misconduct, including causing mistrial. Requires sanctions for certain false certifications in pleadings, motions, papers and arguments to court.

Requires award of attorney fees to party who prevails on motion for summary judgment if summary judgment adjudicates all claims or defenses of party against whom judgment is entered.

Authorizes award of attorney fees to prevailing party in any action based on contract or common law tort if amount claimed is \$20,000 or less.

Amends statutes allowing or requiring award of attorney fees to prevailing plaintiff to allow or require award of attorney fees to prevailing party.

A BILL FOR AN ACT

1
2 Relating to civil procedure; creating new provisions; amending ORS 20.090,
3 20.094, 20.096, 20.105, 20.107, 20.125, 30.075, 30.184, 30.190, 30.680, 30.820,
4 30.822, 30.825, 30.860, 30.862, 30.864, 30.866, 30.960, 59.115, 59.127, 59.255,
5 59.670, 59.890, 59.925, 62.335, 62.440, 65.207, 65.224, 65.781, 70.415, 74A.3050,
6 74A.4040, 79.5070, 83.650, 86.260, 86.265, 86.720, 86.742, 87.076, 87.585, 87.725,
7 87.772, 87.865, 90.710, 92.018, 96.030, 97.760, 105.831, 110.378, 133.739,
8 166.725, 180.510, 192.590, 223.615, 279.365, 307.525, 311.673, 311.679, 311.711,
9 311.771, 346.630, 346.687, 346.690, 431.905, 455.440, 460.165, 462.110, 469.421,
10 474.085, 478.965, 479.265, 480.600, 527.665, 540.120, 540.250, 545.104, 545.502,
11 548.620, 548.660, 553.560, 554.140, 583.126, 583.146, 585.150, 618.516, 621.246,
12 645.225, 646.140, 646.240, 646.359, 646.632, 646.638, 646.641, 646.642, 646.760,
13 646.770, 646.775, 646.780, 646.865, 646.876, 648.135, 650.020, 650.065, 650.250,
14 652.200, 652.230, 653.055, 653.285, 656.052, 658.220, 658.415, 659.160, 659.165,

NOTE: Matter in boldfaced type in an amended section is new; matter [italic and bracketed] is existing law to be omitted.
New sections are in boldfaced type.

1 661.280, 671.578, 671.705, 692.180, 697.762, 697.792, 701.067, 722.116, 722.118,
2 731.314, 731.737, 746.300, 746.350, 746.680, 756.185, 759.720, 759.900, 760.540,
3 774.210, 815.410 and 815.415 and ORCP 17, 47 and 54; and repealing ORS
4 20.080 and 20.098.

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

6

7 **OFFERS OF COMPROMISE, SETTLEMENT AND PREVIOUSLY**
8 **DISMISSED ACTIONS**

9

10 **SECTION 1.** ORCP 54 is amended to read:

11 **A. Voluntary dismissal; effect thereof.**

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

25 **A(2) By order of court.** Except as provided in subsection (1) of this sec-
26 tion, an action shall not be dismissed at the plaintiff's instance save upon
27 judgment of dismissal ordered by the court and upon such terms and condi-
28 tions as the court deems proper. If a counterclaim has been pleaded by a
29 defendant prior to the service upon the defendant of the plaintiff's motion
30 to dismiss, the defendant may proceed with the counterclaim. Unless other-
31 wise specified in the judgment of dismissal, a dismissal under this subsection

1 is without prejudice.

2 A(3) Costs and disbursements. When an action is dismissed under this
3 section, the judgment may include any costs and disbursements, including
4 attorney fees, provided by rule or statute. Unless the circumstances indicate
5 otherwise, the dismissed party shall be considered the prevailing party.

6 B. Involuntary dismissal.

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

11 B(2) Insufficiency of evidence. After the plaintiff in an action tried by the
12 court without a jury has completed the presentation of plaintiff's evidence,
13 the defendant, without waiving the right to offer evidence in the event the
14 motion is not granted, may move for a judgment of dismissal on the ground
15 that upon the facts and the law the plaintiff has shown no right to relief.
16 The court as trier of the facts may then determine them and render judgment
17 of dismissal against the plaintiff or may decline to render any judgment until
18 the close of all the evidence. If the court renders judgment of dismissal with
19 prejudice against the plaintiff, the court shall make findings as provided in
20 Rule 62.

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

1 dismissal by the court at any time, for want of prosecution of any action
2 upon motion of any party thereto.

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

6 C. Dismissal of counterclaim, cross-claim, or third party claim. The pro-
7 visions of this rule apply to the dismissal of any counterclaim, cross-claim,
8 or third party claim.

9 D. Costs of previously dismissed action.

10 **D(1)** If a plaintiff who has once dismissed an action in any court com-
11 mences an action based upon or including the same claim against the same
12 defendant, the court may make such order for the payment of any unpaid
13 judgment for costs and disbursements against plaintiff in the action previ-
14 ously dismissed as it may deem proper and may stay the proceedings in the
15 action until the plaintiff has complied with the order.

16 **D(2)** If a plaintiff who previously filed an action that was dismissed
17 with prejudice subsequently commences an action based upon or in-
18 cluding the same claim against the same defendant, the court shall
19 enter an order requiring the payment of all attorney fees incurred by
20 the defendant in the action previously dismissed.

*- what about
judgment on
the merits*
*Technical
problem.
What if someone
all fees were awarded
in previous action*

21 E. Compromise; effect of acceptance or rejection. Except as provided in
22 ORS 17.065 through 17.085, the party against whom a claim is asserted may,
23 at any time up to [10] 30 days prior to trial, serve upon the party asserting
24 the claim an offer to allow judgment to be given against the party making
25 the offer for the sum, or the property, or to the effect therein specified. The
26 party asserting the claim may accept the offer in the manner specified
27 by this section at any time within 30 days after the offer is made. The
28 court may extend the period during which an offer under this section
29 may be accepted by an additional 30 days if the court determines that
30 the party against whom the claim is made has unreasonably resisted
31 efforts to obtain discovery during the 30-day period following the

*to extent not awarded
and in such action*

1 **making of the offer.** If the party asserting the claim accepts the offer, the
 2 party asserting the claim or such party's attorney shall endorse such ac-
 3 ceptance thereon, and file the same with the clerk before trial, and within
 4 three days from the time it was served upon such party asserting the claim;
 5 and thereupon judgment shall be given accordingly, as a stipulated judgment.
 6 Unless agreed upon otherwise by the parties, costs, disbursements, and at-
 7 torney fees shall be entered in addition as part of such judgment as provided
 8 in Rule 68. If the offer is not accepted and filed within the time prescribed,
 9 it shall be deemed withdrawn, and shall not be given in evidence on the trial;
 10 and if the party asserting the claim fails to obtain a more favorable judg-
 11 ment, the party asserting the claim shall not recover costs, disbursements,
 12 and attorney fees incurred after the date of the offer, but the party against
 13 whom the claim was asserted shall recover of the party asserting the claim
 14 **reasonable attorney fees, reasonable expert witness fees, and costs and**
 15 **disbursements from the time of the service of the offer. For the purpose**
 16 **of determining whether the party asserting the claim failed to obtain**
 17 **a more favorable judgment, the court shall disregard any award of**
 18 **attorney fees made to the claimant.**

19 **F. Settlement Conferences.** A settlement conference may be ordered
 20 by the court at any time at the request of any party or upon the
 21 court's own motion. Upon the request of the judge or a party, a dif-
 22 ferent judge shall preside at the conference.

usually a good idea

not the Federal system of judge assignment

23
 24 **AWARD OF ATTORNEY FEES AS SANCTION FOR FALSE OR**
 25 **FRIVOLOUS**
 26 **PLEADINGS AND OTHER MISCONDUCT**
 27

28 **SECTION 2.** ORS 20.105 is amended to read:

29 20.105. (1) In any civil action, suit or other proceeding in a district court,
 30 a circuit court or the Oregon Tax Court, or in any civil appeal to or review
 31 by the Court of Appeals or Supreme Court, the court [may, in its

1 *discretion,]* shall award reasonable attorney fees [*appropriate in the circum-*
 2 *stances]* to a party against whom a claim, defense or ground for appeal or
 3 review is asserted, if that party is a prevailing party in the proceeding and
 4 to be paid by the party asserting the claim, defense or ground, upon a finding
 5 by the court that the party willfully disobeyed a court order or acted in bad
 6 faith, wantonly or solely for oppressive reasons.

7 (2) All attorney fees paid to any agency of the state under this section
 8 shall be deposited to the credit of the agency's appropriation or cash account
 9 from which the costs and expenses of the proceeding were paid or incurred.
 10 If the agency obtained an Emergency Board allocation to pay costs and ex-
 11 penses of the proceeding, to that extent the attorney fees shall be deposited
 12 in the General Fund available for general governmental expenses.

13 **SECTION 3.** ORS 20.125 is amended to read:

14 20.125. In the case of a mistrial in a civil or criminal action, if the court
 15 determines that the mistrial was caused by the deliberate misconduct of an
 16 attorney, the court, upon motion by the opposing party or upon motion of
 17 the court, [*may*] shall assess costs and disbursements, as defined in ORCP
 18 68, [*of*] and reasonable attorney fees incurred by the opposing party
 19 against the attorney causing the mistrial. Those costs and disbursements
 20 [*may*] and attorney fees shall be assessed against the attorney for the trial
 21 that ended in the mistrial.

22 **SECTION 4.** ORCP 17 is amended to read:

23 **A. Signing by party or attorney; certificate.** Every pleading, motion and
 24 other paper of a party represented by an attorney shall be signed by at least
 25 one attorney of record who is an active member of the Oregon State Bar. A
 26 party who is not represented by an attorney shall sign the pleading, motion
 27 or other paper and state the address of the party. Pleadings need not be
 28 verified or accompanied by affidavit. [*The signature constitutes a certificate*
 29 *that the person has read the pleading, motion or other paper, that to the best*
 30 *of the knowledge, information and belief of the person formed after reasonable*
 31 *inquiry it is well grounded in fact and is warranted by existing law or a good*

1 *faith argument for the extension, modification or reversal of existing law, and*
 2 *that it is not interposed for any improper purpose, such as to harass or to cause*
 3 *unnecessary delay or needless increase in the cost of litigation.]*

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

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

13 C. Certifications to court.

14 C(1) An attorney or party who signs, files or otherwise submits an
 15 argument in support of a pleading, motion or other paper, makes the
 16 certifications to the court identified in subsections (2) to (5) of this
 17 section, and further certifies that the certifications are based on the
 18 person's best knowledge, information and belief, formed after making
 19 all inquiries that are reasonable under the circumstances.

20 C(2) A party or attorney certifies that the pleading, motion or other
 21 paper is not being presented for any improper purpose, such as to
 22 harass or to cause unnecessary delay or needless increase in the cost
 23 of litigation.

24 C(3) An attorney certifies that the claims, defenses, and other legal
 25 positions taken in the pleading, motion or other paper are warranted
 26 by existing law or by a nonfrivolous argument for the extension,
 27 modification or reversal of existing law or the establishment of new
 28 law.

29 C(4) A party or attorney certifies that the allegations and other
 30 factual assertions in the pleading, motion or other paper are supported
 31 by evidence. Any allegation or other factual assertion that the party

1 or attorney does not wish to certify to be supported by evidence must
 2 be specifically identified. The attorney or party certifies that the at-
 3 torney or party believes that an allegation or other factual assertion
 4 so identified will be supported by evidence after further investigation
 5 and discovery.

6 C(5) The party or attorney certifies that any denials of factual as-
 7 sertion are supported by evidence. Any denial of factual assertion that
 8 the party or attorney does not wish to certify to be supported by evi-
 9 dence must be specifically identified. The attorney or party certifies
 10 that the attorney or party believes that a denial of a factual assertion
 11 so identified is reasonably based on a lack of information or belief.

12 D. Sanctions.

13 D(1) The court may impose sanctions against a person or party who
 14 is found to have made a false certification under section C of this rule,
 15 or who is found to be responsible for a false certification under section
 16 C of this rule. A sanction may be imposed under this section only after
 17 notice and an opportunity to be heard are provided to the party or
 18 attorney. A law firm is jointly liable for any sanction imposed against
 19 a partner, associate or employee of the firm, unless the court deter-
 20 mines that joint liability would be unjust under the circumstances.

21 D(2) Sanctions may be imposed under this section upon motion of
 22 a party or upon the court's own motion. If the court seeks to impose
 23 sanctions on its own motion, the court shall direct the party or at-
 24 torney to appear before the court and show cause why the sanctions
 25 should not be imposed. The court may not issue an order to appear
 26 and show cause under this subsection at any time after the filing of
 27 a voluntary dismissal, compromise or settlement of the action with
 28 respect to the party or attorney against whom sanctions are sought
 29 to be imposed.

30 D(3) A motion by a party to the proceeding for imposition of sanc-
 31 tions under this section must be made separately from other motions

1 and pleadings, and must describe with specificity the alleged false
2 certification. Sanctions may not be imposed against a party until at
3 least 21 days after the party is served with the motion in the manner
4 provided by Rule 9. Notwithstanding any other provision of this sec-
5 tion, the court may not impose sanctions against a party if within 21
6 days after the motion is served on the party, the party amends or
7 otherwise withdraws the pleading, motion, paper, or argument in a
8 manner that corrects the false certification specified in the motion.

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of follow down*

9 D(4) Sanctions under this section must be limited to amounts suf-
10 ficient to reimburse the moving party for attorney fees and other ex-
11 penses incurred by reason of the false certification, including
12 reasonable attorney fees and expenses incurred by reason of the mo-
13 tion for sanctions, and amounts sufficient to deter future false certif-
14 ication by the party or attorney and by other parties and attorneys.
15 The sanction may include nonmonetary penalties and monetary pen-
16 alties payable to the court. The sanction must include an order re-
17 quiring payment of reasonable attorney fees and expenses incurred by
18 the moving party by reason of the false certification.

19 D(5) An order imposing sanctions under this section must specif-
20 ically describe the false certification and the grounds for determining
21 that the certification was false. The order must explain the grounds
22 for the imposition of the specific sanction that is ordered.

23 E. Rule not applicable to discovery. This rule does not apply to any
24 motions, pleading or conduct that is subject to sanction under Rule
25 46.

26
27 **ASSESSMENT OF ATTORNEY FEES UPON ENTRY OF SUMMARY**
28 **JUDGMENT**

29
30 **SECTION 5. ORCP 47 is amended to read:**

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

1 or cross-claim or to obtain a declaratory judgment may, at any time after the
2 expiration of 20 days from the commencement of the action or after service
3 of a motion for summary judgment by the adverse party, move, with or
4 without supporting affidavits, for a summary judgment in that party's favor
5 upon all or any part thereof.

