September 24, 1999

To: Acting Chair and Members, Council on Court Procedures

Fm: Maury Holland, Executive Director M.J.H.

Re: Appointments and Reappointments to the Council, etc.

1. Judicial Appointments. I am pleased to inform you that Judges Don Dickey and Rodger Isaacson, whose initial terms had expired, have been reappointed to second four-year terms as members of the Council. I'm sure we are all grateful to them for their willingness to extend the period of their Council service. Karsten Rasmussen, whose initial practitioner term had expired, is now Judge Rasmussen, and in that capacity has been appointed to a four-year term. Also appointed to a four-year term is Judge Richard Barron, who served as a judicial member of the Council several years ago.

2. Practitioner Appointments. None of the practitioner members whose term expired 8-31-99 was reappointed by the OSB Board of Governors to a second term. While I do not know why this occurred, and of course have not asked, I think the only plausible explanation is that the Board of Governors acted as it did in order to give more lawyers the opportunity to serve on the Council. Benjamin M. Bloom of Medford, Kathryn H. Clarke of Portland, Mark A. Johnson of Portland, and Ralph C. Spooner of Salem have been appointed to four-year terms as practitioner members.

3. Meeting Schedule. I have received one or two very mild complaints that Oct. 30, the firm date of the Council's first meeting, and Dec. 4, a suggested date for the second meeting, as announced in my previous memo, both depart from the Council's customary meeting day, which is the second Saturday of the month. Oct. 30 could not be avoided, as it is the earliest Saturday in October when Mick Alexander can attend and preside. December 4 was merely suggested in case the Council decides it should meet in December. When we called the OSB this summer to reserve rooms in the Bar Center, we were told that Dec. 11 had been preempted by the end-of-the-year MCLE programs. I briefly considered asking one of our judicial members to issue an order to the Bar to make a room available on Dec. 11, but then shrewdly concluded that might not be an entirely appropriate exercise of judicial authority. In any event, the schedule of future meetings will be decided by the Council at the Oct. 30 meeting.

I fully appreciate, as I'm sure Mick Alexander does, that it is highly desirable for the Council to adhere as much as possible to the second-Saturday-of-the-month meeting date. Members, especially continuing members, might well have organized their calenders in advance in reliance on that date. Also, I've learned that some other organizations with which members are affiliated have scheduled their meetings to avoid conflicts with the Council's customary meeting dates.

Beginning with January, 2000, we have reserved a meeting room for the second Saturday of the month through the remainder of the biennium. For two reasons, I hope the Council will decide to conform to that schedule, at least to the extent of not meeting on other dates. The first reason is the one already mentioned, reliance by members and others on that meeting schedule. The second is that the Bar Center seems to be extremely crowded on Saturday mornings, and it might be difficult, even impossible without a court order, to reserve a meeting room on other dates.

Enclosed for your information is a current roster of Council members.

August 30, 1999

To: Members, Council on Court Procedures

Fm: Maury Holland, Executive Director M.J.H.

Re: Date of First Meeting of 1999-2001 Biennium

The Council's first meeting of the 1999-2001 biennium will be on **Saturday, October 30, 1999, beginning at 9:30 a.m. at the Bar Center.** This is the earliest Saturday in October on which our Acting Chair, Mick Alexander, can make it. An agenda and other pertinent material will be sent to you about 10 days prior to this meeting date.

One of the things that will be discussed and decided at the October 30 meeting is the schedule of the next few meetings, probably through June, 2000. Given the lateness of the October meeting date, I'd guess that the Council will be unlikely to decide to meet at all in November. Although the Council's customary meeting day is the second Saturday of the month, which in December would be the 11th., the Bar is unable to make space available to us on that date because of an MCLE "video festival." So we have tentatively reserved space on Saturday, December 4, and on the second Saturday of the month in each month thereafter.

Probably the most important item discussed and tentatively decided at the October 30 meeting is the issues and projects concerning the ORCP to which the Council will give priority during this biennium. Fulfilling an assignment made in the last biennium, I have prepared a memo, for inclusion with the agenda of the October 30 meeting, suggesting some ideas for possible amendments which have occurred to me and which the Council might wish to consider. My suggestions are largely, though not totally, based upon perusing the opinions of the Supreme Court and Court of Appeals for the past three years. One of these suggestions will certainly be that the Council will surely want to give careful thought to how to respond to footnote 4 of Justice Gillette's opinion for the Court in *For Counsel, Inc. v. Northwest Web Co,* __Or__, __P2d__ (1999), which states:

> We recognize that our interpretation of ORCP 54 E may exacerbate potential conflicts between lawyer and client concerning whether to accept a pretrial offer of compromise or proceed to trial. Whether the working of the rule is either fair or prudent in that respect cannot, however, alter what it is clear that the rule now provides. At the same time, *we recommend that the Council on Court Procedures review the rule, to determine whether some other formulation of the rule would be better.* (Emphasis added.)

I cannot recall a more pointed recommendation to the Council from either the Supreme Court or the Court of Appeals, at least in recent years.

Beyond *For Counsel, Inc.* and other items suggested in the memo included with the October 30 agenda, it would be extremely helpful if, in preparation for that meeting, each Council member would give some thought to any ideas he or she might have relating to possible deficiencies with the ORCP or how the ORCP might be improved. October 30 is not, of course, the last date on which new thoughts and ideas can be proposed for consideration during this biennium. But, given how quickly the Council's biennial docket seems to fill up to the point of exhausting its capacity to work proposed items through the full deliberative process to completion as promulgated amendments, the earlier proposals are broached, the better.

P.S: The Council came through the 1999 legislative session unscathed. This time, in contrast to 1997 and several earlier sessions, no proposals surfaced to abolish the Council, to defund it entirely, or even to cut its funding. One of Bruce Hamlin's final contributions as Council Chair was the excellent budget presentation he made to the relevant subcommittee of the Joint Committee on Ways and Means. Credit for the Council's faring so well is also due to the continued steadfast support it enjoys from the Oregon State Bar, manifested primarily through Bob Oleson, OSB Public Affairs Director, and Susan Evans Grabe, OSB Public Affairs Attorney, and the fine work done on its behalf by budget analysts in the Office of Legislative Fiscal Services.

cc: Mick Alexander, Vice and Acting Chair
Bruce Hamlin, Immediate Past Chair
Bob Oleson, OSB
Susan Evans Grabe, OSB

SUMMARY OF CHANGES TO THE OREGON RULES OF CIVIL PROCEDURE: 1999–2000

The 1998 Council on Court Procedures promulgated amendments to ORCP 7, 39, 55, and 68 and the 1999 Legislature accepted them. In addition to the amendments initiated by the Council, the 1999 Legislature passed three bills amending four rules. The affected rules include ORCP 46, 47, 55, and 70.

Effective Dates for All Changes

Changes to the ORCP promulgated by the 1998 Council and accepted by the Legislature are effective on January 1, 2000. Changes to the ORCP by the 1999 Legislature are effective on October 23, 1999.

Council Promulgations Accepted by the Legislature

SERVICE ON TENANT OF A MAIL AGENT

ORCP 7. The addition of Rule 7 D(3)(a)(iv) provides for a new method of serving individual defendants. It authorizes service of summonses and complaints to mail agents when the defendant uses a mail agent as the address to which defendant's mail is normally delivered. Tenant of a mail agent is defined in ORS 646.221. The rule provides specific circumstances where this method of service is available.

DEPOSITIONS

ORCP 39. Changes to Rule 39 substantially clarify the procedures regarding oral depositions and remedy problems that have arisen in the past regarding efficiency and convenience. New 39 D(1) deals with examination, cross-examination and oath. 39 D(2) deals with the record of examination. 39 D(3) deals with objections. 39 D(4) deals with written questions as an alternative. The amendments also provide the courts with more authority to provide relief for violations committed. New 39 E pertains to motions for court assistance and expenses. It is a clarification of judicial authority to grant relief for violations inconsistent with the rules.

ATTORNEY FEES, COSTS AND DISBURSEMENTS

ORCP 68. The addition of Rule 68 C(4)(e) is a significant one. It requires a trial court to make special findings of fact and conclusions of law upon request of a party in the case of attorney fees to provide needed guidance to appellate courts in reviewing these cases. If a party does not request special findings, the court may make either general or special findings.

TECHNICAL AMENDMENTS

ORCP 7. Two of the changes to Rule 7 are primarily technical ones. The change to Rule 7 D(2)(b) clarifies that service must be made on a person who is "14 years of age or older." The change to Rule 7 E clarifies that service pursuant to subparagraph D(2)(d)(i) may be made by an attorney for any party.

ORCP 55. Other technical amendments include the ones to Rule 55 I(2) regarding the minimum time period involved with service of subpoenas for medical records. It was changed from 15 days to 14 days to achieve consistency with the time period required for hospital records subpoenas in Rule 55 H(2)(b).

Legislative Enactments

SUMMARY JUDGMENT

ORCP 47. Section C of this rule was changed to clarify who has the burden of production on any issue raised in the summary judgment motion. The adverse party has the burden of producing evidence if the adverse party would have the burden of persuasion at trial. The burden may be satisfied by producing evidence with an affidavit under ORCP 47 E.

DEBTOR/CREDITOR LAW

ORCP 70. This provision was changed to simplify the procedure for obtaining money judgment liens on property of judgment debtors. It was enacted as part of separate legislative reform action involving Debtor/Creditor law. The procedural rule now has more specific requirements for the names of judgment creditors and their attorneys, addresses, Social Security numbers, and driver license numbers. Other previous provisions have been renumbered. The Council on Court Procedures reviewed this change prior to legislative enactment and indicated its support for the change.

TECHNICAL AMENDMENTS

ORCP 46. The legislature deleted the obsolete reference to district courts in 46 B.

ORCP 55. The legislature deleted the obsolete reference to district courts in 55 C.

Attachment B

October 20, 1999

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland, Executive Director

Re: Some ORCP and Legislative Issues for Possible Consideration in the 1999-2001 Biennium

The Council's past practice has been to give first priority to possible problems concerning the ORCP about which members have become aware from their own experience, or which are brought to the Council's attention by communications from judges, attorneys, or occasionally such groups as process servers. That is doubtless how it should be and is likely to remain. In fact, dealing with "live" issues of that current and practical sort seems to take up nearly all the Council's available time and effort, at least has done so in recent biennia.

However, early in the last biennium, in the interest of enabling the Council to become a bit more "pro-active," I was asked to write up something inviting its attention to other possible defects in the ORCP, or ways they might be improved, derived primarily from studying appellate opinions in which one or more ORCP provisions are construed or discussed. The items shown below result from that exercise, together with items suggested by others, including, in one instance, the Oregon Supreme Court. Also included are three items which would require legislative action, two of which have to do with the Council itself rather than the ORCP. Naturally, it is entirely up to the informed, collective judgment of the Council to decide which, if any, of the following items to pursue.

1. Can and should ORCP 54 E be amended in some manner to avoid the conflict of interest possibly created between attorney and client when an offer to allow judgment is made in the form of a single lump sum stated in the offer as including attorney fees, costs and disbursements, and damages? [Suggested by Justice Gillette in footnote 4 of his opinion in *For Counsel, Inc. v. Northwest Web Co*, 329 Or 246, 255, __P2d__ (1999).] Rather than summarizing this opinion or restating the issue which Justice Gillette recommended the Council consider, I've attached the text of this quite short opinion as Attachment B-I to this memo.

2. Possible need to rectify arguably anomalous difference between ORCP 7 D(2)(c) and 7 D(3)(b)(i) [Suggested by Ms. McKelvey based upon a "real life" question which recently arose in her firm]. The question is, when service is made on a corporation pursuant to ORCP 7 D(3)(b)(i) "by personal service upon any clerk on duty in the office of a registered agent," in this instance a secretary in the registered agent's office, does that constitute a form of office service such that the follow-up mailing required for office service is necessary to complete service?

My view is that the answer to this question is "no." The language of

D(2)(b) (substituted service) and D(2)(c) (office service) clearly states that service is complete only on the date of the follow-up mailing required for both those methods of service, whereas D(3)(b)(i) says nothing about follow-up mailing.

If the Council agrees that there is no problem here of lack of clarity, a possible issue for consideration might be reformulated as whether it makes good sense for 7 D(2)(c) to require follow-up mailing in connection with office service, but not to require it in connection with what seems substantially identical to office service, but where the defendant is a corporation. I would guess that the Council would not favor eliminating the follow-up mailing requirements for either substituted or office service, so the issue really comes down to whether that requirement should be added to D(3)(b)(i) and possibly other service methods which resemble substituted or office service.

3. Discovery of expert witnesses; ORCP 36. (See Attachment B-II). It is with some trepidation that I include this item, because it has definitely been a "hot potato" from the time the first Council drafted the original ORCP in 1978. The minutes of those early meetings show that the Council initially decided to depart from the antecedent Oregon discovery statutes by authorizing, for the first time in Oregon practice, limited discovery of expert witnesses more or less along the lines of what is now FRCP 26(b)(4)(A).[1] However, in response to arguments of some members and an outpouring of communications from the bar opposing expert discovery, the Council changed its mind, as it also did with respect to abandonment of fact in favor of notice pleading.

The current problem, if there is one, derives from the fact that the original Council chose not to prohibit expert discovery explicitly, but drafted discovery rules, especially ORCP 36, which at least arguably authorize it. A fair reading of the minutes of meetings where discovery was discussed and debated would, however, I believe leave the reader with the sense that the intent of the original Council, in not saying one thing or the other with the explicitness of FRCP. 26(b)(4)(A), was that expert discovery is not permitted, which was how matters had stood under the statutory predecessors of the ORCP discovery rules.

Since the ORCP became effective Jan. 1, 1980, the Council has revisited the question of expert discovery on at least one, and possibly more, occasions. The most recent one was in 1992, when some members suggested that this issue be reconsidered. At the meeting at which whether even to consider this suggestion was decided, more lawyers appeared to "testify" against it than I've ever seen at any Council meeting. Then-Chief Judge Owen Panner was the principal "witness" in opposition. He told the Council that, based on his long experience in both state and federal courts, he believed that Oregon's discovery rules are, on balance, better than the corresponding federal rules, especially with regard to expert discovery, because, in his view, the federal discovery rules are productive of greater expense, longer delay, and a host of

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[1] FRCP 26(b)(4)(a) provides in relevant part: "A party may depose any person who has been identified as an expert whose opinions may be presented at trial." The current FRCP 26(a)(2) also requires "initial disclosure" of the identity of all prospective expert witnesses, the substance of the opinions to which they are expected to testify, and the bases for such opinions. But this provision was not part of Rule 26 in 1978.

complexities which he did not think worth whatever benefits they provide. The Council was persuaded to drop the matter, and no specific amendment was ever produced for its consideration.

Regardless of whether one favors or opposes expert discovery as a matter of policy, there seems to be room for doubt whether expert discovery is permitted under the current rules. This is illustrated by Judge David Gernant's letter opinion dated 12/8/98 (Attachment B-II) ordering, over plaintiff's objection, depositions of one or more of plaintiff's expert witnesses. The reasoning of Judge Gernant's opinion seems to me compelling. That is, ORCP 36-46 do not, as many seem to assume, actually say nothing about expert discovery, but in fact do authorize it, though not as clearly or explicitly as FRCP 26(b)(4) does. I agree with Judge Gernant that opinions of prospective expert witnesses are certainly within the general scope of discovery under ORCP 36 B(1),[2] are not normally protected by any evidentiary privilege recognized by Oregon law, and would not, at least when sought by means of oral deposition, come within ORCP 36 B(3)'s definition of "trial preparation materials," which extends only to "documents and tangible things."

Despite the point just made, my impression, and it is no more than that, is that the majority of Oregon judges and trial lawyers believe, or simply assume, that expert discovery is not permitted in Oregon practice. The basis for this belief must be folklore, buttressed by the strong legislative history against expert discovery. There is also the existence of ORCP 47 E,[3] which would make little or no sense were the identities or opinions of expert witnesses discoverable. But Judge Gernant is one judge who does not share that belief. Council members will know whether enough other circuit court judges share his view, or are merely in doubt about the question, and therefore whether the Council should now decide the issue one way or the other and promulgate one or more amendments accordingly. On one or two past occasions, Judge Marcus has commented that he does not find in ORCP 36-46 any clear answer to the question whether or not expert discovery is permitted in Oregon practice.

Given the contentiousness of this issue, it seems surprising that, after 20 years under the ORCP, no appellate opinion has yet resolved it. As you know, it is very difficult to get most discovery rulings reviewed on appeal to the Court of Appeals from a final trial court judgment. As far as mandamus in the Supreme Court is concerned, it is hard to believe that a writ has never been sought concerning this issue, but I find nothing in the reports indicating that one has ever been granted.

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[2] ORCP 36 B(1) states in part: "[P]arties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, . . ."

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

If that is accurate, I'm prepared to venture a guess as to why this has been, and is likely to remain, so. My guess is that the justices have been waiting for the Council to do its job by amending ORCP 36 to speak clearly to the issue of expert discovery one way or the other. If that is indeed the case, the reason for the justices' reluctance to resolve this issue might be that it is preeminently one of pure policy and rule-drafting, essentially legislative in character, and therefore not particularly apt for judicial resolution in the absence of clear guidance from the text of statutes or rules of court.

Given some background of which new members will be unaware, there is one thing I wish to add that normally wouldn't need saying. There seems to have arisen suspicion on the part of one or more members that I have some kind of personal ax to grind, and harbor a wish to see the Council authorize expert discovery. First, my personal view about the pros and cons of expert discovery, or any other policy issues relating to the ORCP, does not influence anything I do as Executive Director.

Secondly, I happen not to have a personal view on this subject. This is a matter which seems to me entirely practical in nature, and thus I believe that the only people whose views are entitled to be taken seriously concerning it are judges, particularly trial judges, and trial lawyers, especially those who, like many current members of the Council, have considerable experience actually litigating cases under both the federal and the Oregon discovery rules. That is something I have never done, and almost certainly never will. The only consideration of which I am aware possibly arguing in favor of expert discovery is that Oregon is today the only U.S. jurisdiction where most lawyers and judges appear to believe it is not permitted, even though I join Judge Gernant in thinking the discovery rules actually provide that it is.

4. **Impleader of third-party defendants under ORCP 22 C(1).**

(a) This question came to my attention, not from reading appellate opinions, but from receiving a phone call from a Portland lawyer who actually encountered it. This lawyer represents the sole defendant, an aircraft component manufacturer, in a product liability and negligence case. He timely served a summons and third-party complaint claiming that, pursuant to ORS 18.470(2),[4] the alleged fault of the third-party defendant should be compared with any fault attributed to his client. The third-party defendant responded

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[4] ORS 18.470(2) in relevant part provides: "The trier of fact shall compare the fault of the claimant with the fault of any party against whom recovery is sought, the fault of any third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled. The failure of a claimant to make a direct claim against a third party defendant does not affect the requirement that the fault of the third party defendant be considered by the trier of fact under this subsection. . . ."

ORS 18.485 must have been applicable to the case recounted to me by this lawyer, in which event any liability of his client and that of the third-party defendant would be several, but not joint. Thus, this lawyer's purpose in trying to bring in the third-party defendant was not to seek contribution, but so that the client's share of the total damages recovered by the plaintiff might be proportionately reduced in accordance with any comparative fault assigned to the third-party defendant.

with a motion to dismiss the third-party complaint on the ground of misjoinder, arguing that, pursuant to ORCP 22 C(1), impleader is permitted only when the third-party complaint alleges that the third-party defendant "is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff . . ." Recently the lawyer who contacted me informed me that his motion for leave to serve the third-party complaint was denied on the ground that this kind of joinder is not authorized by ORCP 22 C(1)

The problem with 22 C(1) is that, if my understanding of comparative fault and several liability is correct, it appears not to fit with ORS 18.470(2). Subsection 22 C(1) is a traditional impleader provision, and therefore limits third-party joinder to situations where liability is alleged to run from a third-party defendant to a third-party plaintiff by way of contribution or indemnification. However, ORS 18.470(2), as amended in 1995, in combination with ORS 18.485(1),[5] as also amended in 1995, clearly contemplates joinder of third-party defendants merely for the purpose of the trier of fact's comparing their alleged fault with the fault alleged on the part of one or more originally named defendants as third-party plaintiffs. The net effect under these new statutes might be substantially the same as under the traditional doctrine whereby each joint tortfeasor is liable for the whole amount of plaintiff's damages, with apportionment of such damages being accomplished by means of claims for contribution, but the legal theory of the new statutes is different. It is that difference which subsection 22 C(1) appears not to accommodate.

Please have in mind that while ORS 18.470(2), as well as other subsections of this statute, uses the term "third party defendants," the statute is not itself a joinder provision and says nothing about how third-party defendants come into existence. So far as I know, the only provision of Oregon law which speaks to that issue is ORCP 22 C(1). If the Council agrees with this analysis, a fix should be fairly easily accomplished.

(b) There is one other feature of ORCP 22 C(1) which might warrant reconsideration. It is the sentence reading: "Otherwise the third party plaintiff must obtain agreement of the parties who have appeared *and* leave of court." (Emphasis added.) There might be one somewhere, but I've not been able to find any other provision of the ORCP, or of the FRCP for that matter, which requires *both* agreement of all appearing parties *and* leave of court in order for some procedural step to be taken.

It seems to me worth noting, by way of comparison, that ORCP 23 A provides that, for amendment of a pleading more than 20 days after its being served, leave of court *or* "written consent of the adverse party" is required. An amended complaint could, of course, join one or more additional defendants, which strikes me as not very different from joinder of a third-party

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[5] ORS 18.485(1) provides: "Except as otherwise provided in this section, in any civil action arising out of bodily injury, death or property damage, including claims for emotional injury, loss of care, comfort, companionship and society, and loss of consortium, the liability of each defendant for damages awarded to plaintiff shall be several only and shall not be joint."

defendant.[6]

I assume, maybe incorrectly, that when all parties agree that a third-party complaint may be served more than 90 days after service of plaintiff's summons and complaint, the way this would be done on the record is by filing a consent or stipulated motion and order granting leave. Apart from class actions, do judges ever deny stipulated motions? Can anyone think of a reason why a judge might properly deny a stipulated motion in the context of third-party practice? I can't.

FRCP 14(a),[7] the federal counterpart of ORCP 22 C(1), requires leave of court for a third-party complaint to be served more than 10 days after service of the answer, and says nothing about "agreement of the parties" as an alternative to obtaining leave of court, much less as an added requirement. Almost certainly this provision contemplates that, when the parties have agreed, "leave of court" will take the form of a *pro forma* order attached to the stipulated motion.