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

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

21 D. Form of affidavits; defense required. Except as provided by section E
22 of this rule, supporting and opposing affidavits shall be made on personal
23 knowledge, shall set forth such facts as would be admissible in evidence, and
24 shall show affirmatively that the affiant is competent to testify to the mat-
25 ters stated therein. Sworn or certified copies of all papers or parts thereof
26 referred to in an affidavit shall be attached thereto or served therewith. The
27 court may permit affidavits to be supplemented or opposed by depositions or
28 further affidavits. When a motion for summary judgment is made and sup-
29 ported as provided in this rule an adverse party may not rest upon the mere
30 allegations or denials of that party's pleading, but the adverse party's re-
31 sponse, by affidavits or as otherwise provided in this section, must set forth

1 specific facts showing that there is a genuine issue as to any material fact
2 for trial. If the adverse party does not so respond, summary judgment, if
3 appropriate, shall be entered against such party.

4 E. Affidavit of attorney when expert opinion required. Motions under
5 this rule are not designed to be used as discovery devices to obtain the
6 names of potential expert witnesses or to obtain their facts or opinions. If
7 a party, in opposing a motion for summary judgment, is required to provide
8 the opinion of an expert to establish a genuine issue of material fact, an
9 affidavit of the party's attorney stating that an unnamed qualified expert has
10 been retained who is available and willing to testify to admissible facts or
11 opinions creating a question of fact, will be deemed sufficient to controvert
12 the allegations of the moving party and an adequate basis for the court to
13 deny the motion. The affidavit shall be made in good faith based on admis-
14 sible facts or opinions obtained from a qualified expert who has actually
15 been retained by the attorney who is available and willing to testify and who
16 has actually rendered an opinion or provided facts which, if revealed by af-
17 fidavit, would be a sufficient basis for denying the motion for summary
18 judgment.

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

25 G. Affidavits made in bad faith. Should it appear to the satisfaction of the
26 court at any time that any of the affidavits presented pursuant to this rule
27 are presented in bad faith or solely for the purpose of delay, the court shall
28 forthwith order the party employing them to pay to the other party the
29 amount of the reasonable expenses which the filing of the affidavits caused
30 the other party to incur, including reasonable attorney fees, and any of-
31 fending party or attorney may be subject to sanctions for contempt.

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

4 I. Summary judgment that adjudicates all claims and defenses of a
5 party.

6 I(1) If summary judgment is entered in favor of any party other
7 than the state or a political subdivision of the state, and the summary
8 judgment adjudicates all claims and defenses of the party in favor of
9 the party, the court shall enter judgment against the party who did
10 not prevail for reasonable attorney fees, expert witness fees and all
11 costs attributable to discovery in the action. Attorney fees shall be
12 awarded in the manner provided by ORCP 68.

*Will work
only for A
expenses
claim attorney
fees*

13 I(2) If a party to an action other than the state or a political sub-
14 division of the state files a motion for summary judgment as to one
15 or more claims or defenses of another party, and within 20 days before
16 the scheduled hearing on the motion the other party repleads or oth-
17 erwise takes action to voluntarily dismiss one or more of the claims
18 or defenses that are challenged in the motion for summary judgment,
19 the court shall not award to the party filing the motion all reasonable
20 attorney fees and expert witness fees incurred by the moving party
21 that are attributable to the abandoned claim or defense.

*One-leave.
No award for
party who
repleads or
summary judgment*

22
23 **ATTORNEY FEE AWARDS IN SMALL ACTIONS**

24
25 SECTION 6. (1) Except as provided in subsection (2) of this section,
26 in any action based on contract or common law tort in which the
27 amount claimed is \$20,000 or less, the court shall award reasonable
28 attorney fees to the prevailing party.

29 (2) The court shall not award attorney fees to a prevailing plaintiff
30 in a civil action subject to subsection (1) of this section unless the
31 plaintiff served a copy of the complaint asserting the claim on all de-

KATE BROWN
MULTNOMAH COUNTY
DISTRICT 13



HOUSE OF REPRESENTATIVES
SALEM, OREGON
97310

REPLY TO ADDRESS INDICATED:
 House of Representatives
Salem, OR 97310
 PO Box 82699
Portland, OR 97282

January 26, 1995

Professor Maurice Holland
University of Oregon Law School
Eugene, Oregon 97403

Dear Professor Holland,

You will find enclosed a draft of legislation that I am prepared to submit this session. However, I first want you to see it as I understand that the Oregon Council on Court Procedures may also be interested in submitting such a bill. If this is the case, please let me know. I am happy to defer.

Please call my office in Salem at 986-1413 with your response. I look forward to hearing from you.

Thank you for your time.

Sincerely,

Representative Kate Brown

D R A F T

SUMMARY

Limits discovery of information on sexual conduct of alleged victim in certain civil cases. Allows discovery after motion and hearing in specified circumstances. Requires sanction against person who makes or opposes motion in bad faith.

A BILL FOR AN ACT

1
2 Relating to discovery; creating new provisions; and amending ORCP 36.

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

4 **SECTION 1.** ORCP 36 is amended to read:

5 **A. Discovery methods.** Parties may obtain discovery by one or more of the
6 following methods: depositions upon oral examination or written questions;
7 production of documents or things or permission to enter upon land or other
8 property, for inspection and other purposes; physical and mental examina-
9 tions; and requests for admission.

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

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

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

22 **B(2)(a)** A party, upon the request of an adverse party, shall disclose the

1 existence and contents of any insurance agreement or policy under which a
2 person transacting insurance may be liable to satisfy part or all of a judg-
3 ment which may be entered in the action or to indemnify or reimburse for
4 payments made to satisfy the judgment.

5 B(2)(b) The obligation to disclose under this subsection shall be performed
6 as soon as practicable following the filing of the complaint and the request
7 to disclose. The court may supervise the exercise of disclosure to the extent
8 necessary to insure that it proceeds properly and expeditiously. However, the
9 court may limit the extent of disclosure under this subsection as provided
10 in section C of this rule.

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

15 B(2)(d) As used in this subsection, "disclose" means to afford the adverse
16 party an opportunity to inspect or copy the insurance agreement or policy.

17 B(3) Trial preparation materials. Subject to the provisions of Rule 44, a
18 party may obtain discovery of documents and tangible things otherwise
19 discoverable under subsection B(1) of this rule and prepared in anticipation
20 of litigation or for trial by or for another party or by or for that other par-
21 ty's representative (including an attorney, consultant, surety, indemnitor,
22 insurer, or agent) only upon a showing that the party seeking discovery has
23 substantial need of the materials in the preparation of such party's case and
24 is unable without undue hardship to obtain the substantial equivalent of the
25 materials by other means. In ordering discovery of such materials when the
26 required showing has been made, the court shall protect against disclosure
27 of the mental impressions, conclusions, opinions, or legal theories of an at-
28 torney or other representative of a party concerning the litigation.

29 A party may obtain, without the required showing, a statement concern-
30 ing the action or its subject matter previously made by that party. Upon
31 request, a person who is not a party may obtain, without the required

1 showing, a statement concerning the action or its subject matter previously
2 made by that person. If the request is refused, the person or party requesting
3 the statement may move for a court order. The provisions of Rule 46 A(4)
4 apply to the award of expenses incurred in relation to the motion. For pur-
5 poses of this subsection, a statement previously made is (a) a written state-
6 ment signed or otherwise adopted or approved by the person making it, or
7 (b) a stenographic, mechanical, electrical, or other recording, or a tran-
8 scription thereof, which is a substantially verbatim recital of an oral state-
9 ment by the person making it and contemporaneously recorded.

10 C. Court order limiting extent of disclosure. Upon motion by a party or
11 by the person from whom discovery is sought, and for good cause shown, the
12 court in which the action is pending may make any order which justice re-
13 quires to protect a party or person from annoyance, embarrassment, op-
14 pression, or undue burden or expense, including one or more of the following:
15 (1) that the discovery not be had; (2) that the discovery may be had only on
16 specified terms and conditions, including a designation of the time or place;
17 (3) that the discovery may be had only by a method of discovery other than
18 that selected by the party seeking discovery; (4) that certain matters not be
19 inquired into, or that the scope of the discovery be limited to certain mat-
20 ters; (5) that discovery be conducted with no one present except persons
21 designated by the court; (6) that a deposition after being sealed be opened
22 only by order of the court; (7) that a trade secret or other confidential re-
23 search, development, or commercial information not be disclosed or be dis-
24 closed only in a designated way; (8) that the parties simultaneously file
25 specified documents or information enclosed in sealed envelopes to be opened
26 as directed by the court; or (9) that to prevent hardship the party requesting
27 discovery pay to the other party reasonable expenses incurred in attending
28 the deposition or otherwise responding to the request for discovery.

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

1 to the award of expenses incurred in relation to the motion.

2 D. Discovery of sexual conduct of alleged victim in certain cases.

3 D(1) Limitation on discovery. In any action in which sexual
4 harassment is alleged, or conduct that would constitute a crime under
5 ORS 163.355 to 163.427 is alleged, a party seeking discovery of infor-
6 mation relating to the sexual conduct of the alleged victim with per-
7 sons other than the alleged perpetrator of the harassment or conduct
8 must prove specific facts that establish that there is good cause for
9 seeking discovery, that the information is relevant to the subject
10 matter of the action, and that the information is admissible as evi-
11 dence or is reasonably calculated to lead to the discovery of admissible
12 evidence.

13 D(2) Order for discovery. A court may allow discovery of informa-
14 tion relating to the sexual conduct of a victim in an action subject to
15 this section only after a motion for discovery and a hearing on the
16 motion. The hearing on the motion may be held only after notice is
17 provided to the victim and may not be conducted ex parte. A motion
18 under this section may not be granted unless the party seeking the
19 discovery attaches to the motion an affidavit stating facts showing a
20 good faith attempt by the moving party to informally resolve the is-
21 sues presented by the motion.

*Instead,
should
conform
to unif.
Trial
Court
rules*

22 D(3) Sanctions. Upon a finding by the court that a person did not
23 act in good faith in making or opposing a motion under this section,
24 the court shall impose an appropriate sanction against the person if
25 the person does not prevail on the motion. The sanction may include
26 reasonable expenses incurred by the prevailing party on the motion,
27 including attorney fees.

28 SECTION 2. The amendments to ORCP 36 by section 1 of this Act
29 apply only to actions commenced on or after the effective date of this
30 Act.

delete _____

COUNCIL ON COURT PROCEDURES

University of Oregon
School of Law
Eugene, Oregon 97403-1221

Telephone: (503) 346-3990
Facsimile: (503) 346-1564

January 30, 1995

Representative Kate Brown
House of Representatives
Salem, OR 97310

Dear Representative Brown: Re: LC 117

Thank you for your January 26 letter regarding LC 117, concerning which I replied by phone call to one of your staff people whose name I unfortunately neglected to get. This letter is merely to confirm what I told that person on behalf of the Council.

First, the Council very much appreciates being notified about any proposed legislation that would amend the ORCP, something many legislators do not take the trouble to do.

Secondly, the Council does not submit legislation, although when permitted, it often expresses its views on legislation sponsored or submitted by others that would amend the ORCP, by testimony or otherwise. By statute, the Council must "promulgate" any ORCP amendments it generates during a given biennium prior to the convening of the legislative session. One possible option would be for the Council, if you would like it to, to take the policy decision embodied in LC 117 under consideration during the coming 1995-97 biennium and possibly promulgate an appropriate ORCP amendment in December 1996. Such an amendment would, unless overridden by the 1997 legislature, take effect Jan. 1, 1998.

However, my guess is that a delay of such duration would not be agreeable to you and that you will decide to introduce a bill this session. Obviously, the Council cannot put itself in the position of telling, or even asking, legislators not to legislate. On the assumption that you will want to move forward this session, I would then respectfully request you to give the Council two or three weeks from now to develop some comments, and possibly some suggested alternative language, for forwarding to you for your consideration. I realize there is a deadline on filing bills. We will try to respond as quickly as possible, but if a filing deadline problem arises, perhaps it could be finessed by filing LC 117 and then amending it in committee if, and to the extent, you are persuaded by the Council's comments and suggested alternative language.

Letter to Rep. Kate Brown 1/31/95

Page Two

Allow me to point out one or two things that trouble me a bit with the present language of LC 117. Proposed D(1) provides that a party seeking the protected information "must prove specific facts that establish that there is good cause" This standard is so rigorous that it might require judges to hold mini-trials in order to find "specific facts," but these would presumably be something other than the facts sought to be discovered about the plaintiff's asserted or suspected sexual conduct with persons other than the defendant. This sort of evidentiary hearing might itself require some preliminary discovery, plus live testimony and the like, to the point where the protected information would itself be disclosed.

Trial and motion judges are pretty good and well experienced at determining "good cause" without a full blown evidentiary hearing of the kind the present language would seem to require. You might want something along the lines of what ORCP 44 A now provides regarding physical and mental examinations: "The order [for a physical or mental examination] may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties"

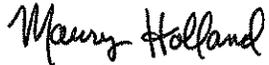
Another difficulty I have has to do with D(2). The latter provides that a court may allow discovery of protected information only upon motion and after hearing, presumably by order. But the final sentence of D(2) provides that a motion under this proposed section must be accompanied by affidavits showing efforts to resolve the issues informally. However, why, if discovery is permitted only pursuant to an order accompanied by specific findings, etc., would a plaintiff ever informally agree to provide the protected information?

Finally, one more thought. I have great difficulty imagining situations where a judge would be justified, in the civil context, in ordering a sexual harassment plaintiff to provide discovery about sexual conduct with persons other than the alleged harasser. This might be justified in 1 out of 100 cases. To deal with that very rare instance, LC 117 would set in place a rather cumbersome, time-consuming, expensive and often nasty hearing procedure that itself might defeat the underlying policy even when the motion for discovery is denied. Might it not make more sense to amend the Oregon Evidence Code to provide that, at least in civil contexts, the information LC 117 seeks to protect is subject to an evidentiary privilege, in which case of course it would never be discoverable? Another advantage of going the evidentiary privilege route is that it would also make this information inadmissible at trial, so that a defendant's lawyer would be barred from asking the plaintiff about this, something that might be attempted even without the benefit of having had prior discovery. Just a thought!

Letter to Rep. Kate Brown 1/31/95
Page Three

Unless I hear from your office to the contrary, I shall assume that you are going forward to introduce LC 117, and will gather as much input as I can from the Council as promptly as possible, in an effort to avoid filing deadline problems. I shall then forward to your office whatever I can gather at the earliest possible date so that you can give it whatever weight you conclude it merits.

Sincerely yours,



Maurice J. Holland
Executive Director

P.S: Should you decide to go the evidentiary privilege route, you could not do better than consult my colleague, Prof. Laird Kirkpatrick (tel. 503-346-3854).

KATE BROWN
MULTNOMAH COUNTY
DISTRICT 13

REPLY TO ADDRESS INDICATED:

- House of Representatives
Salem, OR 97310
- PO Box 82699
Portland, OR 97282



HOUSE OF REPRESENTATIVES
SALEM, OREGON
97310

February 6, 1995

Professor Maurice Holland
University of Oregon Law School
Eugene, Oregon 97402

Dear Professor Holland,

Thank you for your response to my letter.

I want you to know that I have decided to introduce the bill in question this session, although I do not expect it to gather any support now. It is important, however, to raise the issue.

I would like to work with the Counsel and Court Process Committee to further address this issue during the interim with the expectation that we may be able to pass it next session.

Thank you for your continuing interest and I look forward to working with you.

Sincerely,

Representative Kate Brown

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TELEPHONE
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*ALSO ADMITTED IN WASHINGTON

February 14, 1995

John Hart
Maurice Holland
J. Michael Alexander
Hon. Jack Billings
Marianne Bottini
Hon. Sid Brockley
Patricia Crain
Hon. Mary Deits
Hon. Stephen Gallagher
Hon. Susan Graber
Bruce Hamlin

Hon. Nely Johnson
Bernard Jolles
Hon. John Kelly
Rudy Lachenmeier
Hon. Michael Marcus
John McMillan
Michael Phillips
Hon. Milo Pope
Hon. Charles Sam
Stephan J.R. Shepard
Nancy Tauman

RE: Senate Bill 385

Dear Council Members:

The Council on Courts Procedure is scheduled for a special meeting by telephone conference at 9:30 am on Saturday, February 18, 1995. I am writing to propose, and frankly to lobby for, a position to be taken by the Council at that time. Recognizing that we are only being offered one brief opportunity to consider and respond to several profound changes in important ORCPs, and mindful of the difficulties of discussion by a large group in teleconference, I will describe in this letter the Motions I plan to make at that time, and my reasons for them.¹

I refer you to sections 1, 4, and 5 of Senate Bill 385, containing all of its proposed amendments to ORCP, copies attached, for your convenience.

¹There are several observations I could make about the process that is being employed by legislative committee leaders which places unprecedented time constraint on any effort of ours (or theirs) to act thoughtfully on behalf of our (or their) constituents in dealing with potentially huge changes in fundamental rules. I will limit myself to this comment: if these ideas are so good, and so widely supported by voters, why not let them be discussed in daylight, through normal channels, without special limitations placed on opportunities for citizens to express opposition, and without the announcement, prior to public hearings, that opponents cannot stop this bill no matter what they establish about its merits?

The Problem

The Problem, as I see it, is not really what is right or wrong with the ORCP as much as it is the threat of drastic and unnecessary changes being foisted on us by and for a narrow and unknowledgeable special interest group. For those who may not know, this legislation has been drafted by a small group of lobbyists at the request of e.g., Mark Hemstreet, the owner of Shilo Inns (see 1/25/95 Willamette Week front page story for discussion of his spending \$400,000 on state campaigns this election, apparently for purposes of promoting his legal "reform" agenda).

I am writing because I am concerned about the Council's role in this issue, both from a procedural standpoint, and on the merits. Procedurally, I am troubled that proponents have decided to ignore the established routes for new civil procedures in our state, and instead pursue drastically restrictive rules in legislative committee which have never been aired before the Council. This probably reflects the fact that these restrictions are not being proposed by or for any knowledgeable group in the bar or the judiciary, but by outsiders to our system, venting resentment for their own unhappy experiences as litigants. That does not, in my view, justify this end-run around the Council's authority. Under ordinary circumstances, I would prefer to refuse participation in the issue unless it was referred to the Council for its usual careful treatment during the off-legislative year, with ample public hearing and notice to interest groups of all ilks.

Therefore, my **First Motion** is that we resolve that these changes are within our jurisdiction, that they portend major impacts on the way our system works, that there is serious question whether they are needed or useful, and that we ask the legislature to refer them to the Council, as a standing interim committee, to be studied and returned to the 1997 legislature with our recommendations.

However, as I will explain below about the merits of this issue, what is proposed is too serious and too likely to pass through the legislative committees to let it happen without the Council's input. Whether anything the Council says on these issues will make any difference or not, I believe we must vote on them and announce our position, or else our ability to effect future important rule changes will be doubtful.

My **Second Motion** will be that the Council adopt a resolution opposing, and asking the legislature to reject, sections 1, 4, and 5 of Senate Bill 385.² If necessary these can be separated into multiple motions without hurting my feelings. And, if there are strong feelings in favor of statewide mandatory settlement conferences, I am willing to except part F of section 1 of the bill from my motions. See footnote 4 below.

My **Third Motion** will be a simple alternative to my second motion, in case some members are not prepared to be as specifically judgmental as I am.

SB 385 is a bad idea

Overview:

Senate Bill 385 is a massive bill with a small-minded theme. It proposes to amend most provisions throughout the ORS which provide for attorney fee awards, so that they become reciprocal and require courts to award fees against virtually every unsuccessful litigant. The great majority of provisions in the bill represent misguided alterations of ORS sections which promote the use of the courts to remedy various socially unacceptable conduct, but they do not effect, ORCP sections. Specific provisions would amend ORCP 54 (section 1 of the bill), ORCP 17 (section 4 of the bill), and ORCP 47 (section 5 of the bill).

²After drafting this letter, I received Maury's memo and materials dated February 8, 1995, causing me to add the following commentary in response to Senator Bryant's "friendly" advice that we not waste our time opposing the provisions of this bill because it will pass anyway: 1) what else would anyone say, who is a prime mover of legislation, regardless of its political or social merits?; and 2) the comments attributed to the Senator by Maury were made before the first opportunity was allowed by the Senator's committee for any public comment except by the proponents of the bill. On February 9, 1995, the committee hearing room, and an additional room for overflow were packed by citizens there to plead for preserving individual rights against the special interests behind this bill. Five Circuit Court judges and two respected law professors spoke eloquently against changing to this "loser pays" system. If the promoters of this idea still say it cannot be defeated, then it was never going to be about the merits of the bill anyway, and there is nothing to lose by our taking a principled position for its defeat.

ORCP 54E, offer of compromise amendment

My greatest fear and strongest opposition to this bill, arises from its first section, which would amend ORCP 54 E so that an offer of compromise has the effect of shifting onto every plaintiff the obligation to pay the defendants' attorneys fees and expert witness fees, unless the plaintiff wins an award in excess of the offer. Proponents of this bill have claimed to the press and the judiciary committee that it is not a "loser pays" bill, because of the offer of compromise condition, and that it is only fair that losers should pay, in any event.³⁴

chilling effect on exercise of rights

The intent and effect of this change would be to restrict access to the courts to only those litigants who can afford to risk thousands (sometimes hundreds of thousands) of dollars in order to have their day in court, and those who have no assets and therefore, nothing to lose if a large judgement is entered against them under this provision. The bill is disguised as something other than "loser pays" by the use of the offer of compromise to trigger that effect, but in fact makes it even worse: i.e., even "winners" will pay the other side's costs, if the judge or jury should find in their favor but not measure

³The bill also effects ORCP 54 by adding part D(2), requiring payment of previously ordered attorney fees before one can refile after dismissal with prejudice of the same claim. Part D(2) baffles me. I am not aware of any provision in law allowing pursuit of the same claim again after dismissal with prejudice, so I am struggling to understand the reason for conditioning the exercise of this non-existing right on anything.

⁴The bill also effects ORCP 54 by adding part F permitting court ordered settlement conferences at the request of any party or the court. I have no resistance to this proposal. However, while I served on the Uniform Trial Court Rules Committee, the same idea was rejected on more than one occasion, in favor of UTCR 6.200 which reserves a local option to adopt mandatory settlement conferences by Supplemental Local Rule. I also note that UTCR 6.010 already empowers any court to call the parties to a conference to consider, *inter alia*, "(g) the possible settlement of the case;".

their damages or comparative fault as favorably as they expected.⁵

impact likely on every case

No one has explained to me any reason why a defendant would ever fail to make an offer of compromise of some amount under this rule, just to make sure they have evoked the leverage effect this threat would have. Moreover, most meritorious cases for deserving middle-class citizens would never get started, in view of the threat of losing everything they have if they should fail to convince the jury they are right about both the liability for their claim AND the proper award of damages to compensate for it.

Claims by the proponents of this change ring hollow in part because of the deception used in conveying to the legislature the intent and effect of the bill: eg. in materials circulated to us with Maury's recent memo, John DiLorenzo (principle draftsman of the bill apparently for Mr. Hemstreet) tells the legislative committee:

"The purposes of this provision [offer of compromise triggering loser pays] is twofold: (1) It encourages defendants to make real offers of settlement (there is no tactical advantage to make a low-ball offer), and (2) It encourages plaintiffs to focus upon their case at earlier stages prior to trial and to take a hard look at offers which are so made." [emphasis added]

If he intended to suggest that the ability to shift the potential burden of all of the defendants' legal fees and costs onto the

⁵ One lawyer testified at the Joint Senate-House Judiciary Committee Hearing on this bill on February 9, about a drug products liability case in which an estimated 1 million dollars had been spent by more than one corporate defendant. As that lawyer observed, one or more of multiple defendants can often become prevailing parties by being let out of litigation as discovery and tactics become more focused. I have personal knowledge of an expert witness for an all terrain manufacturer who charged over \$600,000 for his pre-trial preparation work on a single case. A plaintiff could win a very large verdict against the main or remaining defendant, and under this rule, still collect nothing.

plaintiff by making any offer above zero is not a "tactical advantage", I think we need some new definitions of terms. If he meant to say plaintiffs are "encouraged" toward earlier analysis of their cases, his skill at understatement is admirable, because any plaintiff with anything of value to lose will be "encouraged" to run away and hide rather than to ever file any lawsuit of any kind, no matter what has been done to harm them, once the prospects of this provision are explained by their lawyer.

a bludgeon against the middle class

I personally would feel compelled to advise every client prior to starting litigation that they are likely to require bankruptcy if we do not win enough to overcome the effects of this bill. On the chance that I am imperfect in advising them how to respond to an offer of settlement at any point during their representation, I will have to notify the PLF that my client may have incurred huge liability in reliance on my advise. Numerous witnesses in the legislative hearings on February 9, including all five circuit court judges, told the committee there is no serious problem of frivolous lawsuits in our court system, no overcrowded docket demanding relief, and no reason to treat plaintiffs who do not prevail as per se frivolous litigants. As Judge RP Jones said, the playing field is reasonably well balanced. Don't fix it when it ain't broke.

No valid argument exists to support this restriction on the rights of ordinary citizens to be treated equally in court. Proponents take out radio ads attacking juries for perceived errors based on grossly inaccurate summaries of the facts of notorious cases.⁶ Those of us working in the courts know there is no flood of frivolous litigation (or any other kind - civil case filings have dropped steadily for several years), and no major broken part of the system that needs drastic fixing. My perception (but they will have to speak for themselves) is that my colleagues in the defense bar do not clamor for this restriction of individual rights, and do not overlook the fact

⁶ Such as the recent award against McDonalds for the woman who suffered third degree burns over her entire groin area because of corporate policy to keep coffee 50 degrees hotter than most home coffee makers can make it (despite over 700 hundred prior burn injuries caused, including some very similar to plaintiff's), none of which facts are reported in the current radio ad harangue about the case.

that it would seriously disrupt the balance of power and opportunity between aggrieved individuals and insured or wealthy corporate interests.

the English Rule

Proponents point to England as the model for restricting access to the courts. However, most observers (including judges who testified on February 9 against this bill) notice that the English system is based on the assumption that trade unions will pay any judgments allowed against unsuccessful injured members who lose under their loser pays rule. Other sources recognize that the English rule works better in a country built on economic class distinctions than it would where we take pride in equal opportunity regardless of station. As a columnist in *The Oregonian* wrote for Sunday, February 5, 1995, quoting from the conservative English magazine, *The Economist*: "Enormous numbers of mostly middle-class people' simply cannot use the courts... because they must pay the other side's lawyers if they lose. 'For most people this means that they are risking financial ruin.'" Anthony Lewis, 'Tort Reform' Shelters the Rich, *The Oregonian*, p. D3, 2/5/95. [See the economist excerpt in materials sent out by Maury].

violation of state constitutional Remedies clause

Constitutional law Professor David Schuman told the Joint Judiciary Committee on Thursday, February 9, 1995, that the effects of this bill of denying access to the courts for a class of citizens is likely to be found unconstitutional under the Remedies clause of the state constitution. It should be no surprise that constitutional protections would be offended by legislation that has as its avowed purpose the prevention of ordinary legal causes for ordinary people against businesses. It cannot be overstated that this provision makes no attempt to limit the restriction of citizen's rights to situations of frivolous litigation.

basic unfairness

I can offer anecdotal evidence to support my vision of how this bill would restrict people's options and work very unfairly against righteous claims. Mr Lewis' column quotes a government executive from Utah to the effect that this bill does not just stop frivolous lawsuits, it stops them all. I recently tried a case for a retired railroad machinist who underwent successful

heart valve surgery, but became permanently paraplegic when his physicians failed to diagnose a hemorrhage in his spine caused by medication they gave him after surgery. Several respected physicians testified for my client's case, but a jury in Lane County found for the local doctors. If this bill had been law (and assuming I and my client had the guts to proceed at all), he and his wife would probably have lost their savings and their house, for not winning their non-frivolous, but unsuccessful legal action. I can describe a dozen other persons with catastrophic injuries who would have been inhibited or prevented from pursuing their ultimately successful claims by this onerous provision.

the Summary Judgment Hammer

Section 5 of SB 385 adds a section to ORCP 47 so that losing a summary judgment motion will have the same terrible effect as failing to exceed an offer of compromise: the losing party will pay the winning party's attorneys and expert witnesses. Of course this could theoretically effect either plaintiffs or defendants, except that there are very few situations where summary judgment is even sought, let alone granted, in favor of a plaintiff. Business litigants (who, relatively speaking, can afford the costs and risks of litigation) may get equal advantage and detriment from this change whether they are plaintiffs or defendants. For injury plaintiffs, it would again put a premium on being perfect or wealthy, or otherwise never venturing near the court system.

I represented a quadriplegic man who lost the only usable extremity he had due to medical negligence, and sued a treating doctor for his damages. A pro tem judge granted summary judgment against all claims on the basis of a mis-reading of the statute of limitations discovery rule. We were successful appealing this outcome to the Court of Appeals, and the State Supreme Court, after which the case was settled for the policy limits of the doctor's insurance coverage. There could be no doubt about the meritorious nature of the case. But under the restrictions sought in SB 385, it is doubtful my client could have risked filing the case in the first place, and especially whether he could have continued the contest into the appellate courts after being ordered to pay attorney fees and witness fees for losing summary judgment.