Please note that FRCP 14(a) permits service of third-party complaints without leave of court only within 10 days of service of the answer, which would normally be within 30 days of service of plaintiff's complaint. Isn't this 30 days from service of the complaint preferable to the 90 days allowed by ORCP 22 C? Third-party complaints inevitably prolong litigation to a greater or lesser extent. Shouldn't other parties, particularly plaintiffs, be entitled to know whether such prolonging is going to occur more promptly than as much as 90 days after service of the complaint? Just asking.

5. <u>Should not ORCP 67 C(2)[8] be amended?</u> What good purpose is served by this provision? Of course this limitation on the amount of damages a judgment may award makes good sense in the context of default judgments, but if C(2) were amended, that would still be provided for by C(1).

C(2) is an exception to the more general rule, stated in 67 C, that "[e]very judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief has not been demanded in the pleadings; . . ." But it is an exception which nearly swallows up the whole

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[6] Incidentally, wouldn't "written consent of the parties who have appeared" be slightly better than "written consent of the adverse party; . . ." which is the language now used in ORCP 23 A? When a litigation is going to be prolonged or complicated as can happen when pleadings are amended after the lapse of more than 20 after it is served, shouldn't all parties other than the one seeking to amend have a chance to object by withholding consent and, if the would-be amender persists by filing a contested motion for leave to amend, argue the reasons for objecting to the judge?

[7] ". . . The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. . . ."

[8] "Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount."

of the, in my opinion clearly sound, general rule.[9] Do not at least 90% of all civil actions involve a demand for money damages? If so, that means the supposedly general rule, that judgments shall award parties the relief to which they are shown to be entitled, applies only in the minority of cases where money damages are not demanded, such as where only injunctive or declaratory relief is sought.

In *Laursen v. Morris*, 103 Or App 538, 799 P2d 1232 (1990), the Court of Appeals approved, properly in my opinion, an end-run around 67 C(2). In this case the jury verdict awarded the plaintiff more than the amount of damages demanded in the complaint. Prior to judgment being entered on this verdict, the trial court granted the plaintiff's motion to amend the complaint so that the ad damnum would equal the amount awarded by the verdict. The Court of Appeals affirmed and ruled that 67 C(2) is not violated as long as the ad damnum is formally amended prior to entry of judgment.

Laursen left open the obvious question whether, if no motion is made to amend the ad damnum, or a motion is made but denied, and judgment is entered on a verdict awarding damages greater than demanded in the complaint, that would violate 67 C(2). If the answer to that question is no, then 67 C(2) becomes a dead letter for all practical purposes. If the answer is yes, then 67 C(2) constitutes a kind of Dickensian trap for the unwary.

6. Subpoenas for hospital and medical Records; ORCP 44 and 55. Continuing members will recall that this is the principal item left over from the 1997-99 biennial agenda, where a broad range of apparent problems in this area was studied by a subcommittee chaired by Judge Anna Brown. That subcommittee reported that those problems appear to be so many and so difficult to fix that this effort would have to be carried over to the 1999-2001 biennium, which I assume the Council will decide to do.

I have always found one aspect of Rule 44 puzzling. What puzzles me is, how can the obligation imposed by 44 C on parties claiming damages for personal injuries to provide, on request of a party against whom such claim is made, "a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply. . . ," be reconciled with ORS 40.280, OEC Rule 511,[10] whereby the mere commencement of litigation to recover for personal injuries does not waive the physician-patient privilege?

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[9] There is no comparable limitation on amounts awarded as damages in federal practice. *See* FRCP 54(c): "* * * Except as to a party against whom a judgment is entered by default, every judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." While I have not checked the rules of the other fifty states, I strongly suspect the vast majority of them more closely resemble FRCP 54(c) than ORCP 67 C(2).

[10] "Voluntary disclosure [of privileged material] does not occur with the mere commencement of litigation or, in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence." The material referred to in section 44 C as "written reports and existing notations of any examinations relating to injuries for which recovery is sought" would seem clearly to be protected by the physician-patient privilege under ORS 40.235(2), OEC Rule 504-1(2).

Is the answer to this query simply that the obligation to produce imposed by section 44 C comes into play only if and when the party alleging personal injuries waives the privilege, either expressly or by doing something like taking a discovery deposition inquiring into the nature and causes of those injuries? That explanation seems implausible, however, because why would a claimant ever take a discovery deposition inquiring about his or her own injuries?

Of course, the mere availability of discovery does not override evidentiary privileges, since pursuant to ORCP 36 B(1), no form of discovery may be had of privileged material unless the privilege has been somehow waived. Perhaps I'm failing to see something here, which would not be the first time that has happened, and none of you find section 44 C in the least bit confusing. If so, there would obviously be nothing the Council need concern itself with, and I'll just ask someone to explain that aspect of 44 C to me during a break. But there does seem, at least to me, something about the way 44 C is worded which makes it appear that the production obligation it imposes operates as a matter of course in a manner which simply ignores or somehow overrides the patient-physician privilege.

If this is indeed a problem, it is probably among the least of those which Judge Brown's subcommittee reported to be currently plaguing practice under Rules 44 and 55. The Council will almost certainly want a new subcommittee appointed to continue this work. One or more among the continuing members of the Council were members of Judge Brown's subcommittee.

7. **Deletion of the final sentence of ORCP 60.**[11] This provision, affording trial judges the option of dismissing a claim without prejudice rather than directing a verdict against the claimant, has been in Rule 60 since the ORCP became effective, and can be traced back through the statutory antecedents of the ORCP to Oregon's territorial code of procedure. The trial judge's option, to grant a dismissal without prejudice rather than direct a verdict, is a vestige of nineteenth-century procedure whereunder claimants were permitted to move for a voluntary "non-suit," without prejudice, at any time prior to the jury's retiring to consider its verdict[12] This option is not provided for in the federal counterpart of ORCP 60, FRCP 50(a).[13]

According to the language of ORCP 60, ordering a dismissal without

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[11] The final sentence of ORCP 60 is as follows: "If a motion for directed verdict is made by the party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict."

[12] The procedural history of the voluntary non-suit and its relationship to the modern directed verdict is discussed quite extensively in *Galloway v. United States,* 319 U.S. 372, 63 S.Ct. 1077 (1943).

[13] "Rule 50(a) Judgment as a Matter of Law. (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

prejudice is an available alternative to directing a verdict, not, of course, to denying a directed verdict. Can anyone imagine any situation where a trial judge, confronted with a situation where a motion for a directed verdict should be granted, would instead order dismissal without prejudice? I cannot. Why would a judge ever do such a thing? On the basis of what criteria would the choice between directing a verdict and dismissing without prejudice possibly be made? Of course, there might be times when a claimant, or a party defending against a claim, would prefer to avoid the claim preclusive effect which entry of judgment on a directed verdict would have, and thus preserve the possibility of coming back for another bite at the apple. But would it ever be appropriate for a judge to produce that result? If not, it seems to me that the final sentence of ORCP 60 should go out.

I have found no appellate opinions discussing the rationale for the option this sentence provides or criteria for how it should be exercised. One reason the older procedure, dating from the nineteenth, and persisting in some jurisdictions well into the early twentieth century, permitted voluntary non-suits until virtually the conclusion of trials was that the rules governing amendments of pleadings were very strict, and amendments to conform to the evidence were virtually unknown. Thus, there was, by modern standards, remarkable solicitude toward litigants who suffered a failure of proof in the initial trial of a case. But in today's climate of crowded dockets, liberal amendments of pleadings, broadly transactional claim preclusion, and non-mutual issue preclusion, allowing any litigant to try the same case twice, for no better reason than a failure of proof the first time around, seems to me entirely out of bounds.

In what must be the extremely unusual situation where the trial judge finds that a failure of proof would warrant a directed verdict, but that for some extraordinary reason the failure of proof should be excused and the possibility of a second action preserved, the "safety valve" of granting a new trial pursuant to ORCP 64 B is always available, including for "newly discovered evidence" under B(4). Deleting the final sentence of ORCP 60, with its anomalous option for which no guidance is provided and criteria for its exercise are difficult to imagine, would point litigants and judges to ORCP 64 B, which where it seems to me the issue should be focused in those rare instances where it arises.

Another advantage of relying upon ORCP 64 B is that, unlike what would presumably happen if the final sentence of ORCP 60 were ever invoked, service of the summons and complaint would not have to be repeated, the case would not have to be repleaded, and no question would arise about the tolling of applicable periods of limitations.

The final sentence of ORCP 60 is anomalous in another respect. The option it provides is available only as an alternative to directing a verdict *against* a claimant. If this option makes any sense in any context, why isn't it also available as an alternative when a trial judge is on the point of directing a verdict *in favor* of a claimant?[14] Granted that directed verdicts

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[14] The answer to this question is, again, afforded by procedural history having scant relevance to modern practice. It is that "non-suits" happened, voluntarily or involuntarily, only to litigants who sued upon claims, or "causes of action" as they were then called. There was, of course, no procedure by which a party not suing, but being sued, and against which a verdict was about to be either returned or directed, could go away and come back another day better prepared. Obviously, the reason for this lack of

in favor of claimants are few and far between, but they must occasionally occur. Everything considered, the final sentence of ORCP 60 should, with apologies to Karl Marx, be consigned to the dustbin of history.

8. **Delete ORCP 64 B(5).**[15] One component of this subsection is superfluous and the other component is misleading. No one doubts that a judgment that is "against law" should be set aside. The problem is that it is impossible to imagine a judgment that would be "against law" in any sense not fully addressed by B(1), (2), (3), (4) or (6).[16]

I have not thoroughly researched all the reported decisions in which B(5) was discussed, but my preliminary check shows that the most recent opinion was in *Hightower v. Paulsen Truck Lines, Inc.*, 277 Or 65, 599 P2d 872 (1977), which dealt with ORS 17.610(6), the statutory predecessor of ORCP 64 B(5). There the court reversed the trial court's grant of defendant's new trial motion, the basis for which was the supposed failure of the jury to follow the instruction on contributory negligence. Although the opinion spoke in terms of whether the judgment was "against law," the analysis was actually focused upon whether the conflicting evidence supported a finding that plaintiff was not contributorily negligent.

If the superfluousness of "against law" were the only problem with 64

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symmetry was that plaintiffs normally have every incentive to avoid delay, whereas defendants might be tempted to encourage it, such as by being poorly prepared for trial the first time around.

[15] "A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

* * *

B(5) Insufficiency of the evidence to justify the verdict or other decisions, or that it is against law."

[16] "A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

"B(1) irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

"B(2) Misconduct of the jury or prevailing party.

"B(3) Accident or surprise which ordinary prudence could not have guarded against.

"B(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

* * *

"B(6) Error in law occurring at the trial and objected to or excepted to by the party making the application."

{Note: It might, or might not, be worthwhile changing to references to "application" to "motion."}

B(5), it might not be worth bothering about. However, its other component, "[i]nsufficiency of the evidence to justify the verdict or other decision, . . ." seems to me to have the potential of being confusing or misleading. The reason I find it misleading is because it implies that an Oregon trial court can grant a new trial on the ground of insufficiency of the evidence to support a verdict under circumstances where it could not grant a motion for jnov.

But that is not true. By virtue of Art. 7 (amended), Sec. 3 of the Oregon Constitution,[17] neither a trial nor an appellate court may grant a new trial if a jury verdict is supported by any evidence whatsoever or, as the standard is sometimes phrased, by even a "scintilla" of evidence. But if a verdict is not supported by any evidence, should not the trial court grant the verdict-loser jnov, assuming a motion therefor was timely made and that a proper motion for directed verdict had also been made?

"Insufficiency of the evidence to justify the verdict" makes perfectly good sense in federal practice and in most other states, where the evidentiary standard for granting a new trial is clearly distinguishable from the standard for granting jnov, or judgment as a matter of law as it now called in federal court. In federal practice, for example, the standard for granting judgment as a matter of law is that the verdict is not supported by "substantial evidence," the precise meaning of which has always been somewhat in doubt, but has been generally understood to mean something a bit more than a mere scintilla. However, the federal standard for granting a new trial on an evidentiary basis asks whether the verdict is contrary to the "manifest weight of the evidence." In other words, U.S. district judges are permitted to weigh evidence when ruling on new trial motions, whereas the Oregon Constitution prohibits Oregon trial judges from doing anything even approaching that.

Should the Council decide this matter is worth pursuing, at least one note of caution is in order. As you probably know, the Oregon Legislative Assembly has seen fit to borrow ORCP 64 as the rule governing new trials in criminal cases. If the Council decides to consider repealing 64 B(5) or otherwise tinkering with ORCP 64, care should be taken to avoid thereby inadvertently causing problems in the area of criminal procedure.

9. **Should ORCP 63 C[18] be amended in light of *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, Inc.*[19]** In this opinion, the Supreme Court, sensibly in my opinion, read into the language of 63 C a limited meaning not expressed, or even hinted at, in that language. The issue is whether that limited meaning would usefully be expressed by language

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[17] "In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict. . . . ."

[18] "A motion in the alternative for a new trial may be joined with a motion for judgment notwithstanding the verdict, and unless so joined shall, in the event that a motion for judgment notwithstanding the verdict is filed, be deemed waived. . . . ."

[19] 325 Or 46, 932 P2d 1141 (1997), *modifying* 322 Or 406, 908 P2d 300 (1995).

amending this section.

To summarize this case, Tualatin recovered damages of $260,000 against Goodyear on a claim of common law fraud. Goodyear timely moved in the circuit court for jnov based on its contention that the fraud damages were not supported by the evidence. The trial judge denied this motion in a ruling that did not directly figure in the subsequent appeal. Goodyear filed no motion for new trial. In the Court of Appeals Goodyear successfully invoked the "we can't tell" or *Whinston* rule[20] to obtain a reversal and remand for new trial on the ground that some of the fraud allegations which had been submitted to the jury, over Goodyear's request that they not be submitted, were not supported by the evidence.[21]

In its initial opinion in this case, the Supreme Court reversed the Court of Appeals' grant of a new trial on the ground that, by failing to join a new trial motion with its jnov motion in the trial court, Goodyear had waived the right to seek a new trial in the trial court or on appeal.[22] In other words, the Court read 63 C to mean literally what it says.

The Supreme Court subsequently granted Goodyear's petition for reconsideration and, after reargument and re-briefing, modified its opinion and the portion of its original judgment which had reversed the Court of Appeals' grant of a new trial.[23] In contrast to the original holding to the effect that 63 C means precisely what it says, the Court held, in its opinion upon reconsideration, that a judgment-loser's failure to join a new trial motion with a jnov motion waives, both in the trial court and on appeal, only the right to seek a grant of a new trial on the same ground as that asserted in the jnov motion. Since the ground asserted in Goodyear's jnov motion had been different from the ground on the basis of which it sought and was granted a new trial by the Court of Appeals, the latter ruling was affirmed rather than reversed.

My suggestion is that the Council might consider two possibilities with respect to the waiver provision of 63 C. The easier, more obvious, and perhaps wiser possibility would be simply to add language to this section to express clearly the limited scope of the waiver to conform to the second *Goodyear* opinion. Admittedly, competent lawyers must understand the meaning of any ORCP provision, or statute for that matter, in light of appellate opinions construing it, when the apparent textual meaning of a provision is as significantly modified as happened in the second *Goodyear* opinion respecting 63 C, and when the modified meaning can be clearly stated by the addition of a few words, there might be some value in doing so.

The second, more venturesome possibility, of course, is that the Council might amend 63 C to entirely delete its waiver provision. I have traced back this provision to the statutes which pre-existed the ORCP, and found that it entered the statute books in the 1920's. I have not located any legislative

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[20] So called from *Whinston v. Kaiser Foundation Hospital*, 309 Or 350, 788 P2d 428 (1990).

[21] 129 Or App 206, 879 P2d 193 (1994).

[22] 322 Or 406, 412, 908 P2d 300, 304 (1995)

[23] 325 Or 46, 932 P2d 1141 (1997).

history or other kind of explanation of why it was adopted, whose idea is was, or what it was intended to accomplish. The minutes of the original Council show that 63 C was simply taken over verbatim from its statutory predecessor, with no indication that its advisability was considered by the Council at that time. A cursory inspection of Council minutes since then disclosed no occasion when the Council has given any thought to the pros and cons of this waiver provision. The FRCP counterpart of ORCP 63 C contains no comparable provision.[24]

I don't see that any good purpose is served by this waiver provision, as either literally construed in the Supreme Court's original *Goodyear* opinion, or given the limiting construction in the opinion upon reconsideration. Reading between the lines of the original opinion, one gets the sense that the Supreme Court did not really discern any particular purpose for the waiver provision, but felt constrained to rule as it did because of the clarity with which waiver is mandated in 63 C.[25]

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[24] FRCP 50(b) If, for any reason, the court does not grant a motion for a judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury to the court's later deciding the legal questions raised by the motion. The movant may renew it request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:
  (A) allow the judgment to stand,
  (B) order a new trial, or
  (C) direct entry of judgment as a matter of law; or
(2) if no verdict was returned:
  (A) order a new trial, or
  (B) direct entry of judgment as a matter of law.

[25] Justice Gillette made a valiant effort to conjure up a rationale for the waiver provision, but, with respect, did not come up with anything very convincing. He speculated that, when a party against whom judgment has been entered moves for jnov but not for new trial, that might be because, unless the moving party can convert defeat into victory, it might prefer accepting defeat to the trouble and expense of a new trial even if the Court of Appeals would grant one. 322 Or at 412, 908 P2d at 303.

I contacted one of Goodyear's lawyers to ask why they failed to join a new trial motion with their jnov motion. The reason he gave had nothing to do with Goodyear's preferring defeat to the trouble and expense of a new trial, which is what it proceeded to seek and obtain in the Court of Appeals. The reason he gave was that Goodyear's lawyers thought their contention that some of the fraud allegations submitted to the jury were not supported by the evidence had been sufficiently argued to the trial judge such that renewing that argument by way of a new trial motion would be a waste of time. He also told me that Goodyear's principal argument the first time the case reached the Supreme Court was that 63 C's waiver provision applies only to waiver of new trial in the trial court, but not as a consequence of reversal on appeal. That argument the Supreme Court properly rejected. Of course, 63 C is a rule which governs proceedings in trial, not appellate, courts, but that is beside

One of Goodyear's lawyers told me that they were "totally shocked" by the Supreme Court's original holding in this case. This caused me to wonder why presumably competent lawyers would be shocked by the Supreme Court's simply applying the law as clearly expressed in 63 C--their shock threshold must be pretty low. The answer must be that at least these lawyers, and perhaps many others, never even considered the possibility that 63 C meant what it said. The only explanation I can imagine for that odd situation is that the waiver provision as it literally appears in 63 C makes so little sense that lawyers have difficulty believing it means what it says.

In its opinion on reconsideration, the Supreme Court was obviously persuaded that 63 C does not, or at least should not, mean what it says. The limiting construction formulated in the opinion on reconsideration will avoid the harm which the continued literal construction of the provision could do.

It certainly would have been helpful to the Supreme Court and to the *Goodyear* litigants if, prior to that case, the Council had done either one of two things.[26] First, if the Council had been able to anticipate the Supreme Court's conclusion upon reconsideration in *Goodyear* that 63 C understood literally makes no sense, and had added appropriate language anticipating the very limited scope of its waiver provision in accordance with that holding, that would have spared the Court and the parties the need for two arguments and briefings in this case.

The second thing the Council might have done would have been simply to delete the waiver provision altogether. Even though the Supreme Court has now established what 63 C means, and that meaning might be just fine, there is still the issue of whether that meaning should now be clearly expressed in the language of the rule. But, why go further, by even considering the possibility of deleting the waiver provision entirely?

Careful thought would have to be given to the matter, but I believe I'm correct in thinking that, given the narrowing construction of this waiver provision, there are no situations to which the provision could apply. That is, I cannot imagine any situation where a new trial could be sought on the same grounds as jnov. That, of course, would not be true if, as in federal practice, the evidentiary standard for granting a new trial were different from the standard for granting jnov, but, as you know, that is not the case in Oregon practice. That being so, would it not be better simply to delete the waiver provision altogether?

Some might be inclined to favor retention of this waiver provision in

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the point. If accepted, Goodyear's argument would mean that some contention could be waived in the trial court, but then retrieved on appeal. If appellate courts failed to enforce waiver rules governing proceedings in trial courts, the whole purpose of having such rules would be defeated.

[26] There might be others, but I am not aware of any case apart from the *Goodyear* litigation, at least not in the last 20 or so years, where the Oregon Supreme Court has announced a holding, granted a petition for reconsideration and reargument, and then announced that it had simply changed its mind on a particular point of law. In fact, the Court did not really do that in its second *Goodyear* opinion. This opinion stated that, in its initial decision, the Court had mistakenly understood that the ground on which Goodyear sought and was granted a new trial in the Court of Appeals was the same as the ground on which it unsuccessfully sought jnov in the trial court. 325 Or at 48 n. 2, 932 P2d at 1142 n. 2.

order to ensure that parties against whom judgment has been entered in the trial court cannot delay things by first filing a jnov motion and then, if that is denied, filing a new trial motion, in the false hope that would postpone the time when a judgment becomes truly final in the sense of the time within which to appeal having expired. In fact, Goodyear's principal argument in the first Supreme Court case was that the effect of the 63 C waiver is limited to the trial court, such that a failure to join a new trial motion with a jnov motion should not foreclose the opportunity of obtaining a reversal and remand for new trial on appeal.

In fact, however, this waiver provision is not needed for this purpose. Pursuant to ORCP 63 D and 64 F respectively, no motion for either jnov or new trial is timely unless filed within 10 days after entry of judgment. The filing of either motion extends the time within which to appeal, but does not extend the time within which the other motion must be filed. Even in the unlikely event a losing party files one motion on day 5 and the other on day 10, surely the court would consolidate them for hearing. In other words, I see no possibility that repeal of the waiver provision would create any kind of opportunity for losing parties to employ "salami tactics" in the trial court. Also, if precluding salami tactics were really the concern of 63 C, why is there no ORCP provision to the effect that filing a new trial motion without joining a jnov motion results in waiver of the latter?

10. Should not ORCP 21 F[27] be amended to provide for waiver of all procedural defenses omitted from a pre-answer motion? Speaking of salami tactics, this provision unaccountably permits them. The filing of a pre-answer motion stops the running of the time within which an answer must be filed.[28] If a defendant files a pre-answer motion raising any one of the defenses enumerated in 21 A, but omits from such motion any other defense except those specified in 21 G(3) and (4),[29] why should not any

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

[28] ORCP 7 B.

[29] "G(3) A defense of failure to state ultimate facts constituting a claim, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made

omitted defenses be deemed waived?