Council on Court Committee Members
February 14, 1995

Page 9

Conclusions

Please join me in voting to take an official position for the Council against these changes. I would be glad to discuss the merits of the proposed restrictions either before or at the time of our telephone meeting. Thanks for your indulgence of this over-long message.

Very truly yours,

GAYLORD & EYERMAN, P.C.



William A. Gaylord

WAG:jki

Enclosures

P.S. I am also enclosing a Draft Bill which I just received, scheduled for hearing soon, and modifying ORCP 47 summary judgment procedures profoundly. It would require granting summary judgment either if the moving party met the usual burden for such a motion or [new language] the respondent failed to set forth "admissible evidence" to avoid the granting of the motion. This not only would return us to the days of summary judgment motions used to discover expert witnesses, it would reverse our traditions that provide trials as the means of resolving facts unless a moving party can meet its burden to establish that trial is unnecessary. We all know of situations in which summary judgment is inappropriate on its face without any opposition to the motion being filed at all, or with strictly legal argument opposing it. I will move a resolution to refer this bill to the council, or oppose it on the merits in this legislature, at the time of our teleconference.

Council On Courts Procedure

teleconference meeting for 2/18/95

Motions Proposed by Bill Gaylord

1. Resolved that the Council on Courts Procedure delegates its chair, or one or more members if he is not available, to attend the hearing of the combined Senate and House Judiciary Committee on Senate Bill 385 (as of the time this motion is written, scheduled for February 20, 1995) and to convey on behalf of the Council the following position:

that the Council on Courts Procedure finds the portions of Senate Bill 385 which would amend certain Oregon Rules of Civil Procedure, to wit, sections 1, 4, and 5 of the bill, to be directly within the statutory, historical, and appropriate authority of the Council on Courts Procedure;

that the Council on Courts Procedure is best equipped to study the problems raised and addressed by these provisions, to take input from interest groups effected by them, and to craft solutions consistent with law, constitutional fundamentals, and societal interests, and to advise the legislature on these matters;

that the subjects of these sections of the bill have never been brought before the Council on Courts Procedure for consideration or action;

that the sections in question have potential for significant change in the procedure by which disputes are resolved, including the practice of law, the conduct of courts, and the rights of citizens;

that there is no apparent emergency requiring hasty legislative action without the benefit of Council input;

that therefore, these sections (1,4, and 5) of Senate Bill 385 should be submitted to the Council on Courts Procedure, along with whatever guidance or instruction the legislature wishes to provide, for consideration and action during the next annual interim term of the Council, to be returned with recommendations to the 1997 legislative session.

2. Resolved that, if Motion 1 above is not adopted by the Council, or if it is adopted, is not followed by the legislature, then the Council on Courts Procedure delegates its chair, or one or more members if he is not available, to attend the hearing of the combined Senate and House Judiciary Committee on Senate Bill 385

(as of the time this motion is written, scheduled for February 20, 1995) and to convey on behalf of the Council the following position:

based on the merits of the propose changes to ORCP embodied in sections 1, 4, and 5 of Senate Bill 385, (and without an opportunity to fully perform its quasi-legislative role of fact-finding, including public hearings, debate, and reasoned consideration over time), the Council finds these proposed changes to be:

unnecessary because the present system provides reasonable and effective deterrence against frivolous litigation (as evidenced by the lack of crowding of our court dockets and the rarity of truly frivolous actions);

unfair because they would place undue burdens and risks on the plaintiffs who seek civil justice under that system;

inappropriate because of the sanctions they create against good faith exercise of rights of citizenship by individuals to the special detriment of the middle class;

therefore, the Council on Courts Procedure opposes the adoption of sections 1, 4, and 5 of SB 385.

3. [In alternative to both 1 and 2 above] Resolved that the Council on Courts Procedure opposes the adoption of sections 1, 4, and 5 of SB 385, and authorizes the Chair, or his delegee, to convey that position to the legislature.

LC 2752

1/30/95 (DH/hl)

D R A F T

SUMMARY

Requires granting of summary judgment unless opposing affidavits and supporting documentation set forth specific facts supported by admissible evidence adequate to avoid granting of motion for directed verdict in trial of matter.

A BILL FOR AN ACT

1
2 Relating to summary judgment; amending ORCP 47 C.

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

4 SECTION 1. ORCP 47 C is amended to read:

5 C. Motion and proceedings thereon. The motion and all supporting docu-
6 ments shall be served and filed at least 45 days before the date set for trial.
7 The adverse party shall have 20 days in which to serve and file opposing
8 affidavits and supporting documents. The moving party shall have five days
9 to reply. The court shall have discretion to modify these stated times. The
10 judgment sought shall be rendered forthwith if: (1) the pleadings, depo-
11 sitions, and admissions on file, together with the affidavits, if any, show that
12 there is no genuine issue as to any material fact and that the moving party
13 is entitled to a judgment as a matter of law; or (2) the opposing affidavits
14 and supporting documentation submitted by the adverse party fail to
15 set forth specific facts supported by admissible evidence adequate to
16 avoid the granting of a motion for a directed verdict in a trial of the
17 matter. A summary judgment, interlocutory in character, may be rendered
18 on the issue of liability alone although there is a genuine issue as to the
19 amount of damages.

20

Senate Bill 385

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

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

Requires plaintiff who previously dismissed action with prejudice and who refiles action to pay all attorney fees incurred by defendants in dismissed action. Allows defendant to recover certain attorney fees and expert witness expenses from plaintiff if defendant offers to allow judgment be taken against defendant and plaintiff fails to obtain more favorable judgment than offered. Allows settlement conference at any time.

Requires award of attorney fees for certain misconduct, including causing mistrial. Requires sanctions for certain false certifications in pleadings, motions, papers and arguments to court.

Requires award of attorney fees to party who prevails on motion for summary judgment if summary judgment adjudicates all claims or defenses of party against whom judgment is entered.

Authorizes award of attorney fees to prevailing party in any action based on contract or common law tort if amount claimed is \$20,000 or less.

Amends statutes allowing or requiring award of attorney fees to prevailing plaintiff to allow or require award of attorney fees to prevailing party.

A BILL FOR AN ACT

1
2 Relating to civil procedure; creating new provisions; amending ORS 20.090, 20.094, 20.096, 20.105,
3 20.107, 20.125, 30.075, 30.184, 30.190, 30.680, 30.820, 30.822, 30.825, 30.860, 30.862, 30.864, 30.866,
4 30.960, 59.115, 59.127, 59.255, 59.670, 59.890, 59.925, 62.335, 62.440, 65.207, 65.224, 65.781, 70.415,
5 74A.3050, 74A.4040, 79.5070, 83.650, 86.260, 86.265, 86.720, 86.742, 87.076, 87.585, 87.725, 87.772,
6 87.865, 90.710, 92.018, 96.030, 97.760, 105.831, 110.378, 133.739, 166.725, 180.510, 192.590, 223.615,
7 279.365, 307.525, 311.673, 311.679, 311.711, 311.771, 346.630, 346.687, 346.690, 431.905, 455.440,
8 460.165, 462.110, 469.421, 474.085, 478.965, 479.265, 480.600, 527.665, 540.120, 540.250, 545.104,
9 545.502, 548.620, 548.660, 553.560, 554.140, 583.126, 583.146, 585.150, 618.516, 621.246, 645.225,
10 646.140, 646.240, 646.359, 646.632, 646.638, 646.641, 646.642, 646.760, 646.770, 646.775, 646.780,
11 646.865, 646.876, 648.135, 650.020, 650.065, 650.250, 652.200, 652.230, 653.055, 653.285, 656.052,
12 658.220, 658.415, 659.160, 659.165, 661.280, 671.578, 671.705, 692.180, 697.762, 697.792, 701.067,
13 722.116, 722.118, 731.314, 731.737, 746.300, 746.350, 746.680, 756.185, 759.720, 759.900, 760.540,
14 774.210, 815.410 and 815.415 and ORCP 17, 47 and 54; and repealing ORS 20.080 and 20.098.

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

16 OFFERS OF COMPROMISE, SETTLEMENT AND PREVIOUSLY 17 DISMISSED ACTIONS 18

19 SECTION 1. ORCP 54 is amended to read:

20 A. Voluntary dismissal; effect thereof.

21 A(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 D and of any statute of this
22 state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of
23 dismissal with the court and serving such notice on the defendant not less than five days prior to
24 the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed
25

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in boldfaced type.

1 by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of
2 dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates
3 as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court
4 of the United States or of any state an action against the same parties on or including the same
5 claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal
6 or stipulation under this subsection, the court shall enter a judgment of dismissal.

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

13 A(3) Costs and disbursements. When an action is dismissed under this section, the judgment may
14 include any costs and disbursements, including attorney fees, provided by rule or statute. Unless the
15 circumstances indicate otherwise, the dismissed party shall be considered the prevailing party.

16 B. Involuntary dismissal.

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

20 B(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury
21 has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to
22 offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the
23 ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier
24 of the facts may then determine them and render judgment of dismissal against the plaintiff or may
25 decline to render any judgment until the close of all the evidence. If the court renders judgment of
26 dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

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

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

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

41 D. Costs of previously dismissed action.

42 D(1) If a plaintiff who has once dismissed an action in any court commences an action based
43 upon or including the same claim against the same defendant, the court may make such order for
44 the payment of any unpaid judgment for costs and disbursements against plaintiff in the action
45 previously dismissed as it may deem proper and may stay the proceedings in the action until the

1 plaintiff has complied with the order.

2 D(2) If a plaintiff who previously filed an action that was dismissed with prejudice sub-
3 sequently commences an action based upon or including the same claim against the same
4 defendant, the court shall enter an order requiring the payment of all attorney fees incurred
5 by the defendant in the action previously dismissed.

6 E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through
7 17.085, the party against whom a claim is asserted may, at any time up to [10] 30 days prior to trial,
8 serve upon the party asserting the claim an offer to allow judgment to be given against the party
9 making the offer for the sum, or the property, or to the effect therein specified. The party asserting
10 the claim may accept the offer in the manner specified by this section at any time within
11 30 days after the offer is made. The court may extend the period during which an offer under
12 this section may be accepted by an additional 30 days if the court determines that the party
13 against whom the claim is made has unreasonably resisted efforts to obtain discovery during
14 the 30-day period following the making of the offer. If the party asserting the claim accepts the
15 offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon,
16 and file the same with the clerk before trial, and within three days from the time it was served upon
17 such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated
18 judgment. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall
19 be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted
20 and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evi-
21 dence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment,
22 the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after
23 the date of the offer, but the party against whom the claim was asserted shall recover of the party
24 asserting the claim reasonable attorney fees, reasonable expert witness fees, and costs and
25 disbursements from the time of the service of the offer. For the purpose of determining whether
26 the party asserting the claim failed to obtain a more favorable judgment, the court shall
27 disregard any award of attorney fees made to the claimant.

28 F. Settlement conferences. A settlement conference may be ordered by the court at any
29 time at the request of any party or upon the court's own motion. Upon the request of the
30 judge or a party, a different judge shall preside at the conference.

31

32 **AWARD OF ATTORNEY FEES AS SANCTION FOR FALSE OR FRIVOLOUS**
33 **PLEADINGS AND OTHER MISCONDUCT**

34

35 SECTION 2. ORS 20.105 is amended to read:

36 20.105. (1) In any civil action, suit or other proceeding in a district court, a circuit court or the
37 Oregon Tax Court, or in any civil appeal to or review by the Court of Appeals or Supreme Court,
38 the court [*may, in its discretion,*] shall award reasonable attorney fees [*appropriate in the circum-*
39 *stances*] to a party against whom a claim, defense or ground for appeal or review is asserted, if that
40 party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense
41 or ground, upon a finding by the court that the party willfully disobeyed a court order or acted in
42 bad faith, wantonly or solely for oppressive reasons.

43 (2) All attorney fees paid to any agency of the state under this section shall be deposited to the
44 credit of the agency's appropriation or cash account from which the costs and expenses of the pro-
45 ceeding were paid or incurred. If the agency obtained an Emergency Board allocation to pay costs

1 and expenses of the proceeding, to that extent the attorney fees shall be deposited in the General
2 Fund available for general governmental expenses.

3 SECTION 3. ORS 20.125 is amended to read:

4 20.125. In the case of a mistrial in a civil or criminal action, if the court determines that the
5 mistrial was caused by the deliberate misconduct of an attorney, the court, upon motion by the op-
6 posing party or upon motion of the court, [may] shall assess costs and disbursements, as defined in
7 ORCP 68, [of] and reasonable attorney fees incurred by the opposing party against the attorney
8 causing the mistrial. Those costs and disbursements [may] and attorney fees shall be assessed
9 against the attorney for the trial that ended in the mistrial.

10 SECTION 4. ORCP 17 is amended to read:

11 A. Signing by party or attorney; certificate. Every pleading, motion and other paper of a party
12 represented by an attorney shall be signed by at least one attorney of record who is an active
13 member of the Oregon State Bar. A party who is not represented by an attorney shall sign the
14 pleading, motion or other paper and state the address of the party. Pleadings need not be verified
15 or accompanied by affidavit. *[The signature constitutes a certificate that the person has read the*
16 *pleading, motion or other paper, that to the best of the knowledge, information and belief of the person*
17 *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good*
18 *faith argument for the extension, modification or reversal of existing law, and that it is not interposed*
19 *for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the*
20 *cost of litigation.]*

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

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

29 C. Certifications to court.

30 C(1) An attorney or party who signs, files or otherwise submits an argument in support
31 of a pleading, motion or other paper makes the certifications to the court identified in sub-
32 sections (2) to (5) of this section, and further certifies that the certifications are based on
33 the person's best knowledge, information and belief, formed after making all inquiries that
34 are reasonable under the circumstances.

35 C(2) A party or attorney certifies that the pleading, motion or other paper is not being
36 presented for any improper purpose, such as to harass or to cause unnecessary delay or
37 needless increase in the cost of litigation.

38 C(3) An attorney certifies that the claims, defenses, and other legal positions taken in
39 the pleading, motion or other paper are warranted by existing law or by a nonfrivolous ar-
40 gument for the extension, modification or reversal of existing law or the establishment of
41 new law.

42 C(4) A party or attorney certifies that the allegations and other factual assertions in the
43 pleading, motion or other paper are supported by evidence. Any allegation or other factual
44 assertion that the party or attorney does not wish to certify to be supported by evidence
45 must be specifically identified. The attorney or party certifies that the attorney or party

1 believes that an allegation or other factual assertion so identified will be supported by evi-
2 dence after further investigation and discovery.

3 C(5) The party or attorney certifies that any denials of factual assertion are supported
4 by evidence. Any denial of factual assertion that the party or attorney does not wish to
5 certify to be supported by evidence must be specifically identified. The attorney or party
6 certifies that the attorney or party believes that a denial of a factual assertion so identified
7 is reasonably based on a lack of information or belief.

8 D. Sanctions.

9 D(1) The court may impose sanctions against a person or party who is found to have
10 made a false certification under section C of this rule, or who is found to be responsible for
11 a false certification under section C of this rule. A sanction may be imposed under this sec-
12 tion only after notice and an opportunity to be heard are provided to the party or attorney.
13 A law firm is jointly liable for any sanction imposed against a partner, associate or employee
14 of the firm, unless the court determines that joint liability would be unjust under the cir-
15 cumstances.

16 D(2) Sanctions may be imposed under this section upon motion of a party or upon the
17 court's own motion. If the court seeks to impose sanctions on its own motion, the court shall
18 direct the party or attorney to appear before the court and show cause why the sanctions
19 should not be imposed. The court may not issue an order to appear and show cause under
20 this subsection at any time after the filing of a voluntary dismissal, compromise or settle-
21 ment of the action with respect to the party or attorney against whom sanctions are sought
22 to be imposed.

23 D(3) A motion by a party to the proceeding for imposition of sanctions under this section
24 must be made separately from other motions and pleadings, and must describe with
25 specificity the alleged false certification. Sanctions may not be imposed against a party until
26 at least 21 days after the party is served with the motion in the manner provided by Rule
27 9. Notwithstanding any other provision of this section, the court may not impose sanctions
28 against a party if within 21 days after the motion is served on the party, the party amends
29 or otherwise withdraws the pleading, motion, paper, or argument in a manner that corrects
30 the false certification specified in the motion.

31 D(4) Sanctions under this section must be limited to amounts sufficient to reimburse the
32 moving party for attorney fees and other expenses incurred by reason of the false certifi-
33 cation, including reasonable attorney fees and expenses incurred by reason of the motion for
34 sanctions, and amounts sufficient to deter future false certification by the party or attorney
35 and by other parties and attorneys. The sanction may include nonmonetary penalties and
36 monetary penalties payable to the court. The sanction must include an order requiring pay-
37 ment of reasonable attorney fees and expenses incurred by the moving party by reason of
38 the false certification.

39 D(5) An order imposing sanctions under this section must specifically describe the false
40 certification and the grounds for determining that the certification was false. The order
41 must explain the grounds for the imposition of the specific sanction that is ordered.

42 E. Rule not applicable to discovery. This rule does not apply to any motion, pleading or
43 conduct that is subject to sanction under Rule 46.

44
45

ASSESSMENT OF ATTORNEY FEES UPON ENTRY OF SUMMARY JUDGMENT

1 **SECTION 5. ORCP 47 is amended to read:**

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

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

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

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

30 E. Affidavit of attorney when expert opinion required. Motions under this rule are not designed
31 to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their
32 facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the
33 opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney
34 stating that an unnamed qualified expert has been retained who is available and willing to testify
35 to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert
36 the allegations of the moving party and an adequate basis for the court to deny the motion. The
37 affidavit shall be made in good faith based on admissible facts or opinions obtained from a qualified
38 expert who has actually been retained by the attorney who is available and willing to testify and
39 who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a
40 sufficient basis for denying the motion for summary judgment.

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

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

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

10 I. Summary judgment that adjudicates all claims and defenses of a party.

11 I(1) If summary judgment is entered in favor of any party other than the state or a poli-
 12 tical subdivision of the state, and the summary judgment adjudicates all claims and defenses
 13 of the party in favor of the party, the court shall enter judgment against the party who did
 14 not prevail for reasonable attorney fees, expert witness fees and all costs attributable to
 15 discovery in the action. Attorney fees shall be awarded in the manner provided by ORCP 68.

16 I(2) If a party to an action other than the state or a political subdivision of the state files
 17 a motion for summary judgment as to one or more claims or defenses of another party, and
 18 within 20 days before the scheduled hearing on the motion the other party repleads or oth-
 19 erwise takes action to voluntarily dismiss one or more of the claims or defenses that are
 20 challenged in the motion for summary judgment, the court shall not award to the party filing
 21 the motion all reasonable attorney fees and expert witness fees incurred by the moving party
 22 that are attributable to the abandoned claim or defense.

23
 24 ATTORNEY FEE AWARDS IN SMALL ACTIONS

25
 26 SECTION 6. (1) Except as provided in subsection (2) of this section, in any action based
 27 on contract or common law tort in which the amount claimed is \$20,000 or less, the court
 28 shall award reasonable attorney fees to the prevailing party.

29 (2) The court shall not award attorney fees to a prevailing plaintiff in a civil action sub-
 30 ject to subsection (1) of this section unless the plaintiff served a copy of the complaint as-
 31 serting the claim on all defendants against whom the claim was made at least 30 days before
 32 filing the complaint with the court. The provisions of this subsection do not apply to
 33 counterclaims, cross-claims or third-party claims.

34 SECTION 7. ORS 20.080 and 20.098 are repealed.

35
 36 RECIPROCITY OF ATTORNEY FEE AWARDS

37
 38 SECTION 8. ORS 20.090 is amended to read:

39 20.090. [(1) Except as otherwise provided in subsection (2) of this section,] In any action against
 40 the maker of any check, draft or order for the payment of money which has been dishonored for lack
 41 of funds or credit to pay the same or because payment has been stopped, the court shall [allow]
 42 award a reasonable attorney fee at trial and on appeal to the prevailing party, in addition to dis-
 43 bursements.

44 [(2) If the plaintiff prevails in an action described in subsection (1) of this section, the court shall
 45 not allow a reasonable attorney fee to the plaintiff as provided in subsection (1) of this section unless

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CASE NAME:

CASE NUMBER:

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February 14, 1995

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Hon. Milo Pope
Hon. Charles Sam
Stephan J.R. Shepard
Nancy Tauman

RE: Senate Bill 385

Dear Council Members:

The Council on Courts Procedure is scheduled for a special meeting by telephone conference at 9:30 am on Saturday, February 18, 1995. I am writing to propose, and frankly to lobby for, a position to be taken by the Council at that time. Recognizing that we are only being offered one brief opportunity to consider and respond to several profound changes in important ORCPs, and mindful of the difficulties of discussion by a large group in teleconference, I will describe in this letter the Motions I plan to make at that time, and my reasons for them.¹

I refer you to sections 1, 4, and 5 of Senate Bill 385, containing all of its proposed amendments to ORCP, copies attached, for your convenience.

¹There are several observations I could make about the process that is being employed by legislative committee leaders which places unprecedented time constraint on any effort of ours (or theirs) to act thoughtfully on behalf of our (or their) constituents in dealing with potentially huge changes in fundamental rules. I will limit myself to this comment: if these ideas are so good, and so widely supported by voters, why not let them be discussed in daylight, through normal channels, without special limitations placed on opportunities for citizens to express opposition, and without the announcement, prior to public hearings, that opponents cannot stop this bill no matter what they establish about its merits?

Council on Court Committee Members
February 14, 1995

Page 2

The Problem

The Problem, as I see it, is not really what is right or wrong with the ORCP as much as it is the threat of drastic and unnecessary changes being foisted on us by and for a narrow and unknowledgeable special interest group. For those who may not know, this legislation has been drafted by a small group of lobbyists at the request of e.g., Mark Hemstreet, the owner of Shilo Inns (see 1/25/95 Willamette Week front page story for discussion of his spending \$400,000 on state campaigns this election, apparently for purposes of promoting his legal "reform" agenda).

I am writing because I am concerned about the Council's role in this issue, both from a procedural standpoint, and on the merits. Procedurally, I am troubled that proponents have decided to ignore the established routes for new civil procedures in our state, and instead pursue drastically restrictive rules in legislative committee which have never been aired before the Council. This probably reflects the fact that these restrictions are not being proposed by or for any knowledgeable group in the bar or the judiciary, but by outsiders to our system, venting resentment for their own unhappy experiences as litigants. That does not, in my view, justify this end-run around the Council's authority. Under ordinary circumstances, I would prefer to refuse participation in the issue unless it was referred to the Council for its usual careful treatment during the off-legislative year, with ample public hearing and notice to interest groups of all ilks.

Therefore, my First Motion is that we resolve that these changes are within our jurisdiction, that they portend major impacts on the way our system works, that there is serious question whether they are needed or useful, and that we ask the legislature to refer them to the Council, as a standing interim committee, to be studied and returned to the 1997 legislature with our recommendations.

However, as I will explain below about the merits of this issue, what is proposed is too serious and too likely to pass through the legislative committees to let it happen without the Council's input. Whether anything the Council says on these issues will make any difference or not, I believe we must vote on them and announce our position, or else our ability to effect future important rule changes will be doubtful.

Council on Court Committee Members
February 14, 1995

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My Second Motion will be that the Council adopt a resolution opposing, and asking the legislature to reject, sections 1, 4, and 5 of Senate Bill 385.² If necessary these can be separated into multiple motions without hurting my feelings. And, if there are strong feelings in favor of statewide mandatory settlement conferences, I am willing to except part F of section 1 of the bill from my motions. See footnote 4 below.

My Third Motion will be a simple alternative to my second motion, in case some members are not prepared to be as specifically judgmental as I am.

SB 385 is a bad idea

Overview:

Senate Bill 385 is a massive bill with a small-minded theme. It proposes to amend most provisions throughout the ORS which provide for attorney fee awards, so that they become reciprocal and require courts to award fees against virtually every unsuccessful litigant. The great majority of provisions in the bill represent misguided alterations of ORS sections which promote the use of the courts to remedy various socially unacceptable conduct, but they do not effect, ORCP sections. Specific provisions would amend ORCP 54 (section 1 of the bill), ORCP 17 (section 4 of the bill), and ORCP 47 (section 5 of the bill).

²After drafting this letter, I received Maury's memo and materials dated February 8, 1995, causing me to add the following commentary in response to Senator Bryant's "friendly" advice that we not waste our time opposing the provisions of this bill because it will pass anyway: 1) what else would anyone say, who is a prime mover of legislation, regardless of its political or social merits?; and 2) the comments attributed to the Senator by Maury were made before the first opportunity was allowed by the Senator's committee for any public comment except by the proponents of the bill. On February 9, 1995, the committee hearing room, and an additional room for overflow were packed by citizens there to plead for preserving individual rights against the special interests behind this bill. Five Circuit Court judges and two respected law professors spoke eloquently against changing to this "loser pays" system. If the promoters of this idea still say it cannot be defeated, then it was never going to be about the merits of the bill anyway, and there is nothing to lose by our taking a principled position for its defeat.

Council on Court Committee Members
February 14, 1995

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ORCP 54E, offer of compromise amendment

My greatest fear and strongest opposition to this bill, arises from its first section, which would amend ORCP 54 E so that an offer of compromise has the effect of shifting onto every plaintiff the obligation to pay the defendants' attorneys fees and expert witness fees, unless the plaintiff wins an award in excess of the offer. Proponents of this bill have claimed to the press and the judiciary committee that it is not a "loser pays" bill, because of the offer of compromise condition, and that it is only fair that losers should pay, in any event.³⁴

chilling effect on exercise of rights

The intent and effect of this change would be to restrict access to the courts to only those litigants who can afford to risk thousands (sometimes hundreds of thousands) of dollars in order to have their day in court, and those who have no assets and therefore, nothing to lose if a large judgement is entered against them under this provision. The bill is disguised as something other than "loser pays" by the use of the offer of compromise to trigger that effect, but in fact makes it even worse: i.e., even "winners" will pay the other side's costs, if the judge or jury should find in their favor but not measure

³⁴The bill also effects ORCP 54 by adding part D(2), requiring payment of previously ordered attorney fees before one can refile after dismissal with prejudice of the same claim. Part D(2) baffles me. I am not aware of any provision in law allowing pursuit of the same claim again after dismissal with prejudice, so I am struggling to understand the reason for conditioning the exercise of this non-existing right on anything.

⁴The bill also effects ORCP 54 by adding part F permitting court ordered settlement conferences at the request of any party or the court. I have no resistance to this proposal. However, while I served on the Uniform Trial Court Rules Committee, the same idea was rejected on more than one occasion, in favor of UTCR 6.200 which reserves a local option to adopt mandatory settlement conferences by Supplemental Local Rule. I also note that UTCR 6.010 already empowers any court to call the parties to a conference to consider, *inter alia*, "(g) the possible settlement of the case;".

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February 14, 1995

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their damages or comparative fault as favorably as they expected.⁵

impact likely on every case

No one has explained to me any reason why a defendant would ever fail to make an offer of compromise of some amount under this rule, just to make sure they have evoked the leverage effect this threat would have. Moreover, most meritorious cases for deserving middle-class citizens would never get started, in view of the threat of losing everything they have if they should fail to convince the jury they are right about both the liability for their claim AND the proper award of damages to compensate for it.

Claims by the proponents of this change ring hollow in part because of the deception used in conveying to the legislature the intent and effect of the bill: eg. in materials circulated to us with Maury's recent memo, John DiLorenzo (principle draftsman of the bill apparently for Mr. Hemstreet) tells the legislative committee:

"The purposes of this provision [offer of compromise triggering loser pays] is twofold: (1) It encourages defendants to make real offers of settlement (there is no tactical advantage to make a low-ball offer), and (2) It encourages plaintiffs to focus upon their case at earlier stages prior to trial and to take a hard look at offers which are so made." [emphasis added]

If he intended to suggest that the ability to shift the potential burden of all of the defendants' legal fees and costs onto the

⁵ One lawyer testified at the Joint Senate-House Judiciary Committee Hearing on this bill on February 9, about a drug products liability case in which an estimated 1 million dollars had been spent by more than one corporate defendant. As that lawyer observed, one or more of multiple defendants can often become prevailing parties by being let out of litigation as discovery and tactics become more focused. I have personal knowledge of an expert witness for an all terrain manufacturer who charged over \$600,000 for his pre-trial preparation work on a single case. A plaintiff could win a very large verdict against the main or remaining defendant, and under this rule, still collect nothing.

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February 14, 1995

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plaintiff by making any offer above zero is not a "tactical advantage", I think we need some new definitions of terms. If he meant to say plaintiffs are "encouraged" toward earlier analysis of their cases, his skill at understatement is admirable, because any plaintiff with anything of value to lose will be "encouraged" to run away and hide rather than to ever file any lawsuit of any kind, no matter what has been done to harm them, once the prospects of this provision are explained by their lawyer.

a bludgeon against the middle class

I personally would feel compelled to advise every client prior to starting litigation that they are likely to require bankruptcy if we do not win enough to overcome the effects of this bill. On the chance that I am imperfect in advising them how to respond to an offer of settlement at any point during their representation, I will have to notify the PLF that my client may have incurred huge liability in reliance on my advise. Numerous witnesses in the legislative hearings on February 9, including all five circuit court judges, told the committee there is no serious problem of frivolous lawsuits in our court system, no overcrowded docket demanding relief, and no reason to treat plaintiffs who do not prevail as per se frivolous litigants. As Judge RP Jones said, the playing field is reasonably well balanced. Don't fix it when it ain't broke.