ORCP 21 F, as presently worded, would permit a defendant to file one pre-answer motion raising the defenses of lack of jurisdiction over the person, insufficiency of service, or insufficiency of summons and, if the motion were denied, then file a second pre-answer motion raising any of the other defenses, including those which I believe should be deemed waived by omission from the first motion--prior action pending, that plaintiff is not the real party in interest, that plaintiff lacks the capacity to sue, or that the complaint shows the action is time-barred. The federal counterpart of 21 F[30] seems to be better in that it provides that, if a pre-answer motion is filed, any defense omitted therefrom which Rule 12 permits to be raised by motion and then available to the defendant is waived except the defenses of failure to state a claim, failure to join an indispensable party, and lack of subject matter jurisdiction. One pre-answer motion should suffice.

11. **Should not ORCP 21 A(3)[31] be amended or deleted?** In most, if not all, other American jurisdictions, the fact of a prior action pending between the same parties concerning essentially the same thing will result in the subsequent action being stayed, but not dismissed. Even a stay is usually not ordered unless the prior action is pending within the same jurisdiction or court system. Thus, federal courts will normally not even stay, much less dismiss, an action on the ground that there is a prior action pending in a state court. Read literally, 21 A(3) would require dismissal of an action on the basis of a prior action pending anywhere in the world. The Court of Appeals has held that A(3) applies when the prior action is pending in federal court,[32] and it would be difficult to distinguish that situation from a prior action pending in a court of another state.

Given the breadth of its application, 21 A(3) contains the admittedly remote, yet real, potential for causing serious injustice. Suppose, for

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at trial, shall be disposed of as provided in Rule 23 B in light of any evidence that may have been received.

"G(4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action."

[30] "12(g) A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

[31] "21 A. How Presented. Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: * * * (3) *that there is another action pending between the same parties for the same cause,* . . ." (Emphasis added).

[32] *Beethan v. Georgia-Pacific Corp.*, 87 Or App 592 (1987).

example, that A sues B in an Oregon circuit court. B then moves for dismissal of the action on the ground that A is a member of the plaintiff class in a class action pending in some other court in the United States. The judge, pursuant to A(3), grants B's motion to dismiss. Some time later the class in the other action is decertified, or the other action is disposed on some procedural ground not going to the merits. A then re-commences his action against B. While the previous dismissal in the Oregon court pursuant to A(3) would have been without prejudice, the pertinent statute of limitations might well have run and A's claim against B thus become time-barred.

At the very least it seems to me that 21 A(3) should be amended to provide for a stay rather than dismissal as a matter of right. The difficulty with amending A(3) in that manner, however, is that if it were to provide for a stay rather than a dismissal, it would no longer belong in a provision dealing solely with motions to dismiss.

If the Council agrees that 21 A(3) needs fixing, one possibility would be to take it out of Section 21 A and find some other place for it where it could be recast as calling for a stay rather than dismissal. Another possibility would be to delete 21 A(3) and not relocate it anywhere in the ORCP. There is nothing in the FRCP or in the U.S. Judicial Code authorizing or requiring stays of actions, yet the federal courts regularly order stays of action which duplicate or overlap with other actions already pending in the federal court system. Discretionary authority to stay actions is regarded as being derived from the inherent judicial power of the federal courts, and thus not dependent upon a rule or statute. On the other hand, since 21 A(3) has been part of Oregon practice since long before adoption of the ORCP, simply deleting it might mislead lawyers and judges into thinking that Oregon trial courts should attach no significance to the fact of a prior action pending, even if the latter is pending in another Oregon court.

ORCP 21 A(3) was taken over from the statute which preceded and, to the best of my knowledge, has never been considered by the Council.

12. Deal with the inconsistency between ORCP 13 B and 19 C. There seems to me to be something of an inconsistency between the fifth sentence of ORCP 13 B[33] and the first sentence of ORCP 19 C.[34] If a plaintiff wishes to avoid an affirmative defense contained in an answer, the latter then becomes "a pleading as to which a responsive pleading is required, . . ." If a plaintiff does as 13 B requires--file and serve a reply limited to "affirmative allegations in avoidance of any defenses asserted in an answer," it is at least arguable that, pursuant to the first sentence of 19 C, the plaintiff would be taken to have admitted such "affirmative allegations," which is almost certainly not the intent of these provisions separately or in

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[33] "There shall be a reply to a counterclaim denominated as such and a reply to assert any affirmative allegations in avoidance of any defenses asserted in an answer."

[34] "Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading."

combination.[35]

If the Council agrees that there is an inconsistency here, my recommended solution would be to amend 13 B to conform to its federal counterpart, FRCP 7(a).[36] Obviously, the requirement that a reply be filed in response to a counterclaim denominated as such should be retained. However, the requirement of 13 B that a reply be filed in order for the plaintiff to introduce evidence in avoidance of an affirmative defense, in lieu of, or in addition to, evidence rebutting facts alleged by way of affirmative defense, is archaic and seems to me to serve no useful purpose in modern practice. It dates from an era when pleadings played a much more significant role in civil practice than they do today.

Replies are not required or permitted for this purpose in federal practice, unless so ordered, which happens extremely rarely, or in the practice of any other state I'm aware of. This provision was carried over by the original Council from the predecessor provision of the ORS with no particular thought being given to the matter as far as the minutes and other materials disclose. Perhaps surprisingly, it has caused a fair amount of difficulty, at least judging by the number of appellate opinions in which it has been construed and applied.[37]

One recurring reason for this difficulty, which unavoidably arises with respect to affirmative defenses as opposed to denials in answers, is that it can sometimes be a matter of metaphysical subtlety whether a given showing at trial can be made pursuant to a denial or only if "matter in avoidance" has been pleaded. There is no good way to get rid of the need to draw the distinction in connection with answers between what may be shown pursuant to denials in contrast with affirmative defenses. But there seems no good reason

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[35] *See, e.g., Soldo v. Follis,* 83 Or App 470, 732 P2d 72 (1987), wherein it was correctly held that a plaintiff who filed no reply did not thereby admit the allegations included in the answer by way of affirmative defenses. However, there is no appellate decision squarely on point concerning the effect of filing a reply to avoid an affirmative defense which contains the required "affirmative allegations," but no denials of the defendant's affirmative allegations, as ORCP 19 C seems to require.

[36] "(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer."

[37] In addition to *Soldo, supra n. 13, see Beckett v. Olsen,* 75 Or App 610, 707 P2d 635 (1985) (absence of a reply denies allegations by way of affirmative defense); *Bourrie v. United States Fidelity and Guaranty Insurance Co.*, 75 Or App 241, 707 P2d 60 (1985) (failure of insured to allege waiver of condition of coverage as raised by insurer as an affirmative defense meant that insured could not show waiver at trial); *Skinner v. Michaels,* 58 Or App 59, (1982) (sufficiency of allegations in reply to avoid defense of release); *and Lang v. Oregon Nurses Ass'n.*, 53 Or App 422, 632 P2d 472, *rev. denied* 291 Or 771, 642 P2d 308 (1981).

to extend the need to draw that sometimes difficult distinction to replies.

13. **Technical Corrections.** The following references are incorrect and should be corrected:

ORCP 32 N(1)(e)(v):		Change "OR 2-106" to "DR 2-106."
" 62 F	:	Change "ORS 19.125" to "ORS 19.415."
" 82 B	:	Add "ORS" before "706.008."

14. **Changes Requiring Legislation.** Following are three items which, if the Council accepts the suggestions, would certainly, or in one case probably, require legislation. Any of them approved by the Council should, I assume, be forwarded through the OSB, in particular what I believe is called the Public Policy Committee of the Board of Governors:

a. Recodification of ORCP 7 D(4)(b).[38] Obviously, this is not a rule of civil procedure at all, but a reporting requirement which belongs in the Vehicle Code of the ORS. That Code contains several similar kinds of reporting requirements, along with a modest penalty provision for failure to comply with them. With this particular reporting requirement misplaced in, of all places, the ORCP, I wonder whether, as a matter of due process, the penalty for non-compliance with it could constitutionally be imposed. Perhaps the thought was that the penalty should be imposed by the Council itself, by summoning violators to a meeting and, upon a finding of guilt by vote of no less than 15 members, pronouncing some appropriate sentence, such as having to attend all Council meetings for one year wearing a dunce cap. However, the only people who could be proceeded against in that fashion might be trial judges and trial lawyers, who are expected to be familiar with the ORCP.

The Council has talked about this tiny problem for years, but has never gotten around to having it fixed. Since all that would be involved is a recodification, could this be done by the Legislative Counsel without bothering the Legislative Assembly? By the time of our first meeting, I'll try to have an answer to that question.

b. Amendment of ORS 1.730(4).[39] I suggest that the Legislature be asked to delete the "staggered terms" language of this subsection shown in italics in footnote 39. Like the similar staggering of

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[38] "Notification of Change of Address. Every motorist of user of the roads, highways, or streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or other event giving rise to liability, shall forthwith notify the Department of Transportation of any change of such defendant's address occurring within three years after such accident, collision or event."

[39] "(4) Members of the Council on Court Procedures shall serve for terms of four years and shall be eligible for reappointment to one additional term, *provided that, where an appointing authority has more than one vacancy to fill, the length of the initial term shall be fixed at either two or four years by that authority to accomplish staggered expiration dates of terms to be filled.* . . ." (Emphasis added).

terms provision of the U.S. Constitution regarding the first Senate,[40] ORS 1.730(4) made good sense, but only as applied to the original Council to avoid a total change of membership after the first four years. Once staggering is accomplished, it doesn't have to be repeated. In fact, continuation of staggering terms could only inadvertently defeat the purpose for which this device was originally intended.

While it is true that this provision does no great amount of harm, it does do some. For one thing, it must be a bit awkward when an appointing authority has to decide which new members to appoint to four-year terms and which to two-year terms. (Incidentally, I was originally appointed to a two-year term as a member before becoming Executive Director, and assumed that was because the Board of Governors wanted to limit the damage I might do to the ORCP. But then, why appoint me at all?)

For a second thing, appointing authorities quite often simply ignore this statutory requirement. For example, the four practitioners just appointed to membership were all appointed to four-year terms. Also, the four circuit court judges just appointed or reappointed by the Executive Committee of the Circuit Judges Association were all given four-year terms.

c Amendment of ORS 1.735(2)[41] to eliminate its "exact language" requirement. This item might be a tad more controversial than a. and b. above. The Council has discussed this topic on a couple of past occasions, and decided not to do anything. It seemed to me that the primary reason for not doing anything was a certain anxiety about calling the Legislature's attention to the Council, particularly by asking it to repeal language enacted as recently as 1993.

Perhaps that cautious view will, and should, prevail again.[42] But, purely on the merits, I cannot understand how any member could regard the "exact language" requirement as anything other than an unfortunate, and mildly insulting, provision. It makes the comment period, between publication of tentatively adopted amendments in the October issue of the advance sheets prior to legislative sessions and the December meeting at which voting on final promulgation occurs, nearly useless. While it hasn't happened recently,

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[40] U.S. CONST. art. I, §3.

[41] "(2) A promulgation, amendment or repeal of a rule by the council is invalid and does not become effective unless the *exact language* of the proposed promulgation, modification or repeal is published or distributed to all members of the bar at least 30 days before the meeting at which final action is taken on the promulgation, modification or repeal." (Emphasis added).

[42] I don't understand this apparent reluctance on the part of the Council to call the Legislature's attention to its existence. Every legislative session must appropriate and authorize funding for the Council's biennial budget. Additionally, all promulgated ORCP amendments are formally reported to the President of the Senate and the Speaker of the House.

If there is agreement with my suggestion that the "exact language" requirement be repealed, I would further suggest that the appropriate bill be sponsored by the OSB as part of the package of proposed legislation which it sponsors in every session.

as a result of the October publication there is always the possibility that some very useful comments for improvements in drafting of proposed ORCP amendments will be received. But the "exact language" requirement effectively prohibits the Council from taking any advantage of suggested improvements, however little they might change the basic meaning of a proposed amendment, while enhancing the quality of its drafting. The only responses the Council can make, if it finds comments to be sufficiently serious, is to decide not to promulgate a proposed amendment at all or to defer promulgation a full two years until the next biennium.

The other, related unfortunate effect of the "exact language" requirement is that, because the Council cannot do anything in response to comments except decide not to promulgate a particular amendment, since this requirement became effective in 1993 the Council has canceled the meetings it might otherwise have usefully held in October and November. Given the lead time required for publication of proposed amendments in the October advance sheets, the last meeting at which tinkering, redrafting, and polishing of amendments can occur is the one in September, which is then followed by two "dead" months. My recollection is that, prior to 1993, the Council usually did meet in Octobers and Novembers leading up to the decisions whether or not to promulgate at the December meeting, and that substantial improvements in drafting occasionally occurred, sometimes in response to comments, sometimes otherwise.

The message implied by the "exact language" requirement strikes me as a trifle insulting. The implication is that, absent this requirement, the Council would either deliberately try to play games by publishing amendments in one form and then promulgating them in a form having a substantially different meaning, as though members would like to "sneak stuff" into the ORCP when no one is looking, or that the Council is too dumb to know the difference between modifications which merely improve clarity and draftsmanship, but do not significantly change meaning, and those which do. If either of these implications were true, how could the Council be trusted to do anything at all?

Perhaps the Legislature needn't be bothered about this after all. Might it be possible for a judicial member of the Council to render what the Indiana Supreme Court once described as a "sui sponte" declaratory judgment that the "exact language" requirement of ORS 1.735(2) is void for impertinence?

For Counsel, Inc. v. Northwest Web Co., 329 Or 246, __P2d__ (1999)

GILLETTE, J.

This case concerns the proper interpretation of ORCP 54 E, the rule of civil procedure that deals with pretrial offers of compromise. Under that rule, a party that declines a pretrial offer must obtain a judgment more favorable than the pretrial offer, or that party loses any right it otherwise might have had to be awarded costs or attorney fees incurred after the date of the offer. The issue presented is whether the rule permits pretrial offers to be made inclusive of costs, disbursements, and attorney fees without the opposing party's prior agreement. The trial court concluded that such inclusive offers are permissible under the rule. Because plaintiff rejected defendant's offer of compromise (which had included costs and attorney fees) and chose instead to proceed to trial, but failed to recover more than the sum offered, the court limited plaintiff's recovery to the damages awarded plaintiff at trial together with that part of plaintiff's attorney fees, costs, and disbursements adjudged to have accrued as of the date of the offer. The Court of Appeals affirmed the judgment of the trial court. For Counsel, Inc. v. Northwest Web Co., 154 Or.App. 492, 962 P.2d 707 (1998). We allowed review and now affirm the decision of the Court of Appeals.

We take the following undisputed facts from the opinion of the Court of Appeals and from the record. Plaintiff filed a complaint against defendant Northwest Web Co. for breach of contract and fraud.[1] Plaintiff sought $240,000 in damages on the contract claim, $30,000 in damages on the fraud claim, and also sought $100,000 in punitive damages. In addition, the complaint included a claim for attorney fees under a term of plaintiff's contract with defendant. Before trial, defendant made an offer of compromise of $150,000, which expressly purported to be "inclusive of all claims for attorney's fees to the date of the Offer and all costs, pursuant to the provisions of ORCP 54(E)."

Plaintiff rejected defendant's offer. The case went to trial. Plaintiff prevailed on the contract claim but lost on the fraud and punitive damages claims. The trial court awarded plaintiff $107,829, not including costs, disbursements, and attorney fees, and directed that amounts for those items be determined after a hearing under ORCP 68 (establishing procedures for determining and awarding costs, disbursements, and attorney fees).

Plaintiff submitted a statement of attorney fees, costs, and disbursements, seeking a total of $163,156.97 for those items, which, plaintiff claimed, represented the amount incurred through trial on the

[1]Northwest Web Co. filed a third-party complaint against Eugene Direct Mail Service (EDMS), and EDMS joined in the offer of compromise. EDMS joined Northwest Web Co. on the briefs before the Court of Appeals and joins Northwest Web Co. in the proceedings before this court. Accordingly, when we refer to "defendant" in this opinion, we refer both to Northwest Web Co. and to EDMS.

contract claim alone. Defendant objected to the amounts claimed for costs and attorney fees on various grounds, but its principal objections were two. First, defendant contended that, although plaintiff arrived at its allocation of fees and costs for the contract claim by discounting its total outlay by 15 percent to account for the time spent pursuing the fraud claim, in reality, the time and effort expended in pursuit of the fraud claim was at least 50 percent. Second, because defendant's pretrial offer of compromise included claims for attorney fees up to the date of the offer, together with costs, and because plaintiff's total recovery did not exceed that amount, under ORCP 54 E plaintiff was not entitled to recover attorney fees and costs incurred after the date of the offer.

In response, plaintiff argued that the attorney fees and costs need not be apportioned at all, because they were incurred for representation on issues common to both the fraud claim and the contract claim. In any event, plaintiff continued, defendant's offer of compromise was invalid from the outset, because the wording of ORCP 54 E permits offers of compromise to include attorney fees only if both parties had agreed to such an arrangement. Plaintiff argued that the rule contemplates that there will be a stipulated judgment for damages on the underlying claim and then the court will determine the appropriate amount of attorney fees and costs.

The trial court concluded that a substantial part (between 40 and 50 percent) of plaintiff's legal effort was expended in pursuit of the fraud claim, exclusive of issues common to both claims, and that plaintiff's total reasonable attorney fees on the contract claim amounted to $50,000. In addition, the court rejected plaintiff's interpretation of ORCP 54 E and held that nothing in the text of that rule prevents a party from offering to allow judgment to be had against it in an amount that includes attorney fees and costs. The court found that $25,000 of plaintiff's attorney fees, and recoverable costs and disbursements in the amount of $6,564.73, were incurred as of the date of defendant's offer of compromise. Those sums, together with the amount awarded plaintiff in damages on the contract claim, totaled $139,393.73. Because that amount was less than the $150,000 offered in compromise, the court held that plaintiff could not recover additional attorney fees and costs incurred after the offer was made. Additionally, the court held that, under the last sentence of ORCP 54 E, defendant was entitled to recover $3,147.31 from plaintiff for costs and disbursements incurred after the date of the offer.

On appeal, plaintiff assigned error to the trial court's conclusion that defendant's offer of compromise was valid, despite the fact, that it purported to be inclusive of attorney fees and costs notwithstanding that plaintiff had not agreed to such an inclusive offer.[2] Plaintiff contented that ORCP 54 E did not apply to such an all-inclusive pretrial offer of compromise, unless the opposing party had agreed that the offer could have that scope. The Court of Appeals performed a statutory analysis under the procedure outlined in PGE v. Bureau of Labor and Industries, 317 Or. 606, 610-12, 859 P.2d 1143 (1993), and concluded that the text of ORCP 54 E permits inclusive offers and does not

[2]Before the Court of Appeals, plaintiff did not challenge the trial court's findings regarding the amount of fees and costs incurred before the offer of compromise was made.

require the opposing party's prior agreement. For Counsel, 154 Or.App. at 496-98, 962 P.2d 707. It therefore affirmed the judgment of the trial court. Id. at 499, 962 P.2d 707. For the reasons that follow, we agree.

We attempt to discern the intent of the legislature with respect to the permissible components of pretrial offers of compromise by using the statutory interpretation methodology set out in PGE. Under that methodology, we first examine the text of the statute, ORCP 54 E, in context. Id. at 610-11. At that first level of analysis, we consider rules of construction that bear on how to read the text, such as the enjoinder found in ORS 174.010 not to omit what has been inserted or insert what has been omitted. Id. at 611. We also consider rules of construction that bear on the interpretation of the statutory provision in context, such as the directive, also found in ORS 174.010, to interpret statutes with multiple particulars or provisions, to the extent possible, so as to give effect to all. Ibid. If, at the conclusion of our examination of the text and context, the intent of the legislature is clear, then we proceed no further. Ibid.

ORCP 54 E provides as follows: "Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer."

The first sentence of ORCP 54 E permits the party against whom a claim is asserted to make "an offer to allow judgment to be given against [it] for the sum, or the property, or to the effect therein specified." Nothing in that wording suggests that a defendant is precluded from making an offer that includes attorney fees or costs. Indeed, under the plain wording of that sentence, the nature and content of offers of compromise are unrestricted. The words "for the sum * * * or to the effect therein specified" are broad and contain no hint that the opposing party's agreement to a particular form of offer is required before it will be considered valid. Unless a contrary intent is manifested elsewhere in ORCP 54 E, then, the first sentence of ORCP 54 E permits offers that include all manner of elements, including attorney fees, costs, and disbursements, with or without the opposing party's prior agreement.

The second sentence of ORCP 54 E sets out the timing and procedures to be followed in the event that the party asserting the claim accepts an offer

of compromise, including the filing of the accepted offer with the clerk of the court and the entry of the terms of the accepted offer as a stipulated judgment. It does not give any indication as to the permissible contours of an offer of compromise.

We bypass, for the moment, the third sentence. The fourth and final sentence of ORCP 54 E provides, in part, that, in the event that an offer is not accepted, it is deemed withdrawn and, if the party asserting the claim fails to recover a more favorable judgment, that party is not entitled to recover costs or fees incurred after the date of the offer. Again, nothing in that recitation of the consequences flowing from a rejection of an offer of compromise suggests that a party against whom a claim is asserted is precluded from making an offer that includes attorney fees and costs, unless the other party agrees. Moreover, and perhaps more importantly, there is no suggestion that those consequences do not apply if the offer happened to include attorney fees and costs.

The remaining sentence, the third, is the one on which plaintiff relies to support its argument that defendant's offer of compromise was invalid because plaintiff had not agreed to a form of offer that included attorney fees and costs. We set that sentence out here for convenience: "Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68." In support of its construction of that sentence, plaintiff focuses on the word "agreed" in the phrase, "unless agreed upon otherwise by the parties," and derives from that usage the conclusion that both parties' agreement is required to effect an all-inclusive offer of compromise. According to plaintiff, implicit in the phrase "unless agreed upon otherwise by the parties" is the assumption that, unless the parties had agreed to an all-inclusive offer, an offer made under ORCP 54 E does not include attorney fees and such fees then shall be determined by a court in accordance with ORCP 68. In addition, plaintiff views the use of the word "shall," in the phrase "costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68," as establishing conclusively that, in the absence of such agreement regarding the nature of the offer, it is for the court to determine attorney fees.

In our view, plaintiff's interpretation of the disputed sentence might make sense if that sentence were read in isolation, outside the context of ORCP 54 E as a whole. As noted, however, our methodology requires us to consider the meaning of the terms used in that sentence in the context of the whole of ORCP 54 E in order to discern the intent of the legislature. When read in that light, the third sentence is a continuation of the discussion in the preceding sentence of what is to happen if a pretrial offer of compromise is accepted. Taking the third sentence together with the second, it is plain that the agreement referred to in the phrase "unless agreed upon otherwise by the parties" is the one formed by one party's acceptance of the other party's

offer.[3] That is, if defendant's offer does not include an amount for attorney fees and costs, but the offer is accepted and filed in court as a stipulated judgment, then the trial court determines the amount of such fees and costs in accordance with ORCP 68 and enters that amount "in addition as part of such judgment."