No valid argument exists to support this restriction on the rights of ordinary citizens to be treated equally in court. Proponents take out radio ads attacking juries for perceived errors based on grossly inaccurate summaries of the facts of notorious cases.⁶ Those of us working in the courts know there is no flood of frivolous litigation (or any other kind - civil case filings have dropped steadily for several years), and no major broken part of the system that needs drastic fixing. My perception (but they will have to speak for themselves) is that my colleagues in the defense bar do not clamor for this restriction of individual rights, and do not overlook the fact

⁶ Such as the recent award against McDonalds for the woman who suffered third degree burns over her entire groin area because of corporate policy to keep coffee 50 degrees hotter than most home coffee makers can make it (despite over 700 hundred prior burn injuries caused, including some very similar to plaintiff's), none of which facts are reported in the current radio ad harangue about the case.

Council on Court Committee Members
February 14, 1995

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that it would seriously disrupt the balance of power and opportunity between aggrieved individuals and insured or wealthy corporate interests.

the English Rule

Proponents point to England as the model for restricting access to the courts. However, most observers (including judges who testified on February 9 against this bill) notice that the English system is based on the assumption that trade unions will pay any judgments allowed against unsuccessful injured members who lose under their loser pays rule. Other sources recognize that the English rule works better in a country built on economic class distinctions than it would where we take pride in equal opportunity regardless of station. As a columnist in The Oregonian wrote for Sunday, February 5, 1995, quoting from the conservative English magazine, The Economist: "Enormous numbers of mostly middle-class people' simply cannot use the courts... because they must pay the other side's lawyers if they lose. 'For most people this means that they are risking financial ruin.'" Anthony Lewis, 'Tort Reform' Shelters the Rich, The Oregonian, p. D3, 2/5/95. [See the economist excerpt in materials sent out by Maury].

violation of state constitutional Remedies clause

Constitutional law Professor David Schuman told the Joint Judiciary Committee on Thursday, February 9, 1995, that the effects of this bill of denying access to the courts for a class of citizens is likely to be found unconstitutional under the Remedies clause of the state constitution. It should be no surprise that constitutional protections would be offended by legislation that has as its avowed purpose the prevention of ordinary legal causes for ordinary people against businesses. It cannot be overstated that this provision makes no attempt to limit the restriction of citizen's rights to situations of frivolous litigation.

basic unfairness

I can offer anecdotal evidence to support my vision of how this bill would restrict people's options and work very unfairly against righteous claims. Mr Lewis' column quotes a government executive from Utah to the effect that this bill does not just stop frivolous lawsuits, it stops them all. I recently tried a case for a retired railroad machinist who underwent successful

Council on Court Committee Members
February 14, 1995

Page 8

heart valve surgery, but became permanently paraplegic when his physicians failed to diagnose a hemorrhage in his spine caused by medication they gave him after surgery. Several respected physicians testified for my client's case, but a jury in Lane County found for the local doctors. If this bill had been law (and assuming I and my client had the guts to proceed at all), he and his wife would probably have lost their savings and their house, for not winning their non-frivolous, but unsuccessful legal action. I can describe a dozen other persons with catastrophic injuries who would have been inhibited or prevented from pursuing their ultimately successful claims by this onerous provision.

the Summary Judgment Hammer

Section 5 of SB 385 adds a section to ORCP 47 so that losing a summary judgment motion will have the same terrible effect as failing to exceed an offer of compromise: the losing party will pay the winning party's attorneys and expert witnesses. Of course this could theoretically effect either plaintiffs or defendants, except that there are very few situations where summary judgment is even sought, let alone granted, in favor of a plaintiff. Business litigants (who, relatively speaking, can afford the costs and risks of litigation) may get equal advantage and detriment from this change whether they are plaintiffs or defendants. For injury plaintiffs, it would again put a premium on being perfect or wealthy, or otherwise never venturing near the court system.

I represented a quadriplegic man who lost the only usable extremity he had due to medical negligence, and sued a treating doctor for his damages. A pro tem judge granted summary judgment against all claims on the basis of a mis-reading of the statute of limitations discovery rule. We were successful appealing this outcome to the Court of Appeals, and the State Supreme Court, after which the case was settled for the policy limits of the doctor's insurance coverage. There could be no doubt about the meritorious nature of the case. But under the restrictions sought in SB 385, it is doubtful my client could have risked filing the case in the first place, and especially whether he could have continued the contest into the appellate courts after being ordered to pay attorney fees and witness fees for losing summary judgment.

Council on Court Committee Members
February 14, 1995

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Conclusions

Please join me in voting to take an official position for the Council against these changes. I would be glad to discuss the merits of the proposed restrictions either before or at the time of our telephone meeting. Thanks for your indulgence of this over-long message.

Very truly yours,

GAYLORD & EYERMAN, P.C.



William A. Gaylord

WAG:jki

Enclosures

P.S. I am also enclosing a Draft Bill which I just received, scheduled for hearing soon, and modifying ORCP 47 summary judgment procedures profoundly. It would require granting summary judgment either if the moving party met the usual burden for such a motion or [new language] the respondent failed to set forth "admissible evidence" to avoid the granting of the motion. This not only would return us to the days of summary judgment motions used to discover expert witnesses, it would reverse our traditions that provide trials as the means of resolving facts unless a moving party can meet its burden to establish that trial is unnecessary. We all know of situations in which summary judgment is inappropriate on its face without any opposition to the motion being filed at all, or with strictly legal argument opposing it. I will move a resolution to refer this bill to the council, or oppose it on the merits in this legislature, at the time of our teleconference.

LC 2752
1/30/95 (DH/hl)

DRAFT

SUMMARY

Requires granting of summary judgment unless opposing affidavits and supporting documentation set forth specific facts supported by admissible evidence adequate to avoid granting of motion for directed verdict in trial of matter.

A BILL FOR AN ACT

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Relating to summary judgment; amending ORCP 47 C.

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

SECTION 1. ORCP 47 C is amended to read:

C. Motion and proceedings thereon. The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The judgment sought shall be rendered forthwith if: (1) the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; or (2) the opposing affidavits and supporting documentation submitted by the adverse party fail to set forth specific facts supported by admissible evidence adequate to avoid the granting of a motion for a directed verdict in a trial of the matter. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

68th OREGON LEGISLATIVE ASSEMBLY--1995 Regular Session

Senate Bill 385

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

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

Requires plaintiff who previously dismissed action with prejudice and who refiles action to pay all attorney fees incurred by defendants in dismissed action. Allows defendant to recover certain attorney fees and expert witness expenses from plaintiff if defendant offers to allow judgment be taken against defendant and plaintiff fails to obtain more favorable judgment than offered. Allows settlement conference at any time.

Requires award of attorney fees for certain misconduct, including causing mistrial. Requires sanctions for certain false certifications in pleadings, motions, papers and arguments to court.

Requires award of attorney fees to party who prevails on motion for summary judgment if summary judgment adjudicates all claims or defenses of party against whom judgment is entered.

Authorizes award of attorney fees to prevailing party in any action based on contract or common law tort if amount claimed is \$20,000 or less.

Amends statutes allowing or requiring award of attorney fees to prevailing plaintiff to allow or require award of attorney fees to prevailing party.

A BILL FOR AN ACT

1
2 Relating to civil procedure; creating new provisions; amending ORS 20.090, 20.094, 20.096, 20.105,
3 20.107, 20.125, 30.075, 30.184, 30.190, 30.680, 30.820, 30.822, 30.825, 30.860, 30.862, 30.864, 30.866,
4 30.960, 59.115, 59.127, 59.255, 59.670, 59.890, 59.925, 62.335, 62.440, 65.207, 65.224, 65.781, 70.415,
5 74A.3050, 74A.4040, 79.5070, 83.650, 86.260, 86.265, 86.720, 86.742, 87.076, 87.585, 87.725, 87.772,
6 87.865, 90.710, 92.018, 96.030, 97.760, 105.831, 110.378, 133.739, 166.725, 180.510, 192.590, 223.615,
7 279.365, 307.525, 311.673, 311.679, 311.711, 311.771, 346.630, 346.687, 346.690, 431.905, 455.440,
8 460.165, 462.110, 469.421, 474.085, 478.965, 479.265, 480.600, 527.665, 540.120, 540.250, 545.104,
9 545.502, 548.620, 548.660, 553.560, 554.140, 583.126, 583.146, 585.150, 618.516, 621.246, 645.225,
10 646.140, 646.240, 646.359, 646.632, 646.638, 646.641, 646.642, 646.760, 646.770, 646.775, 646.780,
11 646.865, 646.876, 648.135, 650.020, 650.065, 650.250, 652.200, 652.230, 653.055, 653.285, 656.052,
12 658.220, 658.415, 659.160, 659.165, 661.280, 671.578, 671.705, 692.180, 697.762, 697.792, 701.067,
13 722.116, 722.118, 731.314, 731.737, 746.300, 746.350, 746.680, 756.185, 759.720, 759.900, 760.540,
14 774.210, 815.410 and 815.415 and ORCP 17, 47 and 54; and repealing ORS 20.080 and 20.098.

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

16
17 OFFERS OF COMPROMISE, SETTLEMENT AND PREVIOUSLY
18 DISMISSED ACTIONS

19
20 SECTION 1. ORCP 54 is amended to read:

21 A. Voluntary dismissal; effect thereof.

22 A(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 D and of any statute of this
23 state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of
24 dismissal with the court and serving such notice on the defendant not less than five days prior to
25 the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed

NOTE: Matter in boldfaced type in an amended section is new; matter (*italic and bracketed*) is existing law to be omitted.
New sections are in boldfaced type.

SB 385

1 by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of
2 dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates
3 as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court
4 of the United States or of any state an action against the same parties on or including the same
5 claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal
6 or stipulation under this subsection, the court shall enter a judgment of dismissal.

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

13 A(3) Costs and disbursements. When an action is dismissed under this section, the judgment may
14 include any costs and disbursements, including attorney fees, provided by rule or statute. Unless the
15 circumstances indicate otherwise, the dismissed party shall be considered the prevailing party.

16 B. Involuntary dismissal.

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

20 B(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury
21 has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to
22 offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the
23 ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier
24 of the facts may then determine them and render judgment of dismissal against the plaintiff or may
25 decline to render any judgment until the close of all the evidence. If the court renders judgment of
26 dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

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

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

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

41 D. Costs of previously dismissed action.

42 D(1) If a plaintiff who has once dismissed an action in any court commences an action based
43 upon or including the same claim against the same defendant, the court may make such order for
44 the payment of any unpaid judgment for costs and disbursements against plaintiff in the action
45 previously dismissed as it may deem proper and may stay the proceedings in the action until the

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1 plaintiff has complied with the order.

2 D(2) If a plaintiff who previously filed an action that was dismissed with prejudice sub-
3 sequently commences an action based upon or including the same claim against the same
4 defendant, the court shall enter an order requiring the payment of all attorney fees incurred
5 by the defendant in the action previously dismissed.

6 E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through
7 17.085, the party against whom a claim is asserted may, at any time up to [10] 30 days prior to trial,
8 serve upon the party asserting the claim an offer to allow judgment to be given against the party
9 making the offer for the sum, or the property, or to the effect therein specified. The party asserting
10 the claim may accept the offer in the manner specified by this section at any time within
11 30 days after the offer is made. The court may extend the period during which an offer under
12 this section may be accepted by an additional 30 days if the court determines that the party
13 against whom the claim is made has unreasonably resisted efforts to obtain discovery during
14 the 30-day period following the making of the offer. If the party asserting the claim accepts the
15 offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon,
16 and file the same with the clerk before trial, and within three days from the time it was served upon
17 such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated
18 judgment. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall
19 be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted
20 and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evi-
21 dence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment,
22 the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after
23 the date of the offer, but the party against whom the claim was asserted shall recover of the party
24 asserting the claim reasonable attorney fees, reasonable expert witness fees, and costs and
25 disbursements from the time of the service of the offer. For the purpose of determining whether
26 the party asserting the claim failed to obtain a more favorable judgment, the court shall
27 disregard any award of attorney fees made to the claimant.

28 F. Settlement conferences. A settlement conference may be ordered by the court at any
29 time at the request of any party or upon the court's own motion. Upon the request of the
30 judge or a party, a different judge shall preside at the conference.

31
32 **AWARD OF ATTORNEY FEES AS SANCTION FOR FALSE OR FRIVOLOUS**
33 **PLEADINGS AND OTHER MISCONDUCT**
34

35 SECTION 2. ORS 20.105 is amended to read:

36 20.105. (1) In any civil action, suit or other proceeding in a district court, a circuit court or the
37 Oregon Tax Court, or in any civil appeal to or review by the Court of Appeals or Supreme Court,
38 the court [may, in its discretion,] shall award reasonable attorney fees [appropriate in the circum-
39 stances] to a party against whom a claim, defense or ground for appeal or review is asserted, if that
40 party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense
41 or ground, upon a finding by the court that the party willfully disobeyed a court order or acted in
42 bad faith, wantonly or solely for oppressive reasons.

43 (2) All attorney fees paid to any agency of the state under this section shall be deposited to the
44 credit of the agency's appropriation or cash account from which the costs and expenses of the pro-
45 ceeding were paid or incurred. If the agency obtained an Emergency Board allocation to pay costs

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1 and expenses of the proceeding, to that extent the attorney fees shall be deposited in the General
2 Fund available for general governmental expenses.

3 **SECTION 3.** ORS 20.125 is amended to read:

4 20.125. In the case of a mistrial in a civil or criminal action, if the court determines that the
5 mistrial was caused by the deliberate misconduct of an attorney, the court, upon motion by the op-
6 posing party or upon motion of the court, [may] shall assess costs and disbursements, as defined in
7 ORCP 68, [of] and reasonable attorney fees incurred by the opposing party against the attorney
8 causing the mistrial. Those costs and disbursements [may] and attorney fees shall be assessed
9 against the attorney for the trial that ended in the mistrial.