Moreover, that last quoted phrase has meaning only by reference to the preceding sentence. The word "such" in the phrase "such judgment" refers to the stipulated judgment of the previous sentence, and that stipulated judgment, in turn, consists of the terms of the accepted offer of compromise. Thus, the phrase "in addition as part of such judgment" means in addition to whatever was agreed by the parties in the accepted offer, as part of the stipulated judgment. By contrast, plaintiff's interpretation, which focuses only on the first part of the disputed sentence, would require the court to ignore the phrase "in addition as part of such judgment." That is contrary to our mandate not to "omit what has been included."

Finally, it is true that the directive to the trial court to determine the amount of fees and costs under ORCP 68 uses the mandatory "shall." However, no limitation on the content of the offer reasonably can be inferred from that wording. Because no such limitation can be found elsewhere in that statute, we hold that, for purposes of ORCP 54 E, an offer of compromise that specifies that it includes attorney fees and costs to the date of the offer is valid. No agreement to such a form of offer by the opposing party is required for the offer to be valid under ORCP 54 E.[4]

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

[3]Plaintiff's insistence on reading the disputed sentence in isolation is apparent in its argument that the Court of Appeals "in essence added additional language to ORCP 54 E when it stated that the 'context' of the Rule referred to an 'attorney fee agreement that is either a part of, or connected to, an accepted offer that is being entered as a stipulated judgment.' " (Quoting For Counsel, 154 Or.App. at 498, 962 P.2d 707.) To the contrary, in interpreting disputed wording of a statute by reference to its context, as the Court of Appeals did, a court is not adding additional wording to that statute; rather, it simply accords the meaning to particular words and phrases that the context dictates.

[4]We recognize that our interpretation of ORCP 54 E may exacerbate potential conflicts between lawyer and client concerning whether to accept a pretrial offer of compromise or proceed to trial. Whether the working of the rule is either fair or prudent in that respect cannot, however, alter what it is clear that the rule now provides. At the same time, we recommend that the Council on Court Procedures review the rule, to determine whether some other formulation of the rule would be better.

Attachment B-II

98-15

DISTRICT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
526 MULTNOMAH COUNTY COURTHOUSE
1021 SW FOURTH AVENUE
PORTLAND, OR 97204-1123
(503) 248-3835

DAVID GERNANT
JUDGE

December 8, 1998

Mr. James S. Crane
Copeland, Landye, Bennett and Wolf
1300 S.W. Fifth Avenue, Suite 3500
Portland, Oregon 97201

Mr. Everett W. Jack
Davis Wright Tremaine LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201

Re: Reynolds Metals v. Aetna Casualty & Surety
Case No. 9505-03520

Gentlemen:

After the status conference in court yesterday, two matters were left unresolved: (1) whether expert witness discovery would be allowed; and (2) whether plaintiff's motion for partial summary judgment on the duty to defend, filed July 14, 1995, will be considered prior to the time contemplated for the filing of other summary judgment motions on October 15, 2000.

I. EXPERT DISCOVERY

Over the objection of plaintiff Reynolds Metals, and pursuant to the plain language of ORCP 36, discovery of experts will be directed to occur as provided in defendant's proposed Case Management Order No. 1, at Part VII(A)(3).

I would like the order amended to include the following footnote which should be attached to the headline of subpart 3:

Expert witness discovery is being permitted (and, because it is over the objection of plaintiff, ordered) pursuant to the

plain language of ORCP 36. Because Oregon rules do not permit interrogatories, such discovery shall be done exclusively by deposition, pursuant to ORCP 39.

The court relies for this order on the policy arguments, which seem to the undersigned judge unanswerable, advanced in J.D. Droddy, "The Case for Discovery of Expert Witnesses under Existing Oregon Law," 27 Will.L.Rev. 1, 1-19 (1991). See also the oft-cited case of PGE v. Bureau of Labor and Industries, 317 Or 606, 610-11, 859 P.2d 1143 (1993), where the court pointed out that if the text of a statute is clear one does not inquire into history or legislative intent. It is the undersigned judge's view, agreeing with the author of the Willamette Law Review article, that only perceived (not to say received) history and continuing practice militate against the conclusion that deposition discovery of experts is permissible in Oregon in any case at the option of any party.

Nonetheless, even if the received history and longstanding practice are normally to be deferred to, this court concludes at least that it possesses discretion to order expert witness discovery in appropriate cases. For similar reasons as those that led to the designation of this case as a complex case, pursuant to UTCR 7.030--e.g., the complexity of the legal issues, the number of parties involved, the expected extent and difficulty of discovery, the anticipated length of trial, together with the greater likelihood of settlement if experts are deposed prior to trial, and the greater value both to the parties and to the court of a settlement prior to trial of such a complex case--this court finds that the interests of justice will best be served by permitting and ordering expert witness discovery in this particular case.

II. SUMMARY JUDGMENT

On page 13 of the defendant's proposed Case Management Order No. 1, please add the following footnote after the sentence ending in the word "abeyance", on line 20:

However, the court is willing to receive briefs on the

subject of whether the plaintiff's "Motion for Partial Summary Judgment on the Duty to Defend" filed July 14, 1995, should be heard and determined at an early date during the discovery process. Plaintiff's brief should be filed on or before December 22, 1998. Defendant's answering brief should be filed on or before January 5, 1999. Any reply brief should be filed on or before January 12, 1999.

If consideration of the motion for partial summary judgment already filed is allowed, a further briefing and argument schedule on the merits of the motion will be established.

III. PROTECTIVE ORDER

I have today signed the "Protective Order" submitted on Davis Wright Tremaine pleading paper and as to which there was no discussion in court yesterday. According to Mr. Everett Jack's cover letter of December 2, 1998, this form of protective order was reached by agreement of all parties.

Very truly yours,

David Gernant

cc: trial court file

DG:bmc

COUNCIL ON COURT PROCEDURES

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

Telephone: (541) 346-3990
FAX: (541) 346-1564

November 17, 1999

TO: **ACTING CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Maury Holland, Executive Director

RE: **REMINDER OF NEXT COUNCIL MEETING**

DATE: January 8, 2000

TIME: 9:30 a.m.

PLACE: Oregon State Bar Center
5200 S.W. Meadows Road
Lake Oswego, Oregon

It was decided at the Council's October 30 meeting that the next meeting of the Council will be held Saturday, January 8, 2000. There will be no meeting on December 4, 1999. An agenda and minutes of the October 30 meeting will be mailed approximately two weeks prior to the January 8 meeting.

A suggested meeting schedule for the year 2000 is enclosed for those members who were not present at the January 8 meeting. Also enclosed is a letter from Attorney Michael Brian regarding ORCP 44A which was distributed at the meeting.

Enc.

Michael Brian
Attorney at Law

1611 E. Barnett Road • Medford, Oregon 97504-8284
Telephone (541) 772-1334 • Fax (541) 770-5560

October 26, 1999

By Fax to (503) 588-7179

J. Michael Alexander, Chair
Council on Court Procedures
Burt, Swanson, Lathen, Alexander
& McCann, P.C.
Attorneys at Law
388 State Street, Suite 1000
Salem, OR 97301

Re: ORCP 44A (amending to allow recording and presence of representative)

Dear Mick:

My practice consists of solely representing individuals who have suffered some type of physical injury as a result of the actions of an individual or corporation. In most claims, where a lawsuit is filed, the defendant requests a medical exam by a doctor chosen by the defendant or the defendant's attorney. Sometimes the other attorney and I can agree on the examining doctor and the ground rules regarding the examination. Often we cannot reach an agreement and ORCP 44A is used by the defense attorney to obtain an order of the court directing the injured individual to submit to a medical exam.

Please note that in the above paragraph I did not use the adjective "independent" in describing the medical exam. Even though that term is often used to describe the medical exam, in my opinion the term is inaccurate. Often the medical exam is adversarial. Even when it is not, disputes can arise about information provided during the exam, or the injured individual may feel uncomfortable being alone with a doctor who works for the other side in the lawsuit. Currently, ORCP 44A is silent as to any procedures to address these issues. Some courts have allowed the exam to be recorded and/or a representative to be present, but it is inefficient and expensive for the courts to establish procedures on a case-by-case basis.

For this reason, I believe that Oregon procedural law would be improved if ORCP 44A was amended to provide that at the medical exam the individual may be accompanied by a representative and may record the exam. This change can be accomplished by adding one or two additional sentences to ORCP 44A, similar to State of Washington Civil Rule 35(a). Under this procedural rule, an individual who is attending a defense medical exam has the right to record the medical exam and have a representative present. A copy of the rule is attached to this letter.

I am willing to appear personally before the Council on Court Procedures concerning the changes I am requesting in ORCP 44A.

Very truly yours,

Michael Brian

Michael Brian

MB/rlo
Enc.
M\W\My Documents\Alexander Ltr Oct. 26

WASHINGTON COURT RULES

STATE

1999

FOR FEDERAL RULES, SEE WASHINGTON COURT RULES, FEDERAL, 1999

FOR LOCAL RULES, SEE WASHINGTON COURT RULES, LOCAL, 1999

WEST GROUP

request shall set forth the items to be ected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; September 1, 1997.]

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The party being examined may have a representative present at the examination, who may observe the examination but not interfere with or obstruct the examination. Unless otherwise ordered by the court, the party or the party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner.

(b) **Report of Examining Physician or Psychologist.**

(1) If requested by the party against whom an order is made under rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

[Amended effective July 1, 1972; September 17, 1993.]

RULE 36. REQUESTS FOR ADMISSION

(a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. Requests

MEMORANDUM

TO: Members of the Council on Court Procedures Mavry Holland

FROM: Dan Harris

RE: Jury reform proposals

DATE: April 4, 2000

We will be discussing jury reform proposals at the meeting this Saturday. Attached to this memo are the three proposals we would like to discuss. The proposals include amendments to ORCP 58 and 59 covering the following subjects:

1. Allowing brief neutral statements to be made to the jury panel before voir dire.

2. Allowing jurors to ask questions to witnesses and the court.

3. Encouraging jury instructions to be in writing.

4. Allowing jurors to discuss the case during recesses.

5. Allowing judges to instruct the jury before or after closing arguments.

You will see from the attached memo that there are other proposals we could add to the list if the Council is prepared to do so. I have received some feedback from the OSB Procedure and Practice Committee and the Chief Justice's Civil Law Advisory Committee. These potential changes to the ORCP are scheduled to be discussed at the up coming judicial conference (April 17 and 18). I have also been invited to discuss these proposals at the OADC convention in June and the OTLA convention in August. Last December I was in a judicial conference in San Francisco where I had the opportunity to discuss these concepts with seven trial judges from Arizona. Without exception, they liked the changes and informed me that they had not experienced any problems in the use of these new procedures. Are there any other groups we should be presenting these proposals to for feedback?

At this Saturday's meeting, we are looking for some guidance from the Council as to which proposals to go forward with for the purpose of receiving informal comment and feedback; we also need to establish a time frame for when the Council wants to put the proposals into a form that can be submitted for formal comment.

PROPOSAL TO AMEND ORCP RULES 58 AND 59

PROPOSAL No. 1 - ORCP 58 A and B

It is proposed that ORCP 58 A and B be amended to read as follows:

A. Order on Proceedings on Trial by the Court.

Trial by the court shall proceed in the order as prescribed in subsections (3) through (6) of section B of this rule unless the court for good cause stated in the record otherwise directs.

B. Order of Proceedings on Jury Trial.

The trial by a jury shall proceed in the following order unless the court, for good and sufficient reason stated in the record, otherwise directs:

B. (1) The jury shall be selected and sworn. Prior to voir dire, the parties may, with the court's consent, present a brief neutral statement of the facts to the entire jury panel.

B. (2) After the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions of witnesses and the elementary legal principles that will govern the proceedings.

B. (3) The plaintiff shall then concisely state plaintiff's case and the issues to be tried; the defendant then, in like manner, shall state defendant's case based upon any defense or counterclaim.

B. (4) The plaintiff shall then introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.

B. (5) The parties respectively then may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense or counterclaim.

B. (6) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the

plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.

B. (7) Not more than two counsel shall address the jury on behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours.

B. (8) After the evidence is concluded, the court shall charge the jury. This may be done before or after the closing arguments of the parties.

B. (9) Jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause, the court may prohibit or limit the submission of questions to witnesses.

PROPOSAL No. 2 - ORCP 58 C

It is proposed that ORCP 58 C be amended to read as follows:

The jurors may be kept together in the charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case, they may be admonished by the court that it is their duty not to converse with or permit themselves to be addressed by any person on any subject connected with the trial; except that the jurors shall be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. Notwithstanding the foregoing, the jurors' discussion of the evidence among themselves during recesses may be limited or prohibited by the court upon its motion, or upon motion by a party for good cause.

PROPOSAL No. 3 - ORCP 59

It is proposed that ORCP 59 be amended as follows:

> The court's preliminary and final instructions on the law may be in written form, in which case a copy of the instructions may be furnished to each juror before being read by the court. Upon retiring for deliberations, the jurors shall take with them all jurors' copies of any final written instructions given by the court.

JURY IMPROVEMENT PROPOSALS NOT CONSIDERED AT THIS TIME:

A number of additional proposals have been made regarding improvement of the jury trial process which we believe should not be included with the proposal set forth above. Those additional proposals can be summarized as follows:

1. **Alternate jurors (ORCP 57 F).** It has been proposed that ORCP 57 F be amended to read as follows:

> If all alternate jurors are impaneled, their identity shall not be determined until the end of the trial. At the time of impanelment, the trial judge shall inform the jurors that at the end of the case, the alternate jurors will be determined by lot in a drawing held in open court.

Amending this rule would require the amendment of the rule governing the exercise of peremptory challenges because the current system requires separate challenges for regular and alternate jurors. There are a number of different proposals for how this concern can be addressed. This proposal could be added to the proposals above if the Council can arrive at a consensus for a simple way to amend all applicable rules relating to this change.

Another concern raised is that alternate jurors would be a part of deliberations, if the jurors are allowed to discuss the case during the pendency of the trial. In other words, persons who would ultimately be excused as alternate jurors would be deliberating and have a potential impact on the outcome.

2. It has been suggested that language be added to the appropriate rule which would encourage jurors to ask questions about the final instructions given by the court. A proposal to make this change has not been worked out to date. This proposal could be added to those above if it could be worked out with the Council. It may be covered by the amendment to ORCP 58B (9).

3. It has also been proposed that we consider adopting a rule that would permit post verdict discussion between the parties or their attorneys and members of the jury. This kind of proposal raises numerous questions and could require a significant examination by another committee before a proposal could be submitted to the Council for consideration.

4. It has also been proposed that we consider adopting a rule which would encourage the courts to regularly use juror notebooks. Again, this is a proposal that requires additional scrutiny and feedback before a specific proposal can be developed for consideration.

5. John McMullen has proposed that we work on adopting a standard for writing procedural rules in plain English. I think this is a great suggestion. However, I believe that we should appoint a separate committee on the council to study this proposal as it raises numerous issues that would need to be considered separate from those proposals listed above.

Again, I welcome your comments and feedback, and apologize again for getting this information to you at this late date. We should come prepared to discuss these proposals at the meeting this Saturday. I will then take the proposals on to the Judicial Conference later this month for additional feedback.

From: "Lisa Amato Craig" <lamato_craig@hotmail.com>
To: ghenthor@law.uoregon.edu
Date: Fri, Apr 14, 2000, 9:17 AM
Subject: CCP - ORCP 44/55 subcommittee

Gilma, I sent you this yesterday, but there was a mail error and it came back. I hope that this timing does not inconvience you.

Gilma, feel free to shorten or modify my comments, but after reviewing my notes, this is essentially what I stated last Saturday at the CCP meeting concerning ORCP 44/55 changes.

The Health Insurance Portability & Accountability Act of 1996 contained a deadline for Congress to pass a comprehensive privacy law by 8/21/99. That deadline passed without any action by Congress. Because of Congress' inaction, the Secretary of Health & Human Services was required to promulgate regulations by Feb. 2000. The Secretary did not meet that deadline, and the current deadlines are now June 2000 for the implemenation of the regulations, which will be effective August 2000.

The ORCP 44/55 subcommittee has been reviewing the Secretary's proposed reguations for any inconsistancies with our changes to the ORCP. The proposed federal regulations govern how and under what circumstances a patient's medical records can be released by certain medical providers.

here are no inconsistencies contained in the proposed federal reguations with our proposed changes to the ORCP. In fact, the proposed federal regulations provide for the release of a patient's records by means we as practitioners already use: 1) signed authorization, whether the records are to be sent to the patient or to a third party, and 2) by the use of a subpoena in a judicial or administrative hearing - as provided in state and federal court and adminstrative rules.

The only area of any concern to the ORCP 44/55 subcommittee's drafting is in regard to the disclosure langague to be contained in any release/authorization signed by the plaintiff/patient. An appendix to the proposed federal regulations contains recommeneded language for the release/authoriation, however the Secretary is still seeking comments on the content of the release/authorization.

It is the subcommittee's plan to incorporate into the draft ORCP 44/55 language that will accommodate and work with and within the proposed federal regulations.

Gilma, I hope this is helpful. If you have any questions, please give me a call at (503) 331-0975.

Lisa Amato

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

'H SWANSON
. LATHEN
IAEL ALEXANDER
LD W. McCANN

:LES D. BURT
928-1996

ATTORNEYS AT LAW

388 STATE STREET
SUITE 1000
SALEM, OR 97301-3571

FAX (503) 588-7179
(503) 581-2421

OF COUNSEL
DAVID W. HITTLE

GREG NOBLE
371-3404

June 13, 2000

TO: Members of the Council on Court Procedures

FROM: J. Michael Alexander

After our last meeting, which I found very productive, I wanted to review the proposed changes that are before the Council, and at least outline where I hope we can go from here. I believe that a number of rule changes can be quickly accomplished, and that much of our work in the time remaining may necessarily be focused on ORCP 44/55. I'm going to go through the proposed changes in what I perceive as an ascending order of complexity and/or controversy.

ORCP 7D. We discussed the changes to this rule at our meeting, and it appears that the amendments proposed by the subcommittee were approved, subject to some tinkering with the language. I would anticipate that this rule change will be passed by the Council and sent to the Legislature.

ORCP 21A. We did not get a chance to discuss this change at our meeting, but Judge Linder submitted proposed changes which were included in the materials that were sent to you. The problem identified with ORCP 21 relates to the dismissal of an action when another action is pending, and the possible preclusive affect that such dismissal could have. The subcommittee recommended allowing dismissal under ORCP 54(B)(3), which provides for dismissal for want of prosecution unless good cause is shown. This would seem to give the party against whom dismissal is sought the opportunity to make his case for keeping the action alive. This change seems quite reasonable, and I would hope that we can approve it at the next meeting.

ORCP 22 C. This is another matter which we did not have the opportunity to discuss, but Judge Barron submitted a rather complete discussion of the issue, with proposed changes. He did have a question concerning whether or not the Legislature indeed intended to allowing defendants to bring into an action other parties who could be liable to the plaintiffs, but perhaps not to the defendant. I was involved in the legislative process which led to many of the amendments concerning joint and several liability. Regardless of whether or not I agree with those changes, I think that the Legislature definitely felt that the defendant could bring in other parties potentially liable to the plaintiffs in order to apportion fault. In reviewing Judge Barron's proposals, I think that the first version, 1a, best accomplishes the desired goal, while preserving the portion of the rule concerning the 90-day time limit. This seems to give a logical fix to the problem, and one which we can hopefully approve at the next meeting.

ORCP 58. This is the "jury reform" proposal that judge Harris presented to the Council last meeting. We voted to consider this at the September meeting. It seemed that the Council was in basic agreement concerning the changes that were proposed, with the exception of whether or not the rules should allow a trial judge to permit both oral and written questions from jurors, or whether questions should be only in writing. There was some concern that if the rule prohibited oral questions, then it would restrict the current practices employed by some trial courts, particularly Judge Jones in Multnomah County. I hope that we can resolve this issue.

ORCP 54. This is the "offer to allow judgment" proposal that Justice Durham reported on at our last

meeting, as well as the meeting in May. It seemed from the discussions that there was a basic substantive controversy concerning the advisability of passing this rule. It did not seem that the problem lay with the language employed, but with the potential affect. Justice Durham said that he was still working on the rule, and would probably have more to report at the next meeting. I would think that the proposed changes can be voted either up or down at one of our next meetings.

ORCP 44 and 46. These proposed rule changes deal with "independent medical examinations", or what Justice Durham referred to as "compelled medical examinations". It was obvious from the subcommittee's report that a great deal of effort had gone into devising a reasonable compromise between potentially extreme positions. It also seems apparent that this is a matter where a rule change will be very helpful to bench and bar. Since this proposed change is just being distributed to interested parties, more discussion is necessary. However, I believe that there is significant potential that any rule change can be passed this year, and submitted to the Legislature.

ORCP 44/55. This "medical records" rule continues to be a problem. I think that we all recognize that the goals of the Council are consistent with most of the interested parties. However, achieving these goals is quite a drafting challenge. Mr. Gaylord indicated that the subcommittee would again meet, and would probably be ready to report at the August meeting. I anticipate that much of the Council's time after the July meeting should and will be spent in dealing with this proposed rule change. We have been working on this for over 3 years, and it would be a shame if we couldn't agree on an acceptable product.

In summary, I would hope that at the July meeting we can largely dispose of all the proposed rule changes, other than those affecting ORCP 44, 46, and 55. If possible, and depending upon the amount of controversy generated, I would certainly hope that the "independent medical examinations" issue can be dealt with. If the meeting in July can resolve most of the less controversial issues, I would hope that the August and September meetings can be largely devoted to the medical records issue.

I look forward to meeting with you in July.

Sincerely,

SWANSON, LATHEN, ALEXANDER & MCCANN, PC

J. Michael Alexander

JMA./jb

COUNCIL ON COURT PROCEDURES

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

Telephone: (541) 346-3990
FAX: (541) 346-1564

June 13, 2000

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland

RE: Dates of Future Council Meetings
(next Council meeting: JULY 15)

Council Members:

This is to remind you that the Council's July meeting will be on **JULY 15**, not July 8. This departure from the customary meeting date, the second Saturday of the month, was decided upon by the Council some time ago, when it set the meeting schedule. The meeting dates for the remainder of the biennium are: **August 12**, **September 9**, and **December 9**, assuming the Council follows its practice of recent years of not meeting in October or November.