10 **SECTION 4.** ORCP 17 is amended to read:

11 **A. Signing by party or attorney; certificate.** Every pleading, motion and other paper of a party
12 represented by an attorney shall be signed by at least one attorney of record who is an active
13 member of the Oregon State Bar. A party who is not represented by an attorney shall sign the
14 pleading, motion or other paper and state the address of the party. Pleadings need not be verified
15 or accompanied by affidavit. *(The signature constitutes a certificate that the person has read the*
16 *pleading, motion or other paper, that to the best of the knowledge, information and belief of the person*
17 *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good*
18 *faith argument for the extension, modification or reversal of existing law, and that it is not interposed*
19 *for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the*
20 *cost of litigation.)*

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

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

29 **C. Certifications to court.**

30 **C(1)** An attorney or party who signs, files or otherwise submits an argument in support
31 of a pleading, motion or other paper makes the certifications to the court identified in sub-
32 sections (2) to (5) of this section, and further certifies that the certifications are based on
33 the person's best knowledge, information and belief, formed after making all inquiries that
34 are reasonable under the circumstances.

35 **C(2)** A party or attorney certifies that the pleading, motion or other paper is not being
36 presented for any improper purpose, such as to harass or to cause unnecessary delay or
37 needless increase in the cost of litigation.

38 **C(3)** An attorney certifies that the claims, defenses, and other legal positions taken in
39 the pleading, motion or other paper are warranted by existing law or by a nonfrivolous ar-
40 gument for the extension, modification or reversal of existing law or the establishment of
41 new law.

42 **C(4)** A party or attorney certifies that the allegations and other factual assertions in the
43 pleading, motion or other paper are supported by evidence. Any allegation or other factual
44 assertion that the party or attorney does not wish to certify to be supported by evidence
45 must be specifically identified. The attorney or party certifies that the attorney or party

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1 believes that an allegation or other factual assertion so identified will be supported by evi-
2 dence after further investigation and discovery.

3 C(5) The party or attorney certifies that any denials of factual assertion are supported
4 by evidence. Any denial of factual assertion that the party or attorney does not wish to
5 certify to be supported by evidence must be specifically identified. The attorney or party
6 certifies that the attorney or party believes that a denial of a factual assertion so identified
7 is reasonably based on a lack of information or belief.

8 D. Sanctions.

9 D(1) The court may impose sanctions against a person or party who is found to have
10 made a false certification under section C of this rule, or who is found to be responsible for
11 a false certification under section C of this rule. A sanction may be imposed under this sec-
12 tion only after notice and an opportunity to be heard are provided to the party or attorney.
13 A law firm is jointly liable for any sanction imposed against a partner, associate or employee
14 of the firm, unless the court determines that joint liability would be unjust under the cir-
15 cumstances.

16 D(2) Sanctions may be imposed under this section upon motion of a party or upon the
17 court's own motion. If the court seeks to impose sanctions on its own motion, the court shall
18 direct the party or attorney to appear before the court and show cause why the sanctions
19 should not be imposed. The court may not issue an order to appear and show cause under
20 this subsection at any time after the filing of a voluntary dismissal, compromise or settle-
21 ment of the action with respect to the party or attorney against whom sanctions are sought
22 to be imposed.

23 D(3) A motion by a party to the proceeding for imposition of sanctions under this section
24 must be made separately from other motions and pleadings, and must describe with
25 specificity the alleged false certification. Sanctions may not be imposed against a party until
26 at least 21 days after the party is served with the motion in the manner provided by Rule
27 9. Notwithstanding any other provision of this section, the court may not impose sanctions
28 against a party if within 21 days after the motion is served on the party, the party amends
29 or otherwise withdraws the pleading, motion, paper, or argument in a manner that corrects
30 the false certification specified in the motion.

31 D(4) Sanctions under this section must be limited to amounts sufficient to reimburse the
32 moving party for attorney fees and other expenses incurred by reason of the false certifi-
33 cation, including reasonable attorney fees and expenses incurred by reason of the motion for
34 sanctions, and amounts sufficient to deter future false certification by the party or attorney
35 and by other parties and attorneys. The sanction may include nonmonetary penalties and
36 monetary penalties payable to the court. The sanction must include an order requiring pay-
37 ment of reasonable attorney fees and expenses incurred by the moving party by reason of
38 the false certification.

39 D(5) An order imposing sanctions under this section must specifically describe the false
40 certification and the grounds for determining that the certification was false. The order
41 must explain the grounds for the imposition of the specific sanction that is ordered.

42 E. Rule not applicable to discovery. This rule does not apply to any motion, pleading or
43 conduct that is subject to sanction under Rule 46.

44
45

ASSESSMENT OF ATTORNEY FEES UPON ENTRY OF SUMMARY JUDGMENT

1 SECTION 5. ORCP 47 is amended to read:

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

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

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

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

30 E. Affidavit of attorney when expert opinion required. Motions under this rule are not designed
31 to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their
32 facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the
33 opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney
34 stating that an unnamed qualified expert has been retained who is available and willing to testify
35 to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert
36 the allegations of the moving party and an adequate basis for the court to deny the motion. The
37 affidavit shall be made in good faith based on admissible facts or opinions obtained from a qualified
38 expert who has actually been retained by the attorney who is available and willing to testify and
39 who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a
40 sufficient basis for denying the motion for summary judgment.

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

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

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

10 I. Summary judgment that adjudicates all claims and defenses of a party.

11 I(1) If summary judgment is entered in favor of any party other than the state or a pol-
 12 itical subdivision of the state, and the summary judgment adjudicates all claims and defenses
 13 of the party in favor of the party, the court shall enter judgment against the party who did
 14 not prevail for reasonable attorney fees, expert witness fees and all costs attributable to
 15 discovery in the action. Attorney fees shall be awarded in the manner provided by ORCP 68.

16 I(2) If a party to an action other than the state or a political subdivision of the state files
 17 a motion for summary judgment as to one or more claims or defenses of another party, and
 18 within 20 days before the scheduled hearing on the motion the other party repleads or oth-
 19 erwise takes action to voluntarily dismiss one or more of the claims or defenses that are
 20 challenged in the motion for summary judgment, the court shall not award to the party filing
 21 the motion all reasonable attorney fees and expert witness fees incurred by the moving party
 22 that are attributable to the abandoned claim or defense.

23
24 **ATTORNEY FEE AWARDS IN SMALL ACTIONS**

25
26 SECTION 6. (1) Except as provided in subsection (2) of this section, in any action based
 27 on contract or common law tort in which the amount claimed is \$20,000 or less, the court
 28 shall award reasonable attorney fees to the prevailing party.

29 (2) The court shall not award attorney fees to a prevailing plaintiff in a civil action sub-
 30 ject to subsection (1) of this section unless the plaintiff served a copy of the complaint as-
 31 serting the claim on all defendants against whom the claim was made at least 30 days before
 32 filing the complaint with the court. The provisions of this subsection do not apply to
 33 counterclaims, cross-claims or third-party claims.

34 SECTION 7. ORS 20.080 and 20.098 are repealed.

35
36 **RECIPROCITY OF ATTORNEY FEE AWARDS**

37
38 SECTION 8. ORS 20.090 is amended to read:

39 20.090. [(1) Except as otherwise provided in subsection (2) of this section,] In any action against
 40 the maker of any check, draft or order for the payment of money which has been dishonored for lack
 41 of funds or credit to pay the same or because payment has been stopped, the court shall [allow]
 42 award a reasonable attorney fee at trial and on appeal to the prevailing party, in addition to dis-
 43 bursements.

44 [(2) If the plaintiff prevails in an action described in subsection (1) of this section, the court shall
 45 not allow a reasonable attorney fee to the plaintiff as provided in subsection (1) of this section unless

CONFIDENTIAL

February 21, 1995

To: Members, Council on Court Procedures
From: Maury Holland, Executive Director *M. J. H.*
Re: Legislative Update #5: Council Testimony re SB 385

Attached is a copy of the prepared statement submitted yesterday by John Hart on the Council's behalf to the Joint Subcommittees in Civil Process regarding Sections 1, 4 and 5 of SB 385 that would amend ORCP 54, 17 and 47. His testimony was an effectively extemporized version of the prepared statement. Given his regular line of work, John is able to do that sort of thing well.

Both the prepared statement and John's testimony accurately reflected a broad and essentially unanimous consensus expressed by the 12 Council members who participated in the Feb. 18 teleconference. While there were some slight differences of opinion among participating members about how assertive as opposed to deferential the Council's approach to the legislature should be, John's effort was to capture the essence of the views expressed and I believe he succeeded. Our appearance was well received. John drew no hostile questions, even about the examples he provided of perceived glitches in the proposed ORCP amendments. The purpose of showcasing these quite technical, but important, deficiencies was naturally to try to impress upon subcommittee members the damage that can be done if the Council is bypassed or given short shrift. Our appearance, incidentally, followed the much more aggressive and policy-oriented statement of the Attorney General, who was really taking no prisoners, as well as highly effective appearances by the Committee on Procedure and Practice, the Section of Litigation, and OADC.

Everything I heard and saw Monday afternoon, and I believe John would agree with this, suggests that the Council's first, preferred request--that the sections of SB 385 that would amend the ORCP be excised and the matters referred to the Council for processing in the 1995-97 biennium--is unlikely to be granted. Even if this turns out to be so, I think it was important that this request and this strong preference be clearly stated and placed on the record. What is nearly certain to be granted is our second, less preferred request, that the Council be allowed as much input as possible before the bill is finalized during this session. What now appears to be in order is a series of informal working sessions in which the Council, along with such other groups as the Procedure and Practice Committee, the Litigation Section, the Department of Justice, plus I believe OTLA and OADC, will be invited to send two representatives each. John will do his best to be one of those representatives, and has asked me to accompany him as the other, which I shall do. If John is unable to participate in any of these working sessions, he will do his best to arrange for some member who has the time and willingness to substitute for him. I would feel somewhat uncomfortable about participating on the Council's behalf unaccompanied by John or some member he has been able to recruit. We have been alerted to expect the first of these working sessions to be all day Friday, Feb. 24.

What follows in this paragraph is perhaps a little bit sensitive, which is why I have marked this covering memo "Confidential" and ask that, unlike a memo a couple of years ago that I intended for Council members only, this stay in the family, where I trust it will not be misunderstood. (This does not of course apply to the attached prepared statement, which is now a matter of public record.) This sensitivity relates to another impression I formed yesterday. This impression is that the proponents of SB 385, and of the larger package of which it is a part, have since my earlier report to you been placed somewhat on

the defensive. The attitude of "this train is going to leave the station regardless of what you think, and your only option is to help clean the passenger car windows," seemed to me far less evident yesterday than two weeks ago. In fact, at one point, Sen. Bryant stated that some "compromises" are under discussion and consideration. He mentioned making the amendment of Rule 54 E regarding offers of compromise reciprocal as an example. My reading of this is that the proponents of "tort reform" have been surprised and somewhat taken aback by the breadth of opposition to their legislative package. Certainly they seemed surprised to see OADC joining ranks with OTLA to oppose much of it. It has been interesting how much their by-passing the Council appears to be costing the proponents. This fact was prominently featured in the Attorney General's statement, as well as virtually all other statements in opposition that I have seen or heard. The persuasive statements of the judges who have testified, including Judge Brockley's (on his own behalf, not that of the Council) also seem to have undercut some of the proponents' momentum.

Please do not interpret this observation as implying that the Council is, or necessarily should be, officially opposed to the substance of SB 385, because I am aware it has taken no such official position and, in accordance with the consensus of last Saturday's teleconference and John's statement yesterday, presumably will not do so. My point is simply that the narrow, but important, position the Council has taken on the matter of process seems to be attracting widespread reinforcement.

cc: John Hart (w/o enc.)

CONFIDENTIAL

February 20, 1995

Before the Joint Senate/House Subcommittees on Civil Process

Re: SB 385

Prepared Statement of John E. Hart on Behalf of
The Council on Court Procedures

Co-Chair Bryant, Co-Chair Parks, and members of the joint subcommittees, for the record, my name is John E. Hart. I have been in active trial practice for 20 years in Portland, primarily representing physicians as defendants in civil actions. This afternoon, however, I appear before you in my capacity as the current Chair of the Council on Court Procedures, a position I have held for almost two years, prior to which I served as a Council member. With me at the witness table is Prof. Maury Holland, formerly Dean of the University of Oregon School of Law, and presently a member of its faculty as well as being the Council's Executive Director. I have provided your counsel with copies of my prepared statement, and ask that, with your permission, my statement be entered into the record. Attached to the statement is a brief description of the Council's history, its statutory mission and functions, its composition, and the methods by which it performs its statutory mission.

At the outset, let me, on behalf of the Council, thank both Co-Chairs of these joint subcommittees, and the members, for inviting this testimony concerning what is obviously extremely important legislation. I shall begin by emphasizing that the Council's concern with SB 385 is strictly limited to those provisions of this large bill that are within its statutory jurisdiction. By this I mean two things, one of which can be stated simply while the other is a bit more subtle and complex. The point that can be simply stated is that the Council's concern is limited to §§1, 4 and 5 of the bill, the sections that would amend the ORCP. The subtler point is that, even with respect to the proposed ORCP amendments, the Council's concern is limited to their technical quality as rules of procedure, and definitely does not extend to agreement or disagreement with their substantive, policy goals or effects. To the extent that ORCP amendments are intended to achieve substantive policy goals, the Council's position is that these are matters exclusively for you as the people's elected representatives to determine. This important limitation is not because Council members, as individual lawyers, judges and citizens, have no opinions on matters of public policy, but because the Council's organic statute limits its authority to "rules governing pleading, practice and procedure, . . . which shall not abridge, enlarge, or modify the substantive rights of any litigant." [ORS 1.735] This jurisdictional restriction is something that, in my observation, the Council has been highly scrupulous about

strictly observing. On more than one occasion that I can personally recall, this self-restraint has caused the Council to reject a proposed ORCP amendment, even when it might otherwise have obtained the support of the required supermajority of members, on the sole ground that it would substantially affect substantive rights and should thus be left solely to our state legislature.

What, then, is the Council's view concerning the sections of SB 385 that would amend ORCP 17, 47, and 54? Although the Council historically completes its biennial cycle of regular meetings prior to the convening of each legislative session, I have been able to elicit a solid consensus reaction of members. That reaction, in which I include myself, is that although the proposed amendments embody substantive policy judgments that are outside the scope of the Council's official competence, they also present some issues of draftsmanship, as well as some technical, non-policy oriented questions as to whether they constitute soundly conceived rules of civil procedure.

Without prejudging what the full Council might decide respecting any of the bill's ORCP amendments if it is afforded the opportunity to subject them to its normal scrutiny and deliberation, let me suggest a couple of examples of where they might be regarded as falling short simply as a matter of sound procedure. One example is proposed new section 54 F [§1, p. [5]], which would provide for a settlement conference on the court's own motion or request of a party. This proposal might

well be, in principle, an excellent idea, and is one that has attracted widespread support from, among other groups, the Section of Litigation of the Oregon State Bar. As presently drafted, however, this proposed section appears to assume the individual-judge assignment system generally used in federal court, but not generally used in Oregon trial courts. Specifically, where the existing language states: "Upon the request of the judge," it would no doubt occur to the trial judges or trial lawyers on the Council to ask: "What judge?" The vast majority of civil cases pending in Oregon trial courts normally have no judge assigned to them until just before trial. Thus, under established Oregon practice, it would be difficult to imagine what judge would take the initiative to order a settlement conference. A similar problem arises in connection with just who would be the "different judge" also referred to in the present wording of the proposed amendment. This does not mean that a good rule could not be devised to authorize judge-initiated and supervised settlement conferences, but the proposed language probably needs some reworking, such as by including reference to the "presiding judge," in order to mesh with Oregon practice.