THE SEPTEMBER 9 MEETING IS CRUCIALLY IMPORTANT because that is the last meeting at which proposed amendments can be tentatively adopted, and when amendments already tentatively adopted can be tweaked, if necessary. The two-month "dead period," October and November, is used for all tentatively adopted amendments to be published for comment. The only things the Council can do at the December 9 meeting is to vote officially to promulgate tentatively adopted amendments precisely as published, or vote not to do so, plus re-elect the current officers to serve in the year 2001. A minimum of 15 affirmative votes is required to finally promulgate an amendment. PLEASE MAKE EVERY POSSIBLE EFFORT TO ATTEND BOTH THE SEPTEMBER 9 AND THE DECEMBER 9 MEETINGS. Of course, this is not to say that the **July** and **August** meetings will not be important, too, since quite a bit of important work remains to be done.

P.S. In order to check the reliability of our List Server, please e-mail me letting me know if you did NOT receive this memo by e-mail. Please also let us know if you have a new e-mail address MJH. My e-mail address is: mholland@law.uoregon.edu

From: Mauryholland@aol.com
To: Chair and Members of the Council <cocp@law.uoregon.edu>
Date: Mon, Sep 11, 2000, 12:18 PM
Subject: COCP: Four Thoughts in Season

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1. Although managing to maintain my accustomed poise, I was very upset with myself at the Sept. 9 meeting to think that the minutes I had prepared, with the help of Gilma's shorthand notes, for the Aug. 12 meeting had omitted the Council's votes tentatively to adopt and publish the amendments to ORCP 7 D and 21 A. After all, at the very least, minutes of any meeting should accurately record any actions taken. Naturally, I try to take care in preparing minutes, but these omissions made me wonder whether, at age 64, the time might have come for me to inquire about going into managed care.

Looking over Gilma's and my notes of the Aug. 12 meeting I think I know what happened. At that meeting the votes tentatively to adopt the 7 D and 21 A amendments were both subject to understanding that one or more issues of detail would remain open in case the respective subcommittees decided to make changes in light of comments made at that or earlier meetings. In the case of the 7 D amendments, Judge Rasmussen said at the Aug. 12 meeting that he wanted to consider Bill Gaylord's suggestion that the language about "a defendant who operated such motor vehicle, or cause it to be operated . . . ." be deleted. I spoke with Judge Rasmussen about this before the 9/9 meeting, and he told me he'd decided it is best to leave that language in. Regarding 21 A I don't recall at the moment what the very minor open issue was, but do vaguely recall that Judge Linder and/or Mr. Johnson said they'd think about one or more points raised at the Aug. 12 meeting, and propose any changes they thought useful at the 9/9 meeting. No such changes were proposed.

ORCP 7

The reason I prepared the 9/9 showing the 7 D and 21 A amendments under Item 3, "Drafts of the following rules," was to ensure that we did not forget that possible last-minute changes had been discussed and might be proposed. Anticipating how long the 9/9 meeting might last, my concern was that if the 7 D and 21 A amendments were placed under "old business," they might not be reached and therefore might slip through the cracks. As the person responsible for preparing tentatively adopted amendments for publication, the last position I ever want to be in after the September meeting is to be in the slightest doubt as to precisely what the Council had done.

Mick, quite reasonably, thought that tenative adoption of these amendments had already been accomplished at the 8/12 meeting, and therefore expected that they would be shown in the 9/9 agenda under "old business. His worry was that, with so much uncompleted work left to be reached at the 9/9 meeting, the agenda I'd prepared would suggest that the Council would first have to take up the 7 D and 21 A amendments de novo, as they say in the law. This difference of understanding between Mick and me merely provides an exception to the old axiom about great minds thinking alike. In any event, no harm, no foul, and the 9/9 minutes will correct the 8/12 minutes to show that the amendments to 7 D and 21 A were tenatively adopted at the latter meeting, as instructed by the Chair and full Council. And, at least for the time being, I'll hold off on seeking managed care.

On the merits, Mick's understanding was more correct than mine, since it is always the case that any tentatively adopted amendments remain subject to being "called back" for revisions at any meeting subsequent to their adoption except at the December promulgation meeting, when they can only be voted up or down.

2. I'm sorry I didn't bring this up earlier, but for some time I've wondered whether it might be legally permissible and otherwise appropriate if, instead of actually meeting at the Bar Center for the December meeting, the votes which must be taken at that meeting could be conducted by phone

confused position. The latter means that Oregon has perpetuated the bifurcation of law and equity which the ORCP ended at the trial court level.

Unfortunately, my "casebook" will never be published in hard copy. The UO is the only law school in the world which offers a course in the subject, and that doesn't produce anything close to enough of a market for publication to be commercially feasible. However, if, out of morbid curiosity, any of you would like to glance at this thing, you can download it (without printing it out, which you wouldn't find worthwhile, not because it is copyrighted, because it isn't) from the UO School of Law homepage, whose Web address is: www.law.uoregon.edu. When you reach that homepage, just click on the "Faculty" link, then the link to my name, then the link to "course materials." To reach these materials, you must have Acrobat 4.0 or some equivalent if there is one.

I stated above that the perspective of my materials is "academic," which is because most of what I know about law is necessarily academic, my last experience is practice being over 30 years ago and in Massachusetts, not Oregon. However, drawing largely on my Council experience, I've included textual notes and comments which attempt to give as much practical insight as possible. In an effort to get my textual notes accurate, I've pestered Skip, Gini, Dave Brever, and many others over the years, about things I either don't know or fully understand. I've sometimes thought that teaching law students Oregon, or any other kind of, civil procedure almost exclusely from appellate opinions, and by a teacher who does not practice, is almost as dubious as someone who has never flown one trying to teach people to fly 707's. The aerodynamic theory of flight might be just fine, but how to land safely in 0/0 visibility might be somewhat lacking. To meet this problem part way, I've always had judges or trial lawyers as guest lecturers in 3 out of my 28 classes, which helps, but still shortchanges practicality. I wish it were possible to have all 28 classes co-taught by a judge or trial lawyer and me or some other professor. In fact, our school is making at least one good move this year, and that is having a prominent Portland trial lawyer teach, as an adjunct, a new course entitled "Advanced Civil Procedure--Pre-trial," which will focus largely on discovery and settlement, the latter subject being one which law schools generally have sadly neglected. When a few students raise their hands in response to my question how many of them plan to become trial lawyers, I tell them that what they'll really become is discovery and settlement lawyers.

My course materials/casebook is definitely not a "page turner," and I don't expect any of you to sit down and read it from beginning to end. (On the other hand, don't wait for the movie, as I doubt there'll ever be one.) However, if any of you happen to glance at or through it, I'd very much appreciate your comments and reactions, especially if you spot something, especially of a practical nature, in any of my text notes which you find inaccurate or misleading. Thanks in advance for whatever cards or letters you send in.

Maury Holland

September 23, 2000

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland M.J.H.

Re: ORCP 44/55 Amendments; Enclosed 9-19-00 Letter from Thomas E. Cooney

I just received the enclosed letter from Tom Cooney enclosing pp. 60056-57 of the 11-3-99 Federal Register containing HIPAA proposed regulation §164.510, which I believe the 44/55 subcommittee has been fully aware of for some time. I suggest you place these materials in your 12-9-00 meeting file.*

Although Mr. Cooney's letter does not expressly so state, his assumption might be that the tentatively adopted amendments to Rules 44 and 55 could still be revised in light of the point he raises. As useful as that point is, I doubt whether it will cause the Council not to promulgate those amendments, especially in view of the fact, or at least what I assume to be the fact, that subpoenas of non-parties' records must be extremely unusual.

It seems to me that the point Mr. Cooney raises almost certainly can be adequately taken care of in the staff comment to the 44/55 amendments, assuming the Council's decision is to promulgate them. I'll therefore incorporate that point, including the suggestion that all parties be named when a subpoena is directed to non-parties' records, and also including a reference to §164.510, in my draft of the staff comment to those amendments.

Speaking of staff comments, for the information of members now in their first biennium of service on the Council, part of my job is to prepare in draft "staff comments" to all newly promulgated amendments. Although their title might imply that they are mine alone, my understanding has always been that staff comments should, insofar as possible, reflect the intent of the full Council, since that is the intent which might matter to a court. Staff comments usually focus on the problem(s) with which newly promulgated amendments are intended to deal. I try to avoid simply paraphrasing amendments themselves. Well drafted amendments do not need, and do not benefit from, paraphrasing.

Enclosed with the notice and agenda of the 12-9-00 meeting will be my drafts of staff comments to all tentatively adopted amendments. At December "promulgation meetings" my drafts are invariably much improved by suggested revisions and criticisms by members.

*There will be an actual meeting on this date, since my suggestion about possibly devising a means of avoiding it went nowhere. Several members expressed strong disagreement with it. Additionally, Mic Alexander told me he personally does not favor the idea of not meeting.

Acknowledged 9-22-00

Cooney & Crew, LLP

LIMITED LIABILITY PARTNERSHIP/ATTORNEYS AT LAW

Thomas E. Cooney

PLEASE RESPOND TO:
888 SW Fifth Avenue
Suite 720
Portland, OR 97204

Phone: (503) 224-7600
Fax: (503) 224-6740
e-mail:tecooney@pdxemail.com

September 19, 2000

Maury Holland
Council on Court Procedures
1221 University of Oregon School of Law
Eugene, Oregon 97403-1221

Re: New HIPAA Regulations

Dear Maury:

The new HIPAA Regulations dealing with confidentiality of Medical Records has a provision that says a medical record of a nonparty cannot be the subject of a subpoena, but can be obtained only by a court order (copy attached). You may wish to consider a change in the ORCPs dealing with this issue, so that lawyers don't mistakenly subpoena nonparty records. It will be difficult for the medical provider to determine whether a patient is a party to the litigation if lawyers use the *et al* designation to list multiple plaintiffs or defendants. I therefore think it's important that we provide in the rule that subpoenas cannot be used to obtain nonparty records, but only court orders.

Sincerely,

Thomas E. Cooney

TEC/alw
Enclosure
cc w/enc: Bob Dernedde
Paul Frisch
Scott Gallant
Mike Crew

(iii) The authorization is known by the covered entity to have been revoked;

(iv) The form lacks an element required by paragraph (c) or (d) of this section, as applicable;

(v) The information on the form is known by the covered entity to be false.

(3) *Compound authorizations.* Except where authorization is requested in connection with a clinical trial, an authorization for use or disclosure of protected health information for purposes other than treatment or payment may not be in the same document as an authorization for or consent to treatment or payment.

(c) *Implementation specifications for authorizations requested by an individual.*—(1) *Required elements.* Before a covered entity may use or disclose protected health information of an individual pursuant to a request from the individual, it must obtain a completed authorization for use or disclosure executed by the individual that contains at least the following elements:

(i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion;

(ii) The name of the covered entity, or class of entities or persons, authorized to make the requested use or disclosure;

(iii) The name or other specific identification of the person(s) or entity(ies), which may include the covered entity itself, to whom the covered entity may make the requested use or disclosure;

(iv) An expiration date;

(v) Signature and date;

(vi) If the authorization is executed by a legal representative or other person authorized to act for the individual, a description of his or her authority to act or relationship to the individual;

(vii) A statement in which the individual acknowledges that he or she has the right to revoke the authorization, except to the extent that information has already been released under the authorization; and

(viii) A statement in which the individual acknowledges that information used or disclosed to any entity other than a health plan or health care provider may no longer be protected by the federal privacy law.

(2) *Plain language requirement.* The model form at appendix A to this subpart may be used. If the model form at appendix A to this subpart is not used, the authorization form must be written in plain language.

(d) *Implementation specifications for authorizations for uses and disclosures requested by covered entities.*—(1) *Required elements.* Before a covered entity may use or disclose protected health information of an individual pursuant to a request that it has made, it must obtain a completed authorization for use or disclosure executed by the individual that meets the requirements of paragraph (c) of this section and contains the following additional elements:

(i) Except where the authorization is requested for a clinical trial, a statement that it will not condition treatment or payment on the individual's providing authorization for the requested use or disclosure;

(ii) A description of the purpose(s) of the requested use or disclosure;

(iii) A statement that the individual may:

(A) Inspect or copy the protected health information to be used or disclosed as provided in § 164.514; and

(B) Refuse to sign the authorization; and

(iv) Where use or disclosure of the requested information will result in financial gain to the entity, a statement that such gain will result.

(2) *Required procedures.* In requesting authorization from an individual under this paragraph, a covered entity must:

(i) Have procedures designed to enable it to request only the minimum amount of protected health information necessary to accomplish the purpose for which the request is made; and

(ii) Provide the individual with a copy of the executed authorization.

(e) *Revocation of authorizations.* An individual may revoke an authorization to use or disclose his or her protected health information at any time, except to the extent that the covered entity has taken action in reliance thereon.

§ 164.510 Uses and disclosures for which individual authorization is not required.

A covered entity may use or disclose protected health information, for purposes other than treatment, payment, or health care operations, without the authorization of the individual, in the situations covered by this section and subject to the applicable requirements provided for by this section.

(a) *General requirements.* In using or disclosing protected health information under this section:

(1) *Verification.* A covered entity must comply with any applicable verification requirements under § 164.518(c).

(2) *Health care clearinghouses.* A health care clearinghouse that uses or discloses protected health information it maintains as a business partner of a covered entity may not make uses or disclosures otherwise permitted under this section that are not permitted by the terms of its contract with the covered entity under § 164.506(e).

(b) *Disclosures and uses for public health activities.*—(1) *Permitted disclosures.* A covered entity may disclose protected health information for the public health activities and purposes described in this paragraph to:

(i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions;

(ii) A public health authority or other appropriate authority authorized by law to receive reports of child abuse or neglect;

(iii) A person or entity other than a governmental authority that can demonstrate or demonstrates that it is acting to comply with requirements or direction of a public health authority; or

(iv) A person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition and is authorized by law to be notified as necessary in the conduct of a public health intervention or investigation.

(2) *Permitted use.* Where the covered entity also is a public health authority, the covered entity is permitted to use protected health information in all cases in which it is permitted to disclose such information for public health activities under paragraph (b)(1) of this section.

(c) *Disclosures and uses for health oversight activities.*—(1) *Permitted disclosures.* A covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audit, investigation, inspection, civil, criminal, or administrative proceeding or action, or other activity necessary for appropriate oversight of:

(i) The health care system;

(ii) Government benefit programs for which health information is relevant to beneficiary eligibility; or

(iii) Government regulatory programs for which health information is necessary for determining compliance with program standards.

(2) *Permitted use.* Where a covered entity is itself a health oversight agency, the covered entity may use protected health information for health oversight activities described by paragraph (c)(1) of this section.

(d) *Disclosures and uses for judicial and administrative proceedings.*—(1) *Permitted disclosures.* A covered entity may disclose protected health

information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal; or

(ii) Where the individual is a party to the proceeding and his or her medical condition or history is at issue and the disclosure is pursuant to lawful process or otherwise authorized by law.

(2) *Permitted use.* Where the covered entity is itself a government agency, the covered entity may use protected health information in all cases in which it is permitted to disclose such information in the course of any judicial or administrative proceeding under paragraph (d)(1) of this section.

(3) *Additional restriction.* (i) Where the request for disclosure of protected health information is accompanied by a court order, the covered entity may disclose only that protected health information which the court order authorizes to be disclosed.

(ii) Where the request for disclosure of protected health information is not accompanied by a court order, the covered entity may not disclose the information requested unless a request authorized by law has been made by the agency requesting the information or by legal counsel representing a party to litigation, with a written statement certifying that the protected health information requested concerns a litigant to the proceeding and that the health condition of such litigant is at issue at such proceeding.

(e) *Disclosures to coroners and medical examiners.* A covered entity may disclose protected health information to a coroner or medical examiner, consistent with applicable law, for the purposes of identifying a deceased person or determining a cause of death.

(f) *Disclosures for law enforcement purposes.* A covered entity may disclose protected health information to a law enforcement official if:

(1) *Pursuant to process.* (i) The law enforcement official is conducting or supervising a law enforcement inquiry or proceeding authorized by law and the disclosure is:

(A) Pursuant to a warrant, subpoena, or order issued by a judicial officer that documents a finding by the judicial officer;

(B) Pursuant to a grand jury subpoena; or

(C) Pursuant to an administrative request, including an administrative subpoena or summons, a civil investigative demand, or similar process authorized under law, provided that:

(*1*) The information sought is relevant and material to a legitimate law enforcement inquiry;

(*2*) The request is as specific and narrowly drawn as is reasonably practicable; and

(*3*) De-identified information could not reasonably be used.

(ii) For the purposes of this paragraph, "law enforcement inquiry or proceeding" means:

(A) An investigation or official proceeding inquiring into a violation of, or failure to comply with, law; or

(B) A criminal, civil, or administrative proceeding arising from a violation of, or failure to comply with, law.

(2) *Limited information for identifying purposes.* The disclosure is for the purpose of identifying a suspect, fugitive, material witness, or missing person, *provided* that, the covered entity may disclose only the following information:

(i) Name;

(ii) Address;

(iii) Social security number;

(iv) Date of birth;

(v) Place of birth;

(vi) Type of injury or other distinguishing characteristic; and

(vii) Date and time of treatment.

(3) *Information about a victim of crime or abuse.* The disclosure is of the protected health information of an individual who is or is suspected to be a victim of a crime, abuse, or other harm, if the law enforcement official represents that:

(i) Such information is needed to determine whether a violation of law by a person other than the victim has occurred; and

(ii) Immediate law enforcement activity that depends upon obtaining such information may be necessary.

(4) *Intelligence and national security activities.* The disclosure is:

(i) For the conduct of lawful intelligence activities conducted pursuant to the National Security Act (50 U.S.C. 401, *et seq.*);

(ii) Made in connection with providing protective services to the President or other persons pursuant to 18 U.S.C. 3056; or

(iii) Made pursuant to 22 U.S.C. 2709(a)(3).

(5) *Health care fraud.* The covered entity believes in good faith that the information disclosed constitutes evidence of criminal conduct:

(i) That arises out of and is directly related to:

(A) The receipt of health care or payment for health care, including a fraudulent claim for health care;

(B) Qualification for or receipt of benefits, payments, or services based on a fraudulent statement or material misrepresentation of the health of the individual;

(ii) That occurred on the premises of the covered entity; or

(iii) Was witnessed by a member of the covered entity's workforce.

(5) *Urgent circumstances.* The disclosure is of the protected health information of an individual who is or is suspected to be a victim of a crime, abuse, or other harm, if the law enforcement official represents that:

(i) Such information is needed to determine whether a violation of law by a person other than the victim has occurred; and

(ii) Immediate law enforcement activity that depends upon obtaining such information may be necessary.

(g) *Disclosures and uses for governmental health data systems.*—(1) *Permitted disclosures.* A covered entity may disclose protected health information to a government agency, or private entity acting on behalf of a government agency, for inclusion in a governmental health data system that collects health data for analysis in support of policy, planning, regulatory, or management functions authorized by law.

(2) *Permitted uses.* Where a covered entity is itself a government agency that collects health data for analysis in support of policy, planning, regulatory, or management functions, the covered entity may use protected health information in all cases in which it is permitted to disclose such information for government health data systems under paragraph (g)(1) of this section.

(h) *Disclosures of directory information.* (1) *Individuals with capacity.* For individuals with the capacity to make their own health care decisions, a covered entity that is a health care provider may disclose protected health information for directory purposes, provided that, the individual has agreed to such disclosure.

(2) *Incapacitated individuals.* For individuals who are incapacitated, a covered entity that is a health care provider may, at its discretion and consistent with good medical practice and any prior expressions of preference of which the covered entity is aware, disclose protected health information for directory purposes.

(3) *Information to be disclosed.* The information that may be disclosed for directory purposes pursuant to paragraphs (h)(1) and (2) of this section, is limited to:

(i) Name of the individual;

(ii) Location of the individual in the health care provider's facility; and

(iii) Description of the individual's condition in general terms that do not

December 1, 2000

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland M.J.H.

Re: Rules 44/55 Amendments; Comments of OADC

Attached are copies of a 11-30-00 letter from Jonathan Hoffman on behalf of OADC commenting on the tentatively adopted amendments to Rules 44 and 55, and of his 5-18-00 letter, also on behalf of OADC, regarding the same subject.

OADC Oregon Association of Defense Counsel

Acknowledged 11/30/00

November 30, 2000

•Association Office
147 SE 102nd
Portland, Oregon 97216
503-253-0527
800-461 6687
FAX 503 253-0172
info@oadc.com
www.oadc.com

•OADC Board of Directors

Officers

JONATHAN M. HOFFMAN
President
900 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
503-224 3113
FAX 503-224-0471
jhoffman@martinbischoff.com

STEVEN K. BLACKHURST
President Elect
Suite 1800
222 S.W. Columbia
Portland, Oregon 97201
503-226-1191
FAX 503 226 0079
skb@stoelwynne.com

STEPHEN P. RICKLES
Secretary/Treasurer
Suite 1850
One S.W. Columbia
Portland, OR 97258
503 229-1850
FAX 503-229-1856
klesf@aol.com

...mbers at Large

PETER R. CHAMBERLAIN
Suite 300
65 S.W. Yamhill Street
Portland, OR 97204
503 243-1022
FAX 503-243-2019
chamberlain@lanse-law.com

MARK D. CLARKE
2592 E. Barnett Road
Medford, OR 97504
541-779-2333
FAX 541-779-6379

C. MARIE ECKERT
111 S.W. Fifth Avenue, T-2
Portland, OR 97204
503-275 6182
FAX 503 275-5000
c.eckert@usbank.com

JAMES C. EDMONDS
P.O. Box 2206
Salem, OR 97308
503-581-1542
FAX 503-585-3978
clm@cyberis.net

MARTHA J. HODGKINSON
20th Floor
1000 S.W. Broadway
Portland, OR 97204
503 222 4400
FAX 503 222-2301
mjh@hhw.com

ROBERT M. KEATING
Suite 800
One S.W. Columbia
...land, OR 97258
...222-9955
...X 503-796 0600
rkeating@keatingjones.com

JAMES C. TAIT
294 Warner Milne Road
Oregon City, OR 97045
503-657-8144
FAX 503-650 0367
taitj@compuserve.com

VIA FACSIMILE 541-346-1564

Prof. Maurice J. Holland, Executive Director
Council on Court Procedures
1221 University of Oregon
School of Law
Eugene, Or 97403-1221

Re: Proposed Amendments to Oregon Rules of Civil Procedure 44 and 55

Dear Professor Holland:

The Oregon Association of Defense Counsel Board of Directors has now had an opportunity to review the final version of proposed amendments to ORCP 44 and 55, which will come before the Council on December 9, 2000. As you know, the OADC Board objected to the proposed amendments for a number of reasons by letter to you dated May 18, 2000.