My second example of a procedural proposal that many, including perhaps the Council, might conclude would be questionable simply as a matter of sound procedure, has to do with proposed new subsection 54 D(2) [§1, p. [4]]. The social purpose of this proposal is presumably to penalize harshly, and

thus hopefully deter frivolous initiation of civil litigation, a purpose no sensible person could disagree with. Read literally, however, the proposed language of this amendment requires the court in the subsequent proceeding to order the plaintiff to pay the defendant the full amount of the latter's attorney fees from the prior proceeding, regardless of whether any amount of attorney fees might have been already awarded to the defendant in the prior proceeding, a result I assume everyone would agree would be unintended overkill. To any who might respond that so literal a reading would be an absurdity, my counsel is to be extremely careful about literal readings, since many conscientious judges will feel bound by them despite an arguably absurd result, and that is the sort of thing that is productive of wasteful litigation. At the very least, this proposal should be reworded to make clear that no double-payment of attorney fees is intended. Another question, and here I should again emphasize that I am speaking only for myself, not the Council, in giving examples of some technical problems I see, is whether this retroactive award of attorney fees would be in addition to the sanctions that might also be sought under proposed section 17 D?

More fundamentally, I believe the Council, if given the chance to take a close look might well conclude that proposed subsection 54 D(2) would constitute ill-advised procedure judged by experienced civil practitioners regardless of how determined one is to deter frivolous litigation. For a plaintiff to refile a claim already dismissed on the merits should occur in only one

of three situations: one is a *pro se* plaintiff who doesn't know anything about claim preclusion; the second is a plaintiff with a grossly incompetent lawyer, and the third is the not unknown situation where whether the subsequently filed claim is indeed claim-barred by virtue of the prior dismissal is genuinely doubtful enough so that a competent plaintiff's attorney would be fully entitled, and might even be obligated, to litigate the question with a realistic hope the second court will determine the claim was not barred by the prior proceedings. Should that realistic, good faith hope not be realized, the court would be mandated to impose a perhaps devastating fee award on the plaintiff, possibly in addition to having to pay both his or her own attorney fees in the subsequent action, plus those of the defendant should the loser-pays rule become applicable under one of the proposed ORS amendments. In the case of a *pro se* plaintiff, it seems to me at least arguable that the subsequent court should at least have discretion not to penalize such a litigant with a potentially devastating fee award, especially since defendants in these circumstances will normally be able to obtain a dismissal of the subsequent case at a very early stage. In the case of the incompetent attorney, if there is to be any retroactive fee award, it might more appropriately be made against such attorney, not against the litigant-client who typically has no understanding of *res judicata*. Proposed subsection 54 D(2), however, unlike proposed section 17 D, does not authorize awards against attorneys, in the absence of which

judges might determine that they lack such authority. Finally, in the case of the good faith refiling of a claim which is arguably barred, but also arguably not barred, by a prior dismissal, the Council might well determine that any retroactive fee award should be discretionary, rather than mandatory; perhaps, upon reflection, a majority of these legislative subcommittees might agree with the conclusion as well.

If your reaction to these examples I have given--and more could be given if time permitted--is that these are all matters of procedural nitpicking and technical detail, your reaction would largely make the very point I am trying to convey. Sound and workable rules of procedure require, not only informed decisions on matters of substantive rights which only you as legislators can properly make, but also painstaking attention to matters of fairly intricate detail, matters precisely of the kind the Council was created to work on, subject of course to legislative override; matters that can best be attended to by trial lawyers and judges who work with the rules on a daily basis, in other words, by members of the Council who volunteer their time and efforts for this purpose. The wisest and fairest set of procedural rules will not do much good if they are ambiguously drafted, internally contradictory, inconsistent with one another or with other statutory laws.

While I can offer no scientific proof, my sense, based upon having tried cases in Oregon state courts for 20 years, is that the vast majority of civil trial lawyers and judges believe our

procedural rules function remarkably well, certainly on the civil side. I do not say this for guild-like self-protection. I am confident our State court Administrator could furnish objective data which indicate that Oregon state courts do a far better job of handling civil cases fairly, expeditiously and at minimal cost to litigants than is true of the courts in most other American jurisdictions.

Nevertheless, citizens not only in Oregon, but throughout the United States, have expressed dissatisfaction with the civil justice system. To the extent you legislators conclude this dissatisfaction is well grounded, you should improve the law. I am not here on the Council's behalf to dissuade you from that task.

What I have come here this afternoon on the Council's behalf to respectfully suggest is that you allow the Council to perform the job for which it is created by the 1977 Legislative Assembly. Experience in this state since the ORCP came into effect in 1980 has been that, with regard to the ongoing process of upgrading and amending them, the process works best when the Council is allowed to have, not the last word, which is clearly yours, but at least the first word. If the Council is accorded this opportunity, you can be assured that it will give to the ORCP amendments proposed in SB 385 its typically balanced, careful, and painstaking consideration, and will also, as it always has in the past, steer clear of matters that clearly implicate

substantive policy. The Legislature can then review and, if it wishes, revise the Council's work product.

There are really only two possible ways in which this legislature could facilitate the Council's performance of the job for which it was created by your predecessors. The first way is the one that is strongly preferred by the Council, and that is to delete §§1, 4, and 5 from SB 385 and refer those amendments to the Council for processing during the coming 1995-97 biennium. Those sections are readily excisable from the bill without significantly impacting the remaining sections relating to ORS amendments. Although those sections could readily be excised from the bill, it is not realistically possible for me this afternoon to advise you how to separate the purely procedural aspects of the proposed ORCP amendments set forth in those sections from those aspects that reflect substantive policy judgments. That analytical process is best done initially by the Council, subject, like everything the Council does, to your review.

The other way is to ask the Council to simply do its best during whatever time remains in this session, before the bill must be finalized, to confer and advise you with our comments and any suggested changes in language. Obviously, it is entirely within your authority to insist upon this way, but it is the one far less preferred by the Council since we do not do our best work in haste.

The Council functions best when it adheres to its statutory procedure, whereby proposed ORCP amendments are discussed and drafted, with the benefit of testimony, deliberated upon and refined over the course of the roughly 18 months of its biennial cycle between legislative sessions. This time frame allows for the assignment of proposed amendments to a Council subcommittee for intensive study, drafting and redrafting, and reporting back to the full Council for debate, and for hearing public testimony from lawyers and judges not on the Council, as well as from interested groups and organizations and from the public. That, plus the opportunity for legislative review and possible further revision in the session following the Council's promulgation of amendments, is the sort of deliberative process that is most conducive to achieving and maintaining our excellent civil procedure rules for the trial courts of this state. On behalf of the Council, it is that process which I most respectfully ask your subcommittees and this legislature to respect on this occasion, as your predecessors did some 18 years ago when they allowed the first Council to prepare the original ORCP in their entirety before exercising the necessary and proper power of legislative review and revision.

Thank you for your attention. I'll be happy to try to respond, Co-Chair Bryant and Co-Chair Parks, to any questions from you or any members of the subcommittees.

Attachment to Prepared Statement of John E. Hart to

Joint Senate and House Subcommittees on Civil Process, Feb. 20, 1995

Brief Description of Council on Court Procedures

1. History. From the date of statehood until the creation of the Council on Court Procedures by the 1977 Legislative Assembly, the rules of civil procedure applicable in the trial courts of Oregon were contained in a code of statutory enactments, similar to what obtained in most other American states. Beginning in the 1930's, and culminating in the 1970's, a growing concern emerged in the part of large segments of the Bench and Bar of Oregon that the time available to this state's biennial, citizen legislature was not adequate to the task of modernizing the civil trial court rules and ensuring that they kept current with changing needs. Although the procedural rules enacted by the legislature, and frequently amended, was referred to as a "code," they lacked at least one important virtue usually associated with a code, and that is a highly integrated and comprehensive assemblage of rules which could all be located in the same place in the statute books. Whether due to legislative inattention or otherwise, Oregon's statutory code of civil procedure came to be widely regarded as flawed and outmoded in several respects. One notable example was its failure to merge law and equity.

The Council grew out of the work of a special commission on judicial reform appointed by Governor Tom McCall. One of the recommendations of this Commission was that the legislature create what came to be called the Council on Court Procedures and delegate to this new entity, on a limited basis, a portion of its legislative authority over civil procedure. The possible alternative, of the legislature delegating its rule-making and rule-amending power to the Oregon Supreme Court, was rejected, in part because of concern that such an arrangement might violate the separation-of-powers provision of the Oregon Constitution.

The Council was created and given limited authority over rules of civil procedure by the 1977 Legislative Assembly. The initial Council worked on devising the original Oregon Rules of Civil Procedure ("ORCP") throughout 1978, in time to submit its work product to the 1979 Legislative Assembly. In accomplishing this task the Council drew heavily upon the Federal Rules of Civil Procedure, but also incorporated some important innovations, such as including provisions for "long-arm" jurisdiction over non-resident defendants as part of the rules of court, and retained some features of Oregon civil practice under the statutory code, such as "fact pleading" and some limitations upon pre-trial discovery, both of which were intended to reduce the costs of litigation. The 1979 Legislative Assembly approved the original ORCP, with some modifications, and they became effective January 1, 1980. Additional rules were formulated by the Council and reported to the 1981 Legislative Assembly, and these became effective on January 1, 1982.

2. Composition. The Council consists of 23 members, 1 of whom is a Justice of the Oregon Supreme Court appointed by that Court, 1 Judge of the Oregon Court of Appeals appointed by that Court, 6 Circuit Court judges appointed by the Executive Committee of the Circuit Judges Association, 2 District Court judges appointed by the Executive Committee of the District Judges Association, 1 public member appointed by the Oregon Supreme Court, and 12 practitioners appointed by the Board of Governors of the Oregon State. To ensure geographic diversity, at least 2 practitioner-members must be appointed from each of Oregon's five Congressional districts, and all are typically involved in an active civil trial practice. Members are appointed for terms of two or four years, are eligible for reappointment to one additional term, and serve without compensation. At the beginning of each biennium the Council elects its Chair and other officers. Professional and secretarial staff support to the Council is provided by an Executive Director and Executive Assistant, each of whom is compensated on a part-time basis.

3. Functioning. Each September following the conclusion of a legislative session, following the filling of vacancies in its membership, the Council begins a biennial cycle of monthly meetings that lead up to the December meeting before the beginning of a new session. At that December meeting, ORCP amendments that have been studied, discussed, debated and tentatively adopted are, after being published to the Bench, Bar and public, voted upon for promulgation. Any amendment that is promulgated is formerly reported to the President of the Senate and Speaker of the House. Unless the Legislature by statute abrogates or modifies them, ORCP amendments as thus promulgated become law on January 1 following adjournment of the legislative session. In addition to disapproving or modifying ORCP amendments promulgated by the Council, the Legislative Assembly may of course initiate and enact its own amendments by statute.

Some suggestions of needed or desirable ORCP amendments emanate from within the Council; many others are suggested to the Council by lawyers, judges, individual citizens, or various groups and organizations. The Council maintains an especially close working relationship with the Committee on Practice and Procedure of the Oregon State Bar, which over the years has been a valuable source of suggested amendments. Suggested amendments are normally assigned by the Chair to a subcommittee of the Council for intensive study, consultation with others having expert knowledge, and reporting back to the full Council with a preliminary recommendation. Depending upon the reaction of the full Council, preliminary recommendations are frequently referred back for further consideration and drafting work by the subcommittee. Agendas of Council meetings are published in advance, which often results in concerned individuals or groups appearing to testify before the Council during one of its public meetings. In addition, the Council makes special efforts to keep individuals and organizations known to have a particular interest in, or expertise concerning, any particular proposed amendment, fully informed about its deliberations and often invites their testimony.

Proposed amendments typically return to the full Council by way of a second report, recommendation and proposed draft of the pertinent subcommittee. Following an opportunity for any public testimony or written comments to be received and considered, the full Council will normally vote, in response to a subcommittee's second report and recommendation, whether to tentatively adopt the proposed amendment in question. The discussion preceding this vote often

prompts a few further revisions in drafting. A vote for adoption at this point is said to be tentative because any amendment thus adopted can be brought back for further consideration by the full Council or the relevant subcommittee until a vote is taken on final promulgation at the December meeting that ends the Council's biennial cycle. The Council frequently votes not to promulgate proposed amendments on the ground that, while they might make good sense if enacted by the legislature, they would affect substantive rights of litigants and would thus exceed the Council's statutory authority to "promulgate rules governing pleading, practice and procedure, . . . which shall not abridge, enlarge, or modify the substantive rights of any litigant." ORS 1.735.

4. The Council's Contribution to Oregon's Civil Procedure. The Council came into existence against a background and long tradition of legislative supremacy with respect to judicial procedure. The immediate background of its creation was an increasing belief on the part of many informed lawyers and judges that the Legislative Assembly operated under certain built-in handicaps in being solely charged with the difficult and time-consuming function of keeping this states civil trial court rules abreast of changing times and altered circumstances. In particular, it had become clear to many that the relatively short, and increasingly hectic, biennial sessions of the legislature did not afford adequate time for legislators to give careful and sustained thought to the often highly technical task of civil rules amendment.

The creation of the Council, and the delegation to it of limited and provisional authority in the rules-amending process, appears in retrospect to have been a sensible compromise, a compromise that takes account of the dual character of civil procedure. By this is meant that the Legislative Assembly is able to retain the final authority that rightfully belongs to it over those aspects of civil procedure which implicate substantive public policy, while being able to rely upon the Council to keep the more technical, though in the long run no less important, aspects of the ORCP in good repair. In this partnership between the Legislative Assembly and the Council, the former assuredly occupies the senior position. This arrangement works best when the Legislature allows the full operation of the Council's deliberative process to run its course respecting all proposed ORCP amendments before undertaking to exercise the former's ultimate authority.

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Gentlemen:

As things have turned out, I will personally attend the work session on Senate Bill 385 all day Friday, February 24, together with Maury Holland. The Council has been accorded two seats at a roundtable work session; it is interesting since the OADC, OTLA, and the proponents of the Senate Bill were each only accorded one seat. We will keep you posted.

Best personal regards,


John E. Hart

JEH:ikw
cc: Maury Holland (via facsimile)