The OADC Board appreciates the willingness of the Council to consider the views of the OADC, whose members comprise a large part of the civil trial practitioners in the State of Oregon. The final version of the proposed amendments to ORCP 44 and 55 does address some of the OADC's concerns with these proposed amendments. For example, the new version reduces earlier version's multiple opportunities for objections to production of medical records. However, notwithstanding the improvements, OADC's membership continues to have strong objections to the proposed amendments and believes that these proposed amendments will complicate rather than streamline medical records discovery in civil litigation. We refer you to our letter of May 18, 2000, that sets out these objections in detail. A copy of that letter is attached for your reference. We believe that adoption of these proposed amendments would delay the production of medical records and create an adversarial framework that would require an incredible amount of court time to resolve disputes between plaintiffs bar and defendants over discoverability of certain records. The procedure created by these amendments is cumbersome and time-consuming. In the end, we believe a number of plaintiff's counsel, even if they comply with the various time deadlines in

the rules, will routinely withhold medical records on the basis they do not relate "to the injury for which recovery is sought." This, in time, will inexorably lead to continual court intervention concerning these issues.

We understand that a lot of work went into these proposed amendments. We do not make our objections lightly. The OADC Board believes a better approach can be designed to streamline the full and complete disclosure of medical records in a way that would significantly reduce the need for court intervention. In this regard, we have conducted some research and confirmed that most states have some form of waiver of the physician/patient privilege when a person files a lawsuit putting their bodily condition at issue. For example, New Mexico, Nevada, California, Washington, Alaska and Hawaii, all have some form of favor of the physician/patient privilege when the person puts their bodily condition at issue. The New Mexico rule is fairly typical. It provides as follows:

> *Section 11-504(D)(3): Condition an Element of Claim or Defense: There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.*

Nevada, Alaska and Hawaii follow similar approaches. The other states mentioned above have variations of this rule. We believe that a short amendment to Oregon Evidence Code Rule 505, similar to the New Mexico provision above, could significantly simplify the production of medical records in civil litigation. The OADC , at this time, is not proposing that there be any *ex parte* contact with treating physicians or depositions of treating physicians in civil litigation. The focus of the amendment would simply be to streamline the production of medical records. The OADC is presently considering proposing such an amendment to the upcoming legislature. We have not yet fully researched all the mechanics of how medical records are produced in these various states that recognize a physician/patient waiver upon the filing of a lawsuit. There is no question that discovery disputes can occasionally arise over relevancy and some other objections other than privilege to the production of medical records, as with other discovery issues motions for protective order and motions in limine are already available procedural

remedies to resolve these issues. We think that these procedures can readily be adopted, and perhaps improved, to adequately ensure that plaintiff's bar can raise appropriate relevancy objections or other appropriate evidentiary objections to the production of specific records or in advance of trial without creating a process as complicated as what is presently being proposed.

We propose the establishment of a committee formed of members from the OADC, Oregon Trial Lawyers Association, and representatives from the Oregon Medical Association, perhaps under the auspices of the Civil Law Advisory Committee, to try to reach some consensus for a mechanism for the full and fair production of medical records. If we could reach an agreement on all points, we could then come back to the Council on Court Procedures with an outline of what we can agree upon and try to put together a proposal agreeable to all parties.

OTLA and the OMA have raised additional concerns about the proposed amendments to ORCP 44 and 55, arising from some federal regulations presently being promulgated regarding access to patient medical records and production of medical records that may significantly affect the procedural production of medical records. These are referred to as the HIPAA Patient Privacy Rules. We understand these rules are authorized by what is referred to fully as the Health Insurance Portability and Accountability Act of 1996. As we understand it, these rules will govern in some fashion what medical providers must do with records in response to a patient release. Whatever is ultimately adopted, time will be needed to educate both medical practitioners and lawyers as to how to comply with the new procedure. It makes sense to do this once rather than twice. Therefore, we think it would be a good idea to defer adoption of proposed amendments to ORCP 44 and 55 until we can ensure that the procedure fits within any procedural requirements of the new regulations.

In summary, the OADC Board believes that the current proposed amendments to ORCP 44 and 55 risk imposing an unnecessary, cumbersome, time-consuming and litigious approach to the production of medical records in civil litigation. We believe they are a step in the wrong direction. A much more streamlined approach to the production of medical records can be established that would involve a waiver of the physician/patient privilege upon the filing of a lawsuit, coupled with automatic protection of such records from public disclosure as well as appropriate mechanisms so the plaintiff's bar can raise relevancy and

appropriate objections pretrial without delaying the production of records and taking up substantial court time. We are prepared to work with the Oregon Trial Lawyers Association and the Oregon Medical Association in trying to fashion a more workable approach.

Thank you for this opportunity to further comment on these proposed amendments. We urge the members of the Council on Court Procedures to table these proposed amendments for further study by the involved groups or to disapprove the proposed amendments as presently written.

Very truly yours,

Jonathan M. Hoffman
President

Enc.
cc: Mr. J. Michael Alexander (via facsimile 503-588-7179)
Mr. William A. Gaylord (via facsimile 503-228-3628)
Mr. Ralph C. Spooner (via facsimile 503-588-5899)

OADC Oregon Association of Defense Counsel

Jonathan M. Hoffman

•Association Office
147 SE 102nd
Portland, Oregon 97216
503-253-0527
800-461 6687
FAX 503-253 9172
info@oadc.com
www.oadc.com

•OADC Board of Directors

Officers

JONATHAN M. HOFFMAN
President
900 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
503-224-3113
FAX 503-221-9171
jhoffman@martinbischoff.com

STEVEN K. BLACKHURST
President Elect
Suite 1800
222 S.W Columbia
Portland, Oregon 97201
503-226-1191
FAX 503 226 0079
skb@tierwynne.com

STEPHEN P. RICKLES
Secretary/Treasurer
Suite 1850
One S.W. Columbia
Portland, OR 97258
503-220-1850
FAX 503-220-1856
rickles@aol.com

Members at Large

PETER R. CHAMBERLAIN
Suite 300
65 S.W. Yamhill Street
Portland, OR 97204
503-243-1022
FAX 503-243-2019
chamberlain@hmse law.com

MARK D. CLARKE
2592 E Barnett Road
Medford, OR 97504
541-779-2333
FAX 541-779-6378

C. MARIE ECKERT
111 S.W. Fifth Avenue, T-2
Portland, OR 97204
503-275-6182
FAX 503-275-5000
c.eckert@usbank.com

JAMES C. EDMONDS
P.O. Box 2206
Salem, OR 97308
503-581-1542
FAX 503 585-3878
clm@cyberis.net

MARTHA J. HODGKINSON
20th Floor
1000 S.W. Broadway
Portland, OR 97204
503-222-4499
FAX 503-222-2301
mjh@hhw.com

ROBERT M. KEATING
Suite 800
One S W. Columbia
Portland, OR 97258
03 222-9955
FAX 503-796-0699
rkeating@keatingjones.com

JAMES C. TAIT
284 Warner Milne Road
Oregon City, OR 97045
503-657 8144
FAX 503-650 0367
taitj@compuserve.com

May 18, 2000

VIA FACSIMILE 541-346-1564

Prof. Maurice J. Holland, Executive Director
Council on Court Procedures
1221 University of Oregon
School of Law
Eugene, Or 97403-1221

Re: Proposed Amendments to Oregon Rules of Civil Procedure 44 and 55

Dear Professor Holland:

The Oregon Association of Defense Counsel appreciates the opportunity to comment on the proposed amendments to ORCP 44 and 55, which we understand will be further considered at the Council meeting on Saturday, May 20, 2000.

The OADC board discussed these proposed amendments, at length, at our last meeting on May 10, 2000. After careful consideration, the OADC has decided to oppose the amendments to ORCP 44 and 55. The OADC respectfully believes that these proposed amendments would significantly complicate, delay and increase the cost for the parties, attorneys and court of obtaining necessary medical records for use in civil litigation. The OADC board raised the following concerns, among others, about the proposed amendments to ORCP 44 and 55.

First, obtaining medical records under these proposed amendments could take 90 days or more, particularly when following the new authorization/subpoena procedure. There are so many places where plaintiff's counsel can object to the subpoena or particular records that the parties and court could be tied up with motions to compel and other procedural complications for months, trying to obtain medical records. There is nothing in these proposed amendments that would require a plaintiff or plaintiff's counsel to provide a list of medical providers at the time a personal injury lawsuit is filed. As a practical matter, therefore, defense counsel often does not find out about all the medical providers until the time of the plaintiff's deposition. Because of Rule 21 motions and document discovery, that deposition can often be as much as six months after the filing of a lawsuit. If defense counsel then needed to proceed with the subpoena/authorization route, it could be very

difficult to obtain those records in preparation for trial. As you know, a number of Oregon counties, such as Multnomah, follow a very strict adherence to the 12-month trial rule. Coos County sets cases 6 to 8 months from filing and setovers are rarely granted. The roadblocks facilitated by these amendments seem very unfair when a plaintiff's attorney often has months or years to obtain records and prepare a case before filing a lawsuit.

Second, the OADC believes that these proposed amendments would be a step backward from existing rules. For example, under current practice, defense counsel can subpoena hospital records under ORCP 55(h) and medical records under ORCP 55(I). There was, no doubt, substantial discussion about these provisions when they were adopted. As we read the new proposed amendments, the authorization and subpoena and the records would go to plaintiff's counsel even as to hospital records, which has not been existing practice. Plaintiff's counsel now has 14 days to object to a hospital subpoena under ORCP 55(h). We do not see why additional roadblocks need to be created for the production of medical records.

Third, the OADC believes that these proposed amendments will result in significant time and cost for plaintiff's counsel, defense counsel and the courts. We envision a significant increase in pretrial discovery motions, arguing over the scope of subpoenas and what records will be produced and what records will not be produced. As will be discussed below, we do not believe any of this is necessary, and the production of medical records can be accomplished much more easily to all parties concerned as is done in many states. It is beneficial to all parties and to the system to facilitate early case evaluation and early settlement discussion. This proposal does just the opposite.

Fourth, these amendments shift all the decision making about what is relevant discovery from the courts to the plaintiff's attorney. It is not uncommon for parties to have legitimate disagreement about which medical records are relevant to a particular injury claim; it is difficult for the court to fairly resolve such a disagreement without both sides having have a full opportunity to know what the medical records say in the first place.

The OADC requests the Council on Court Procedures to table these proposed amendments so that all interested groups could try to come up with a much more efficient way to produce medical records. We urge the Council to consider a proposal to accomplish the following:

First, a plaintiff waives the physician/patient privilege when a lawsuit is filed which places plaintiff's physical or mental condition in issue.

Second, a plaintiff or their attorney shall respond to an agreed upon interrogatory form that requires the plaintiff to reveal names of medical providers they have seen over the last 10 years.

Third, plaintiff or the plaintiff's attorney, shall provide a release to obtain all of those records.

Fourth, an independent process service company could then obtain copies of all those records for both the plaintiff's counsel and the defense counsel.

Fifth, plaintiff is entitled to a protective order ensuring that information about plaintiff's medical condition would only be used in the context of the litigation, and if requested, the records would be returned to plaintiff, or plaintiff's counsel, at the conclusion of the case.

Sixth, plaintiff counsel would have sufficient time to make any objections as to the admissibility of any of the records prior to trial.

The OADC recognizes the Council on Court Procedures has limited authority to adopt amendments that would affect the patient/physician privilege and that, therefore, some of these proposed changes might have to be made by the legislature. However, the OADC believes that the type of procedure outlined above would make life much easier on plaintiff's counsel, defense counsel and the courts, while at the same time, ensuring the confidentiality of plaintiff's medical information. In practice, defense counsel are not going to try to refer to medical records at trial that have nothing to do with the injuries being claimed. For example, if a plaintiff is claiming neck injuries, defense counsel is not going to refer to unrelated prior problems that plaintiff has had with his knee. Any objections that a plaintiff's counsel may have to any records coming in at trial can be made in advance of trial, but do not need to delay the production of those records. The records at a minimum may lead to admissible evidence and, therefore, are discoverable. We suspect that there would be a number of plaintiff's attorneys that would not object to this type of proposal, which is used in a number of states. This would be much better for the court system. The details of such a proposal could be worked out with all interested groups.

The OADC recognizes that the Council is made up of counsel representing the number of different interests and trial judges. We further recognize that the Council attempts to work in a bipartisan way and that it can be difficult to get consensus on any type of amendments. We know that a substantial amount of work has gone into these proposed amendments. We do not make these objections lightly or as a knee-jerk partisan reaction, but sincerely believe that these proposed amendments will seriously interfere with the ability of defense counsel to represent their clients, some of whom are being sued for substantial sums of money, above available insurance policy limits. The proposed amendments are simply not acceptable to the OADC.

Thank you for this opportunity. We will have a representative at the meeting on May 20, 2000.

Very truly yours,

/s/ Jonathan M. Hoffman

Jonathan M. Hoffman
President

cc: Mr. William A. Gaylord (via facsimile 503-228-3628)
Mr. Ralph C. Spooner (via facsimile 503-588-5899)
Ms. Kathryn S. Chase (via facsimile 541-343-0701)
The Honorable Daniel L. Harris (via facsimile 541-776-7057)
JMH:cst

GAYLORD & EYERMAN, P.C.
Attorneys at Law
1400 S.W. Montgomery Street
Portland, Oregon 97201-6093

William A. Gaylord
Linda K. Eyerman
Todd A. Bradley
Deanna L. Wray

Telephone: (503) 222-3526
Facsimile: (503) 228-3628

December 4, 2000

VIA PRIORITY MAIL

Council on Court Procedures
c/o Professor Maury Holland
University of Oregon School of Law
Eugene, Oregon 97403-1221

RE: Proposed Changes to ORCP 44

Dear Council Members:

I am writing regarding the proposed changes to ORCP 44 (compelled medical exams). Because the date for voting on these changes is approaching, this information is being mailed to you directly, rather than through Professor Maury Holland. Also, I hope that receiving this information in advance of the meeting will give you an opportunity to review it, because it is somewhat voluminous.

The purpose of this letter is to strongly support adoption of Alternative #1 (examinee has right to record exam and to have attorney present). This alternative is the only one which guarantees that examinees will be protected from abuse, whether inadvertent or intentional. In my opinion, many Oregon lawyers (myself included) have been remiss over the years in not seeking for our clients the protections which Alternative #1 would provide. Fortunately the practice is changing, and I now see lawyers routinely consulting with opposing counsel about these issues and/or filing motions in the trial courts. Unfortunately, there is presently no uniformity in what is being allowed, and I expect that we will soon see appellate court challenges to trial court rulings which deny examinees the right to record or have counsel present at their compelled medical exams.

As an example of what might be expected regarding court challenges in this area, I am enclosing copies of two cases on this subject decided by the Alaska Supreme Court. In the earlier case, *Langfeldt-Haaland v. Saupe*, 768 P2d 1144 (1989), the trial judge had denied a personal injury plaintiff's request to record his compelled medical exam and to have his attorney present. The Alaska Supreme Court granted plaintiff's petition for review and reversed, citing the due process clause of the Alaska Constitution (art. I § 7) as authority for its holding that "[p]arties are, in general, entitled to the protection and advice of counsel when they enter the litigation arena," thus "counsel in a civil case should have the right to attend a physician or psychiatric exam of his client." In the second case, *State of Alaska v. Johnson*, 2 P3d 56 (2000), a personal injury action involving a prison inmate who fell on a stairway, the trial court excluded the testimony of the physician who conducted a compelled medical exam without the plaintiff's counsel being present, and the Alaska Supreme Court affirmed.

Also enclosed is a copy of 84 ALR4th 558 (1991) (including 2000 Pocket Part), which compiles the cases in which appellate courts have considered whether or under what circumstances a party to a civil action, subjected to a physical or mental exam at the instance of an opposing party and conducted by a medical expert of the opponent's choice, is entitled or permitted to have his or her own attorney or medical expert present during the exam. Although the jurisdictions are split, it appears that the majority of state courts which have addressed this issue have ruled in favor of the view that an examinee ordinarily may have an attorney present. Specific case citations from appellate courts in Alaska, California, Florida, Illinois, Michigan, New York, Pennsylvania and Washington may be found at pages 569 - 571 and in the Pocket Part at pages 25 - 26.

Finally, I am enclosing an important recent case, *U.S. Security Ins. Co. v. Cimino*, 754 So2d 697 (2000) (not included in the ALR annotation), in which the Supreme Court of Florida extended the right to counsel to compelled medical exams for personal injury protection (PIP) benefits. The court reasoned that "when resort to an independent medical exam is deemed necessary by either party, the parties' relationship is clearly adversarial," and the party being examined is entitled to the same protections that are afforded parties at other stages of the adversary process.

Thank you for your consideration of this matter.

Very truly yours,

GAYLORD & EYERMAN, P.C.

Linda K. Eyerman

Linda K. Eyerman
LKE:cb
Enclosures
cc: Via Priority Mail (w/enc)

J. Michael Alexander, Chair
Lisa Amato
Hon. Richard Barron
Benjamin Bloom
Bruce Brothers
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SUBJECT OF ANNOTATION

Beginning on page 558

Right of party to have attorney or physician present during physical or mental examination at instance of opposing party

Svend LANGFELDT-HAALAND, Petitioner
v
SAUPE ENTERPRISES, INC., Respondent

Supreme Court of Alaska
February 17, 1989
768 P2d 1144, 84 ALR4th 547

SUMMARY OF DECISION

A defendant in a personal injury action moved for an order requiring that the plaintiff in the action submit to a physical examination by a physician selected by the defendant, as authorized by an Alaska rule of civil procedure. The plaintiff did not object, but asserted rights to record the examination and to have his attorney present. An Alaska trial court ordered the plaintiff to submit to the examination without benefit of counsel or tape recording.

The Supreme Court of Alaska, Mathews, Ch. J., reversed. Stressing that a medical examination authorized in a personal injury action under the rule of civil procedure was part of the litigation process, and often a critical part, the court held that a plaintiff's counsel is entitled to attend and record, as a matter of course, court-ordered medical examinations in civil cases, while the trial courts retain authority to enter appropriate protective orders. The court held that there was a constitutional right to counsel in civil cases arising under the due process clause of the Alaska Constitution, and that while the right to counsel in civil cases was not coextensive with the right to counsel in criminal prosecutions, in the area of compelled examinations there was no reason to draw a distinction.

Moore, J., dissented and filed a separate opinion in which Compton, J., joined.

HEADNOTES

Classified to ALR Digests

Attorneys § 48; Discovery and Inspection § 19 — compelled medical examination in personal injury action — right to have attorney present

1. When the plaintiff in a personal injury action is compelled to have a medical examination by a doctor chosen by the opposing party, as authorized under a state rule of civil procedure, the plaintiff is entitled to have his counsel attend and record, as a matter of course, such a court-ordered medical examination, with the trial courts retaining power to enter appropriate protective orders.
[Annotated]

Constitutional Law § 626 — due process — right to counsel in civil cases — compelled medical examinations

2. There is a constitutional right to counsel in civil cases arising from the due process clause of the state constitution, and while the right to counsel in civil cases is not coextensive with the right to counsel in criminal prosecutions, there is no reason to draw a distinction between the two classes of cases in the area of compelled examinations by a physician chosen by the opposing party, as authorized under a state rule of civil procedure in personal injury actions.
[Annotated]

APPEARANCES OF COUNSEL

Joseph L. Paskvan, Hoppner & Paskvan, Fairbanks, for petitioner.

Susan M. West, Robertson, Monagle & Eastaugh, Anchorage, and **Howard Staley, Staley, DeLisio, Cook & Sherry,** Fairbanks, for respondent.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION OF THE COURT

MATTHEWS, Chief Justice.

This petition raises the question whether an attorney for a plaintiff in a personal injury case is entitled to attend or tape record a Civil Rule 35[1] medical examination.

1. Alaska R.Civ.P. 35.

Svend Langfeldt-Haaland sued Saupe Enterprises to recover for personal injuries sustained in an automobile accident. Pursuant to Civil Rule 35, Saupe moved for an order requiring that Svend submit to a physical examination by a physician selected by Saupe. Svend did not object, but asserted rights to record the exam and to have his attorney present. The court ordered Svend to submit to the examination without benefit of counsel or tape recording. We granted Svend's petition for review.

Civil Rule 35(a) provides in part:

> *Order for Examination.* When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician. . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

The person examined is entitled to receive a written report of the examination. Civil Rule 35(b).

We have never addressed the question whether a party in a civil action has the right to have his attorney present during an examination by a physician hired by his opponent. Other courts have done so, with widely divergent results.

In California, a party compelled to submit to a physical examination is entitled to have an attorney present.[2] Moreover, either party is entitled to request the presence of a court reporter.[3] The fact that a court reporter is present does not preclude the attendance of plaintiff's attorney.[4] However, the party has no right to his attorney's presence during a psychiatric examination.[5]

Florida, New York, and Washington permit an attorney to attend both physical and psychiatric examinations as a matter of course.[6] In Montana, an attorney has the right to be present while a physician takes his client's medical history, but not during the

2. *Sharff v. Superior Court,* 44 Cal.2d 508, 282 P.2d 896, 897 (1955).

3. *Gonzi v. Superior Court,* 51 Cal.2d 586, 335 P.2d 97, 99 (1959).

4. *Munoz v. Superior Court,* 26 Cal.App.3d 643, 102 Cal.Rptr. 686, 687 (1972).

5. *Edwards v. Superior Court,* 16 Cal.3d 905, 130 Cal.Rptr. 14, 549 P.2d 846, 848-50 (1976).

6. *Bartell v. McCarrick,* 498 So.2d 1378, 1379 (Fla.App.1986); *Reardon v. Port Auth.,* 132 Misc. 2d 212, 503 N.Y.S.2d 233, 234-35 (1986); *Tietjen v. Department of Labor & Indus.,* 13 Wash.App. 86, 534 P.2d 151, 153-54 (1975).

physical examination.[7] In Oregon and Wisconsin, the burden is on the injured plaintiff to show good cause justifying the attorney's presence.[8] The federal rule, followed by several states,[9] is that the plaintiff's attorney may not attend an examination.[10]

The courts which do not permit attorney attendance reason that ethical problems may arise because the attorney may be called as a witness for his client.[11] Moreover, they wish to divest the examination of any adversary character.[12] The examinee is protected because he has access to the doctor's written report, and may depose the doctor and object to inadmissible evidence during trial.[13] Some courts also note that physicians may refuse to perform an examination in the presence of an attorney, that the attorney is likely to interfere, and that the patient's reactions may be skewed, rendering the examination useless.[14]

Those courts which permit an attorney to be present generally reason that the physician should be prevented from making inquiries beyond the legitimate scope of the exam, thus transforming the exam into a sort of deposition.[15] Moreover, the attorney's presence may aid in the eventual cross-examination of the physician.[16] The attorney need never be called as a witness for his client if the examination is tape recorded.[17] These courts refuse to presume that the attorney will interfere with the examination and recognize

7. *Mohr v. District Court,* 202 Mont. 423, 660 P.2d 88, 88 (1983).

8. *Pemberton v. Bennett,* 234 Or. 285, 381 P.2d 705, 706-07 (1963); *Whanger v. American Family Mut. Ins. Co.,* 58 Wis.2d 461, 207 N.W.2d 74, 79 (1973).

9. *E.g., Pedro v. Glenn,* 8 Ariz.App. 332, 446 P.2d 31, 33-34 (1968).

10. *McDaniel v. Toledo, P. & W. R.R.,* 97 F.R.D. 525, 526 (C.D.Ill.1983); *Dziwanoski v. Ocean Carriers Corp.,* 26 F.R.D. 595, 597-98 (D.Md.1960).

11. *McDaniel,* 97 F.R.D. at 526; *see* Alaska Code of Professional Responsibility DR 5-102 (attorney shall withdraw if he ought to be called as a witness for his client).

12. *McDaniel,* 97 F.R.D. at 526; *Pemberton,* 381 P.2d at 706; *Whanger,* 207 N.W.2d at 79.

13. *Warrick v. Brode,* 46 F.R.D. 427, 428 (D.Del.1969); *Dziwanoski,* 26 F.R.D. at 598; *Pedro,* 446 P.2d at 33; *Edwards,* 549 P.2d at 850 (psychiatric exam); *Mohr,* 660 P.2d at 89.

14. *Pedro,* 446 P.2d at 33 (psychiatric exam); *Edwards,* 549 P.2d at 849 (same); *Pemberton,* 381 P.2d at 706.

15. *Sharff,* 282 P.2d at 897; *Reardon,* 503 N.Y.S. 2d at 234-35; *Steele v. True Temper Corp.,* 174 N.E.2d 298, 301-02 (Ohio Common Pleas), *appeal dismissed,* 193 N.E.2d 196 (Ohio App.1961); *Tietjen,* 534 P.2d at 154.

16. *Reardon,* 503 N.Y.S.2d at 235; *Jakubowski v. Lengen,* 86 A.D.2d 398, 450 N.Y.S.2d 612, 613 (1982).

17. *Gonzi,* 335 P.2d at 99.

that the courts have the authority to deal with any actual interference.[18]

[1] In our view, those cases which allow the examinee's attorney to be present are the more persuasive. The Rule 35 examination is part of the litigation process, often a critical part. Parties are, in general, entitled to the protection and advice of counsel when they enter the litigation arena. An attorney's protection and advice may be needed in the context of a Rule 35 examination, and we see no good reason why it should not be available.

In *Houston v. State,* 602 P.2d 784, 792-96 (Alaska 1979), we held that a criminal defendant has the right to have his attorney present at a psychiatric examination conducted under a court order requested by the prosecution. This right is part of the right to counsel in criminal cases expressed in article I, section 11 of the Alaska Constitution.[19] *Id.* at 795.

Although we did not delineate the precise function of counsel at the examination, we expressed our belief that defense counsel's role would generally be passive in nature. *Id.* at 796 n. 23. We relied in part on the decision in *Lee v. County Court,*[20] wherein the New York Court of Appeals explained the passive function of counsel at a psychiatric examination:

> [T]he function of counsel is limited to that of an observer. . . . [T]he defense attorney may take notes and save [his] comments or objections for the trial and cross-examination of the examining psychiatrist.

However, we also cited with approval two Oregon cases which anticipated more active participation by counsel, namely, advising the client not to answer potentially incriminating questions posed by the psychiatrist.[21]

18. *Reardon,* 503 N.Y.S.2d at 235; *Jakubowski,* 450 N.Y.S.2d at 614; *Steele,* 174 N.E.2d at 302; *Tietjen,* 534 P.2d at 154.

19. Alaska Const. art. I, § 11 provides:

> In all criminal prosecutions, the accused . . . is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.*
> (Emphasis added).

20. 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452, 459, *cert. denied,* 404 U.S. 823, 92 S.Ct. 46, 30 L.Ed.2d 50 (1971), *quoted in Houston,* 602 P.2d at 794.

21. 602 P.2d at 793-94 & n. 19 (citing *State v. Corbin,* 15 Or.App. 536, 516 P.2d 1314 (1973) and *Shepard v. Bowe,* 250 Or. 288, 442 P.2d 238 (1968)); *see also Jakubowski,* 450 N.Y.S.2d at 613-14.

[2] *Houston* supports, by analogy, our conclusion that plaintiff's counsel in a civil case should have the right to attend a physical, or psychiatric, examination of his client in several respects. First, there is a constitutional right to counsel in civil cases arising from the due process clause.[22] We recognize that the right to counsel in civil cases is not co-extensive with the right to counsel in criminal prosecutions,[23] but in the area of compelled examinations we see no reason to draw a distinction. Second, counsel may observe shortcomings and improprieties in an examination which can be brought out during cross-examination at either a civil or criminal trial. Third, although observation may be the primary role of counsel in both criminal and civil cases, counsel may on occasion properly object to questions concerning privileged information. There are privileges which may be invaded in civil as well as in criminal cases. Thus the reasons for allowing counsel to be present in a criminal case which we accepted in *Houston* also generally apply in civil cases.

We align Alaska with those authorities which allow plaintiff's counsel to attend and record, as a matter of course, court-ordered medical examinations in civil cases.[24] The trial courts retain authority to enter appropriate protective orders under Civil Rule 26(c). The question whether defense counsel should also be allowed to attend the examination was not taken on review, and we express no opinion on this issue.

The order of the superior court requiring petitioner to submit to an unrecorded medical examination without the presence of counsel is REVERSED.

SEPARATE OPINION

MOORE, Justice, with whom COMPTON, Justice, joins, dissenting.

22. Alaska Const. art. I, § 7 provides: No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

23. Article I, section 11 applies only to "criminal prosecutions." *McCracken v. State*, 518 P.2d 85, 90 (Alaska 1974). Thus, an indigent person has no right to appointed counsel in most civil cases, although certain exceptions exist in the areas of termination of parental rights, *V.F. v. State*, 666 P.2d 42, 44-45 (Alaska 1983); child custody, *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979); paternity suits, *Reynolds v. Kimmons*, 569 P.2d 799, 803 (Alaska 1977); and civil contempt proceedings, *Otton v. Zaborac*, 525 P.2d 537, 538 (Alaska 1974).

24. If the client does not wish his or her attorney to attend all or part of an examination, these wishes must of course govern.

The court adopts a blanket rule that plaintiffs have a presumptive right to have their counsel attend medical examinations ordered pursuant to Alaska Rule of Civil Procedure 35. This ruling presents grave policy concerns as well as practical problems for litigants, their counsel and the medical profession. Furthermore, this ruling departs from both the terms of Rule 35 and Alaska case law.

This ruling is premised on the assumption that most physicians hired to conduct independent medical examinations are nothing more than "hired guns." The assumption that most physicians will exceed the legitimate scope of such exams unless checked by the presence of opposing counsel denigrates the professionalism and objectivity of the medical profession. While cases of abuse certainly may exist, I submit that these situations are more appropriately dealt with on a case-by-case basis by the use of protective or preclusion orders authorized under our rules of civil procedure.

A presumptive rule allowing counsel into medical exams interjects an adversarial, partisan atmosphere into what should otherwise be a wholly objective inquiry. Many reputable physicians will be loath to perform such medical examinations if they become dominated by opposing counsel.[1] This rule is yet another intrusion into an area which should be properly the province of the physician. Much conflict has arisen lately between the legal and medical professions. As one commentator has noted, the time has come for each profession to cooperate and respect the role of their counterpart. LeBang, *Professionalism and Interprofessional Cooperation Between Physicians and Attorneys*, 12 S.Ill. U.L.J. 507 (1988).

I firmly believe that this court should follow the general approach developed over the last thirty years by the federal courts in interpreting Federal Rule of Civil Procedure 35. Alaska Rule of Civil Procedure 35 and the Federal Rule are identically worded. This court has repeatedly found federal authorities to be persuasive when interpreting a similarly worded Alaska rule. *Drickersen v. Drickersen*, 546 P.2d 162, 167 n. 9 (Alaska 1976) (Alaska Rules 13(g) and 14(a)); *Fenner v. Bassett*, 412 P.2d 318, 321 (Alaska 1966) (Alaska Rule 12(d)). Federal courts have consistently held that a plaintiff is not entitled to have his or her attorney present at

1. Indeed in this case, the physician hired by Saupe Enterprises to examine Sevand refused to perform the first medical exam because "he thought that the tape recording of the exam was a 'foot in the door' tactic of counsel to intrude into and dominate medical examinations, and that doctors should not consent to perform examinations under such conditions."

a Rule 35 examination.[2] As the federal court reasoned in *Dziwanoski v. Ocean Carriers Corporation,* 26 F.R.D. 595, 596-97 (1960):

> [I]t is desirable that once an examination be ordered, the procedure should be divested, as far as possible, of any adversary character. The physician is an 'officer of the Court' performing a non-adversarial duty. The best possible attitude for both the party and the examiner is one of cooperation in a joint search for facts. The very presence of a lawyer for one side will inject a partisan role into what should be a wholly objective inquiry. The attorney has ample opportunity to challenge the use made of the information obtained by the examination when the findings are presented as evidence in Court.

Other courts have recognized that the presence of counsel at medical exams will skew the reactions of the patients, perhaps rendering the examination useless.[3] Counsel are likely to interfere with the exam, objecting to normal medical procedures and to questions posed by the examining physician.

The court ignores the practical problems posed by its ruling. Will counsel be able to interrupt exams to seek rulings by trial court judges on the propriety of doctors' questions or procedures? What about the exacerbated scheduling problems posed by counsel, clients and doctors? Finally, what about the right of opposing counsel to also attend these examinations or those of non-treating expert doctors hired by plaintiff for trial? The court dodges the critical question of defense counsel's role by stating that the issue was not raised in the trial court. By failing to consider the right of opposing counsel to also attend medical exams under Rule 35, the court provides a special tool to one side without considering its full impact on the carefully crafted balancing of interests set forth in the rule.

The court contends that the defendant is "represented" at the exam by her selected physician. However, most physicians are not legally trained and will not be in a position to respond to the legal objections raised by any counsel, nor should they be. If defendants are to be fairly treated, they should have the corresponding right to have their counsel attend these examinations. Or why should

2. *McDaniel v. Toledo, P. & W. R.R.,* 97 F.R.D. 525, 526 (C.D.Ill.1983); *Brandenberg v. El Al Israel Airlines,* 79 F.R.D. 543, 546 (S.D.N.Y. 1978); *Warrick v. Brode,* 46 F.R.D. 427, 428 (D.Del.1969); *Dziwanoski v. Ocean Carriers Corp.,* 26 F.R.D. 595, 597-98 (D.Md.1960).

3. *See Pedro v. Glenn,* 8 Ariz.App. 332, 446 P.2d 31, 33 (1968) (psychiatric exam); *Edwards v. Superior Court,* 16 Cal.3d 905, 130 Cal.Rptr. 14, 549 P.2d 846, 849 (Cal.1976) (same); *Pemberton v. Bennett,* 234 Or. 285, 381 P.2d 705, 706 (1963).

not defendants be given the reciprocal advantage of attending examinations by doctors hired by the plaintiff for purposes of preparing for trial? When viewed in its full implications, it becomes clear that this ruling threatens to turn medical exams into mini-depositions dominated by legal theatrics rather than medical fact finding. Counsel, who for the most part lack any special training in medical matters, will have unbridled discretion over the way a doctor examines the plaintiff. This, of course, assumes that doctors will even agree to do these exams under such onerous conditions.

The court's decision flies in the face of the language of Alaska Rule 35 itself and the protective scheme it provides. Rule 35 was adopted to provide defendants with equally unimpaired opportunity to evaluate the physical condition of the plaintiff. Plaintiff's counsel has already been afforded this unimpaired opportunity to evaluate his or her client's condition through examinations by the treating physician and any special experts hired in the course of litigation. The rationale of the rule is that fundamental fairness dictates that the defendant be given a similarly unimpaired opportunity to examine the plaintiff.[4]

The rule protects the interests of the plaintiff by requiring the production of the examining doctor's report. Moreover, under the federal rule, plaintiffs may elect to have their own physician present during the examination.[5] Rule 35(b) therefore provides a method for plaintiff's counsel to discover the extent, scope and results of the exam without intruding into the examination room and threatening the effectiveness of the exam.[6] Plaintiff's attorney may depose the doctor and object to inadmissible evidence during trial.[7] By interjecting counsel into every exam, the court disrupts the rule's careful balancing of each party's interests. As the *Dziwanoski* court explained:

4. *See Dziwanoski,* 26 F.R.D. at 597 (quoting *Bowing v. Delaware Rayon Co.,* 38 Del. 206, 190 A. 567, 569 (1937)).

5. *Brandenberg,* 79 F.R.D. at 546; *Warrick,* 46 F.R.D. at 428; *Dziwanoski,* 26 F.R.D. at 598.

6. The court states that even if improper evidence obtained at a medical examination is excluded at trial, the defendant will also benefit from having the improper information. These rare circumstances of abuse must be balanced against the threats posed by attorney interference on the rights of all defendants to an unhindered evaluation of plaintiff's condition. The latter situation is likely to occur far more frequently and thus outweighs the threat posed by use of excluded information by defendants.

7. *See Warrick,* 46 F.R.D. at 428; *Dziwanoski,* 26 F.R.D. at 598; Pedro, 446 P.2d at 33; *Edwards,* 549 P.2d at 850 (psychiatric exam); *Mohr v. District Court,* 202 Mont. 423, 660 P.2d 88, 89 (1983).

> In the absence of a . . . rule similar to Rule 35 it has been generally held that the attorney for the examined party may be present at such an examination. See cases collected in 64 A.L.R.2d 497, 501 (sec. 5). *On the other hand, it has been held that where the examination is authorized by a . . . rule which provides some protection devices but does not provide for the presence of counsel, the result should be otherwise.*

26 F.R.D. at 597 (emphasis added).[8]

The court's reasons for departing from this precedent are not persuasive. The majority relies on *Houston v. State,* 602 P.2d 784 (Alaska 1979), a criminal right to counsel case, to justify its decision to impose a general right to counsel for plaintiffs in all Rule 35 medical examinations. While the court claims to recognize the difference between the constitutional right to counsel in criminal cases[9] versus that of civil cases[10] under the Alaska Constitution, it fails to take this difference into account when considering the costs and benefits of their new rule. Far more protection is granted to defendants in a criminal action and consequently, the state is expected to undergo greater burdens in proving its case. The same is not true in civil cases. In fact, in personal injury civil cases, the need for, or even a request for, a psychiatric exam is rare. On the other hand, in criminal cases, such a need or request is the norm and is usually expected from defense counsel.

The *Houston* decision to allow counsel to attend psychiatric exams was based on a criminal defendant's constitutional right to confront and cross-examine witnesses. 602 P.2d at 795. The court concluded that the added benefit to the criminal defendant's counsel in cross-examining the psychiatrist justified allowing defendant's counsel to attend the psychiatric interview. *Id.* at 795-6.

This reasoning is simply not applicable to civil exams under Rule 35. Without the right of confrontation to justify the risks of disruption of the psychiatric interview, the benefits of more informed cross-examination and the rare instances where a counsel's presence may prevent an improper question do not outweigh the burdens imposed by counsel's attendance at an exam. In sum, the *Houston* experience, on which this court relies, does not justify such a broad rule in civil cases.

8. If this court wishes to amend Rule 35, it would be far wiser to allow the Civil Rules Committee to solicit the advice of practitioners, physicians and other parties so as to allow for a more thorough examination of any reasons for reform.

9. Alaska Constitution article I, § 11.

10. The due process protections of the Alaska Constitution are provided in article I, § 7.

Finally, Svend contends that his right to counsel at a Rule 35 exam derives in part from his right to privacy. It seems likely that the ruling Svend seeks will ultimately intrude on a litigant's privacy more than the infrequent cases of improper medical exams the majority's new rule seeks to prevent. In most cases, the presence of counsel, tape recorders or video cameras in the doctor's examination room will likely compound rather than minimize the intrusion on the privacy of the examinee. With the adoption of this rule, counsel will feel compelled to attend all examinations. Moreover, plaintiffs will be subjected to greater potential embarrassment by having third parties in the examination room because plaintiffs will feel that the successful litigation of their claims somehow requires it.

I cannot subscribe to a broad rule that assumes physicians will act unprofessionally when conducting medical examinations under Rule 35. The infrequent cases of abuse are better handled through the use of special protective orders granted by the trial court on a case-by-case basis.

There are no allegations of improprieties, past or present, by the doctor involved in this case. Accordingly, I would affirm the trial court's order granting the exam with no requirement that it be tape recorded or that Svend's counsel be present.

State v. Johnson, No. S-8669 (Alaska 05/05/2000)

[1] THE SUPREME COURT OF THE STATE OF ALASKA

[2] Supreme Court Nos. S-8669/8670

[3] 2000.AK.0042101 <http://www.versuslaw.com>

[4] May 5, 2000

[5] **STATE OF ALASKA, DEPARTMENT OF CORRECTIONS, APPELLANT/CROSS-APPELLEE, V. GARRY JOHNSON, APPELLEE/CROSS-APPELLANT.**

[6] Superior Court No. 3AN-96-173 CI

[7] Appearances: Thomas J. Slagle, Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for Appellant and Cross-Appellee. Thomas V. Van Flein and Craig F. Stowers, Clapp, Peterson & Stowers, Anchorage, for Appellee and Cross-Appellant.

[8] Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner, and Carpeneti, Justices.

[9] The opinion of the court was delivered by: Fabe, Justice.

[10] OPINION

[11] [No. 5269 - May 5, 2000]

[12] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Rene J. Gonzalez, Judge.

[13] I. INTRODUCTION

[14] The State appeals a jury verdict in favor of Garry Johnson, a former inmate at the Ketchikan Correctional Center, for damages he suffered when a swinging door knocked him down a stairway. Because the superior court incorrectly instructed the jury on the duty of care that the State must exercise when building a jail, we reverse. Although we remand on the issue of whether the State breached its duty to Johnson, we find no error tainting

either the jury's finding that Johnson's fall caused his injuries or its calculation of damages. We therefore remand for a new trial limited to the issue of whether the State breached its duty to exercise reasonable care in the construction of the Ketchikan jail.

[15] II. FACTS AND PROCEEDINGS

[16] One evening in February 1994 Garry Johnson was returning to his cell at the Ketchikan Correctional Center. As he climbed to the landing at the top of the stairs, he turned to speak to a fellow inmate. At this precise moment, his cell mate, Thomas Coen, opened the cell door, striking Johnson and knocking him off the landing and down the stairs. Johnson fell to the base of the stairs, where he lay unconscious.

[17] Johnson has suffered severe medical hardship since the accident. Dr. Susan Hunter-Joerns testified that the fall damaged the sacral root nerves that control urinary, bowel, and erectile function. The accident has impaired these functions severely and permanently. Johnson must use a catheter and wear adult incontinence protection devices for the rest of his life.

[18] Johnson sued the State for his injuries. The State filed a third-party complaint against Thomas Coen in an attempt to assign a portion of the fault to him for opening the door.

[19] Less than a month before trial, and after discovery had closed, the State sought an independent medical evaluation (IME) of Johnson. Despite the close of discovery, Johnson's counsel cooperatively agreed to allow the IME but did not waive Johnson's right to have counsel present at the examination. Although the State scheduled the IME for a date several weeks later, it did not reveal this information to Johnson's counsel, purportedly because of security concerns about transporting a prisoner. The State made no effort to notify Johnson's counsel of the scheduling for the IME until one-half hour before the exam took place. Even then, counsel for the State just left a voice-mail message for Johnson's attorney. That message, however, concerned only general matters and failed even to mention the impending IME. The IME entailed many invasive and painful procedures; yet Johnson's counsel did not learn of it until afterward. After a hearing on the issue, the superior court excluded the testimony of the examining physician, Dr. John Keene.

[20] At trial Johnson contended that the stair landing from which he fell was too short. At the time the State received the building permit for the jail in 1980, Alaska had adopted the 1970 version of the Uniform Building Code (UBC). The 1970 UBC required forty-eight-inch-deep stair landings, and the jail complied with that requirement. But state law requires the state's public buildings to comply with local building codes as well. *fn1 Before the State received its building permit, Ketchikan had adopted the 1979 UBC, which required sixty-inch stair landings -- a full foot longer than the landing in front of Johnson's cell. Prior to Johnson's accident, however, both the State and Ketchikan adopted the 1991 UBC, which required only forty-four-inch landings. All of the trial experts agreed that the landing complied with the 1991 UBC in effect at the time of the accident.

[21] Johnson filed a pretrial motion, seeking a ruling that the State's construction of the landing was negligent per se. The State filed a cross-motion, arguing that the building code effective at the time of injury defined the standard of care. The superior court ruled that

the State violated the Ketchikan building code that was in effect when the building permit was issued, but refused to give the requested negligence per se instruction. Instead, the court ruled that "the finder of fact may consider the State's violation of [the] 1979 UBC . . . as evidence of negligence." Despite the pretrial ruling, the actual instruction given to the jury stated: "You are instructed to consider the State's violation . . . as evidence of negligence."

[22] The trial began on October 13, 1997 and lasted almost two weeks. At trial the parties disputed the standard of care owed by a jailer to a prisoner. The State asserted that the standard required the jailer only to exercise "reasonable care for the safety of his prisoners." But the court instructed the jurors that the jailer owed Johnson the duty of "utmost care."

[23] The State also objected repeatedly to Johnson's closing argument. In the argument, Johnson's counsel told a fictional story in the first person about an accident that his own wife had allegedly suffered. The described facts of this incident were almost identical to those of Johnson's accident. Upon each of the State's three objections, the court instructed the jury that plaintiff's counsel was using an analogy. Johnson's counsel admitted as much but only at the story's conclusion. The State argues that this argument had no support in the evidence and that allowing it constituted reversible error.

[24] The State also argues that the court erred when it removed the question whether Johnson suffered from "severe physical impairment" from jury consideration and ruled that the statutory $500,000 cap on non-economic damages did not apply to Johnson.

[25] The jury found the State one hundred percent negligent, assigning no comparative negligence to Johnson or his cell mate Coen. The jury awarded $2,050,000 in damages, including $1,250,000 in past and future non-economic damages. After the court added attorney's fees and interest, it entered a final judgment of $2,356,292.55. The superior court rejected the State's motion for a new trial, and the State appeals.

[26] In his cross-appeal Johnson disputes the superior court's failure to take judicial notice of the Occupational Safety and Health Administration (OSHA) regulations that he claims show that the jail violated federal safety standards.

[27] III. STANDARD OF REVIEW

[28] Assessing the validity of jury instructions involves questions of law, which are subject to our independent review. *fn2 An error in jury instructions will be grounds for reversal only if it caused prejudice. *fn3

[29] We review the superior court's exclusion of expert witnesses for an abuse of discretion. *fn4 A trial court abuses its discretion if exclusion of an expert "determin[es] a central issue in the litigation," unless the party seeking to admit the expert acted willfully to gain an advantage in the litigation. *fn5

[30] IV. DISCUSSION

[31] A. The Superior Court Committed Prejudicial Error When It Instructed the Jury that the State Owed Johnson a Duty to Exercise the Utmost Caution.

[32] The standard in Wilson v. City of Kotzebue *fn6 requires the State to exercise "reasonable care for the protection of [the prisoner's] life and health." *fn7 Because prisoners often cannot avail themselves of opportunities for self-protection, the reasonable care standard periodically requires the jailer to exercise more then ordinary care. *fn8 The "amount of risk or responsibility" involved in holding a prisoner may dictate that a jailer must exercise the "utmost caution" to "assist a prisoner who is in danger." *fn9 Acknowledging this duty as utmost caution is really just a way of restating the requirement that the jailer must exercise reasonable care under the circumstances. *fn10

[33] Reasonable care in these circumstances did not require the State to exercise the "utmost caution" because Johnson was not in any unique danger and was able to protect himself.

[34] The superior court instructed the jury:

[35] One who is required by law to take or who voluntarily takes the custody of another, under circumstances which deprive the other of his normal opportunities for protection, has a duty to exercise the utmost caution to protect that person against unreasonable risk of harm. Such a duty encompasses the jailer's duty to guard against risk of injury to his prisoners. (Emphasis added.)

[36] In this case, however, Johnson had an opportunity to protect himself. Johnson was neither incapacitated nor did the terms of his custody impair his ability to exercise caution on the stairway. He had the same opportunity as any other stairway user, such as a guard or other prison employee, to avoid being knocked off the landing by the swinging door. Being in custody did not place Johnson "in danger" that would have triggered the State's duty to exercise more then ordinary care. *fn11

[37] This case does not present any of the concerns that led us in Wilson to characterize the standard of care as one of "utmost caution." *fn12 In Wilson *fn13 and Kanayurak v. North Slope Borough, *fn14 we pointed to circumstances that would justify the "utmost caution" instruction. In these cases we held that the jailer must exercise a higher degree of care when the jailer knows or reasonably should have foreseen that the prisoner was incapacitated, suicidal, or otherwise "in danger." *fn15 Because Johnson could have exercised the same amount of care as any other stairway user, the superior court should not have instructed the jury that the State owed him the utmost care. *fn16

[38] Moreover, the State should employ the same safety standards for stairways in all state buildings. The need for safety in a state building's design is not peculiar to a prison. And the fact that the State compels Johnson to reside in the prison does not in itself warrant a heightened duty. If the State owed the utmost care to those it compelled to be in a particular building, then the heightened duty would extend to individuals subpoenaed to appear at a courthouse *fn17 or students required to attend school. *fn18 We do not hold

the State to the duty of utmost care in either of these circumstances.

[39] Because Johnson was not "in danger" as contemplated by the court in Wilson, the situation did not permit an instruction more stringent than reasonable and prudent care under the circumstances. The instruction made a verdict for the plaintiff more likely; therefore we reverse and remand for a new trial.

[40] We now proceed to address the other issues on appeal in order to provide guidance to the trial court on remand. In doing so we conclude that the trial court committed no error that would affect the jury's finding that Johnson's fall caused his injuries or its calculation of damages. When no error taints a portion of the jury's verdict and we believe the interests of justice and judicial economy dictate, a remand for a new trial may be limited to the issues affected by the error. *fn19 Accordingly, on remand the trial should be limited to the issue of whether the State was negligent in designing and building the stairway to Johnson's cell.

[41] B. The Superior Court Acted Within Its Discretion When It Excluded Dr. Keene's Testimony.

[42] The examination that Dr. Keene conducted without Johnson's counsel present violated Johnson's right to have an attorney present during a Rule 35 exam. *fn20 We have recognized that right explicitly. *fn21 A Rule 35 exam is "often a critical part" of the litigation process, *fn22 making this right more than a procedural protection. *fn23 Having counsel present is a right that may protect the examinee from invasive, painful procedures and questions that exceed the proper scope of the exam. The presence of counsel may also facilitate future cross-examination of the examining physician. *fn24 Because Johnson had a right to counsel during a Rule 35 examination, we give great deference to the trial court's sanction protecting it.

[43] The exclusion of Dr. Keene's testimony and his exam report was an appropriate sanction under Rule 37(b)(3). *fn25 The State only sought an IME after discovery had closed and the trial date approached. Johnson's counsel nevertheless agreed to allow the examination but expressed his desire to be present. Despite this request, the State scheduled and conducted the exam, failing to provide any notice to Johnson's counsel that it would be taking place.

[44] The State's reliance on a Department of Corrections policy requiring the transportation of prisoners to be confidential does not justify the State's failure to notify counsel. This policy is only a broad guideline, providing that "[p]risoner transportation will be treated as confidential information." The State presented no evidence that informing Johnson's counsel would create a security risk. The State routinely informs attorneys of their clients' transportation while keeping this information from the public for security reasons. A simple request of counsel to keep the time and place confidential would have sufficed to allay the State's concerns.

[45] The State concedes that it did not attempt to contact Johnson's attorney until thirty minutes before the exam. Even then the voice mail that the State left with Johnson's counsel failed to mention the imminent exam. Johnson's counsel did not learn of the exam until after it had taken place. The State's conduct exhibited utter disregard for Johnson's right to have

an attorney present.

[46] The State's discovery violation is especially egregious considering the invasive, painful nature of the exam. Dr. Keene performed an "anal wink" test, in which he poked the tissue surrounding Johnson's anus with a sharp medical instrument. Dr. Keene also performed a cystometrogram, in which he inserted a tube into Johnson's penis and filled his bladder with fluid to the point of causing severe pain.

[47] Moreover, the court's ruling did not preclude the State from offering evidence on the issue of causation. The State cites Sykes v. Melba Creek Mining, Inc. *fn26 for the proposition that a showing of willfulness is necessary under Rule 37(b)(3) when exclusion of a witness effectively determines an issue. Our decision in Sykes is not controlling in this case, however, because the trial court's decision was not issue determinative. The State could have procured other evidence on the causation issue, including the testimony from one of the many doctors who has examined Johnson.

[48] Because Dr. Keene's exam violated Johnson's substantive rights and its exclusion did not determine an issue against the State, we conclude that the superior court acted within its discretion when it condemned the State's deliberate conduct, excluded Dr. Keene's testimony, and refused to allow another invasive exam.

[49] C. On Remand the Superior Court Should Instruct the Jury to Consider Violation of the 1979 Building Code as Evidence of Negligence.

[50] The parties have disputed the importance of the State's violation of the 1979 UBC, which was effective at the time of construction but had been relaxed before Johnson's injury. The trial court correctly resolved this issue before trial when it concluded that "the finder of fact may consider the State's violation of 1979 UBC Sec. 3303(i) as evidence of negligence." But the State's proposed instructions state the law more accurately than that of the instruction that the superior court actually gave.

[51] 1. The superior court correctly refused to issue a negligence per se instruction.

[52] Johnson argues that the superior court should have issued a negligence per se instruction. In determining whether a negligence per se instruction is appropriate, the trial court must conduct a two-step inquiry. *fn27 First, it must analyze "whether the conduct at issue is under the ambit of the statute according to the criteria set out in Restatement (Second) of Torts § 286." *fn28 Second, upon a finding that an injury falls within the ambit of the statute, the trial court must decide whether to exercise its limited discretion to refuse the negligence per se instruction. *fn29

[53] This discretion is appropriately exercised, however, when the law is obsolete:

[54] Obviously, cases will be relatively infrequent in which legislation directed to the safety of persons . . . will be so obsolete, or so unreasonable, or for some other reason inapplicable to the case, that the court will take this position; but where the situation calls for it, the

court is free to do so.[*fn30]

[55] Even if the 1979 UBC, which required sixty-inch landings, applied to the State at the time of construction, both Ketchikan and the State had repealed it at the time of injury. Because the applicable law had changed such that the State's purportedly negligent design now complied with the statute, the superior court acted appropriately when it denied the negligence per se instruction. As the superior court observed: "It would be absurd for this court to declare, through a finding of negligence per se . . . that a 48 inch landing is not reasonable when in fact the standard for new construction at the time of the accident held that as little as 44 inches [was] an acceptable length for a landing . . . ." We agree with the superior court's analysis and conclude that a negligence per se instruction was not appropriate.

[56] This decision will not, as Johnson contends, spawn a flood of litigation over buildings that complied with old building codes but do not meet the current requirements. First, the grandfathering regulation states that conditions not in strict compliance with the amended building code may continue where they do not constitute a distinct hazard to life or health. *fn31 Second, we confine our holding that the appropriateness of the negligence per se instruction depends on the code at the time of injury to situations where amendments to the UBC bring a pre-existing code violation into compliance.

[57] Nor does our recent decision in Cable v. Schefik *fn32 compel us to reach the conclusion that a negligence per se instruction was appropriate in this case. In Cable we held that the trial court abused its discretion when it did not issue a negligence per se instruction and merely submitted the violation as evidence of negligence. *fn33 But in Cable the general safety code provision that the defendant violated was in effect at the time of the accident. *fn34 In this case the State was not in violation of the UBC at the time of the accident. The landing's compliance with the current code justifies an instruction on the past violation as "evidence of negligence" rather then negligence per se.

[58] Although Johnson's injury may have fallen within the ambit of the statute, the statute was obsolete at the time of injury. Thus, the court correctly refused to grant a negligence per se instruction.

[59] 2. On remand the superior court should instruct the fact finder that it may consider the UBC violation as evidence of negligence.

[60] The State argues that although the superior court correctly ruled before trial that the jury "may consider the State's violation of [the] 1979 UBC . . . as evidence of negligence," it improperly gave Instruction 32, which told the jury "to consider the State's violation of the 1979 U.B.C. . . . as evidence of negligence." *fn35 According to the State, the superior court reversed the law of the case by issuing what amounted to a negligence per se instruction despite its earlier ruling denying such an instruction. *fn36 While the superior court's pretrial ruling was correct, the instruction actually given amended and expanded the court's pretrial decision. Because the jury could have interpreted this instruction as compelling it to consider the UBC violation as evidence of negligence when it would be free either to accept or reject the evidence, the State's proposed instructions more accurately state the law. *fn37 On remand the trial court should issue an instruction that allows the jury either to accept or reject the UBC violation as evidence of negligence.

[61] D. The Superior Court Correctly Directed a Verdict Holding the Non-economic Damages Cap Inapplicable to Johnson Because He Suffered a Severe Physical Impairment.

[62] The superior court appropriately directed a verdict for Johnson on the issue of the applicability of the statutory cap on damages. Former AS 09.17.010 *fn38 imposes a $500,000 cap on non-economic damages unless the victim has suffered "severe physical impairment." *fn39 The question whether a plaintiff suffers from a severe physical impairment is one of fact, which would normally be presented to the jury. *fn40 In this case, however, the superior court appropriately removed the question from the jury because "reasonable persons could not differ in their judgment as to the facts." *fn41 The plaintiff presented medical experts who testified that Johnson suffered from a severe physical impairment. The State presented no contrary evidence.

[63] And although the State replies by listing the parts of Johnson's body that were not impaired or damaged by the accident, this argument ignores the overwhelming testimony that Johnson suffers from a severe physical impairment:

[64] Q: Doctor, is Garry Johnson's condition, as you understand it, with regard to bowel, bladder, and erectile dysfunctions, is it permanent?

[65] A: As far as we can tell, yes.

[66] Q: Does it constitute physical impairment?

[67] A: You bet. And . . . people will put up with back pain fairly readily, and leg pain, or missing fingers . . . , but when you start affecting their bowel, their bladder and their erectile []function, you're real close to home. This is a major disability.

[68] Q: And on a scale of mild, moderate to severe, how would you rate it?

[69] A: Severe, he's lost the bowel and bladder and all . . . erectile []function, it can't get any worse than that.

[70] The evidence was undisputed that Johnson has permanently lost urinary and bowel function. Johnson must use a catheter and wear an adult incontinence protection product every day for the rest of his life. Because permanently losing the normal use of a body system necessary for day-to-day life constitutes severe physical impairment, *fn42 the superior court properly removed this issue from the jury's consideration. *fn43

[71] E. Johnson's Closing Argument Was Improper.

[72] In closing argument Johnson's counsel gave a fictional account of an accident allegedly suffered by his wife. Johnson's counsel told the story in the first person and did not

acknowledge it was untrue until he had concluded his account.

[73] The fictional accident was similar to that suffered by Johnson:

[74] My wife and I . . . took a trip to Juneau this past February, and we visited the state museum . . . . And when we went up . . . this flight of stairs that led to an art gallery, and it was down kind of a narrow hall and they would have smaller art objects hanging on the wall. . . .

[75] . . . [S]he was walking up the stairs ahead of me, and she got to the top of the stairs and I said honey, look, and I pointed down the hall because there were some really neat paintings hanging on the wall. And she stopped at the top of the landing and she turned and -- because I had called to her, and she turned . . . and unbeknownst to either of us, this door opened. And subsequently, I found out it was a really heavy metal door that swung open. . . . [I]t bumped her as she was standing, and she lost her balance and she fell down the stairs. . . .

[76] And I ran to her . . . and there was no response, but she was shaking and spasming and . . . I was scared, I really was. . . .

[77] But I have a friend who's an engineer in Juneau, and I contacted him . . . about the situation.....

[78] And I asked him . . . if he'd look into this, and he said . . . he would be happy to. . . . He got back to me and told me, that [this door violated the building code]. . . .

[79] And that brings up another subject, that's the subject of what's wrong with [my wife]. The doctors say she -- well she's been urinating in a bag, using a catheter the entire time since this fall. And in order to go to the bathroom . . . she has to use an enema . . . . And I don't know, could you look into this case for me, because this is what I'm dealing with.

[80] The trial judge counteracted the misleading nature of the argument by telling the jury on three occasions that it was just an analogy. But without such admonitions, counsel's argument could have confused the jury, causing it to believe that the "facts" of the story were evidence in the case or that the State had negligently designed another state building. Although the use of analogies is certainly an approved technique for closing argument and may counteract prejudice toward an unsympathetic client, *fn44 Johnson's counsel could have avoided all possible confusion by positing the story as a hypothetical at the outset of closing argument. In the event that counsel for Johnson wishes to make a similar closing argument on retrial, the trial court should ensure that this happens. *fn45

[81] V. CONCLUSION

[82] The superior court erred when it instructed the jury that the State owed Johnson a duty of "utmost care." Because the jury could have found the State liable for violating the duty of

"utmost care" but not liable under the appropriate "reasonable care" standard, the error was prejudicial. Consequently, we REVERSE and REMAND for a new trial. Because we find no error tainting the jury's verdict regarding causation and the calculation of damages, we limit the issue at the new trial to whether the State was negligent in designing and building the Ketchikan Correctional Center.

Opinion Footnotes

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[83] *fn1 See AS 35.10.025.

[84] *fn2 See Sever v. Alaska Pulp Corp., 931 P.2d 354, 361 n.11 (Alaska 1996).

[85] *fn3 See Coulson v. Marsh & McClennan, Inc., 973 P.2d 1142, 1150 n.21 (Alaska 1999).

[86] *fn4 See Fairbanks N. Star Borough v. Lakeview Enters., Inc., 897 P.2d 47, 58 (Alaska 1995).

[87] *fn5 Sykes v. Melba Creek Mining, Inc., 952 P.2d 1164, 1170 (Alaska 1998) (quoting Alaska R. Civ. P. 37(b)(3)).

[88] *fn6 627 P.2d 623 (Alaska 1981).

[89] *fn7 Id. at 628.

[90] *fn8 See id.

[91] *fn9 Id. (emphasis added).

[92] *fn10 See id.; see also W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 34 (5th ed. 1984).

[93] *fn11 Wilson, 627 P.2d at 628.

[94] *fn12 Id. at 628-29. We reserve the question of precisely which circumstances justify the "utmost caution" instruction.

[95] *fn13 Id. In Wilson an intoxicated prisoner started a fire in his cell, but the jailers failed to confiscate his lighter. The second fire set by the prisoner caused his injuries. See id. at 626.

[96] *fn14 677 P.2d 893, 897 (Alaska 1984). In Kanayurak the prisoner was intoxicated and experiencing hardship in her family life. See id. at 894-95. In reversing a grant of summary judgment, we held that a genuine issue of material fact existed as to whether the jailer should have recognized that the prisoner was prone to commit suicide, thus holding him to a duty to take action to prevent it.

[97] *fn15 Wilson, 627 P.2d at 628-29; Kanayurak, 677 P.2d at 898-99. To justify requiring more than ordinary care in some circumstances, the Wilson court analogized to the special relationship between a common carrier and its passengers. This analogy is only warranted in special situations when circumstances unique to prisoners and known to or reasonably foreseeable by the jailer endanger the prisoner. See Wilson, 627 P.2d at 628.

[98] *fn16 Another jurisdiction requires a jail designer to build the jail "safe for its intended use." Tittle v. Giattina, Fisher & Co., Architects, Inc., 597 So. 2d 679, 681 (Ala. 1992); see also La Bombarbe v. Phillips Swager Assocs., Inc., 474 N.E.2d 942, 944 (Ill. App. 1985).

[99] *fn17 See AS 09.50.010(10) (allowing a judge to hold people who disregard a subpoena in contempt of court); Alaska R. Crim. P. 17(g).

[100] *fn18 See AS 14.30.10 (requiring children aged 7 to 16 to attend school).

[101] *fn19 See Fancyboy v. Alaska Village Elec. Coop., Inc., 984 P.2d 1128, 1136 (Alaska 1999); General Motors Corp. v. Farnsworth, 965 P.2d 1209, 1222-23 (Alaska 1998); Sturm, Ruger & Co. v. Day, 615 P.2d 621, 624 (Alaska 1980).

[102] *fn20 Alaska R. Civ. P. 35 (authorizing courts to order a party to submit to a physical or mental exam upon a showing of good cause and proper notice to the party to be examined, when the physical or mental condition of a party is at issue).

[103] *fn21 See Langfeldt-Haaland v. Saupe Enters., Inc., 768 P.2d 1144, 1147 (Alaska 1989) ("We align Alaska with those authorities which allow plaintiff's counsel to attend and record, as a matter of course, court-ordered medical examinations in civil cases.").

[104] *fn22 Id. at 1146.

[105] *fn23 The State has attempted to distinguish Langfeldt-Haaland because the examination was not court-ordered but by agreement of the parties. It is unclear why this distinction is relevant, especially in light of Rule 35(b)(3), which extends 35(b)'s other protections to examinations by agreement.

[106] *fn24 See Langfeldt-Haaland, 768 P.2d at 1145.

[107] *fn25 This rule, which governs the imposition of discovery sanctions, provides: Prior to making an order . . . the court shall consider (A) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose; (B) the prejudice to the opposing party; (C) the relationship between the information the party failed to disclose and the proposed sanction; (D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and (E) other factors deemed appropriate by the court or required by law. The court shall not make an order that has the effect of establishing or dismissing a claim or defense or determining a central issue in the litigation unless the court finds that the party acted willfully.

[108] *fn26 952 P.2d 1164, 1170 (Alaska 1998).

[109] *fn27 See Cable v. Shefchik, 985 P.2d 474, 477 (Alaska 1999).

[110] *fn28 Those criteria are: The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results. Restatement (Second) of Torts § 286 (1971) (quoted in Cable, 985 P.2d at 477 n.2).

[111] *fn29 See Cable, 985 P.2d at 477.

[112] *fn30 Northern Lights Motel v. Sweaney, 561 P.2d 1176, 1184 (Alaska 1977) (quoting Restatement (Second) of Torts § 286 cmt. d).

[113] *fn31 See 13 Alaska Administrative Code (AAC) 55.030(a) (1998).

[114] *fn32 985 P.2d 474.

[115] *fn33 See id. at 478-79.

[116] *fn34 See id. at 477-79.

[117] *fn35 Instruction 32 reads in its entirety: You are instructed that at the time the Ketchikan Correctional Center was built, Alaska law under AS 35.10.025 provided as follows: A public building shall be built in accordance with applicable local building codes. . . . This section applies to all buildings of the state . . . . . [A]t the time of the facility planning and construction, the State was bound under AS 35.[1]0.025 to follow the local building

codes of the City of Ketchikan . . . . Ketchikan's local building code includes Sec. 3303(i) of the 1979 Uniform Building Code which required that a landing to a stairway that had a door opening over it was to have a minimum length of five feet. Therefore, the landing in question was in violation of the 1979 Uniform Building Code. You are instructed to consider the State's violation of 1979 U.B.C. Sec. 3303(i) as evidence of negligence. This court has not determined as a matter of law, whether or not the violation of any building code by the State of Alaska was a proximate cause of injury to Mr. Johnson. That is for you to determine as the finder of fact.

[118] *fn36 Johnson argues that the State failed to object to Instruction 32. But the State did object to a negligence per se instruction. Because we conclude that Instruction 32 amounted to a negligence per se instruction, the State's objection was not waived.

[119] *fn37 The State's proposed Instruction 5 reads in pertinent part: There was a building code in effect for the City of Ketchikan and State of Alaska in 1982/1983 when the Ketchikan Correctional Center was constructed. It provides: 1979 Uniform Building Code § 3303 (i). (i) Change in Floor Level at Doors. . . . Where doors open over landings, the landing shall have a length of not less than 5 feet. If you decide it is more likely true than not true that the State of Alaska violated any part of this law, you may consider that fact along with all other evidence [including any evidence tending to show why the law was violated] in deciding whether under the circumstances of this case the defendant used reasonable care. (Brackets in original.) The State's proposed Instruction 6 reads in pertinent part: There was a building code in effect for the City of Ketchikan and State of Alaska in 1994 that applies to this case. It provides: 1991 Uniform Building Code § 3304 (j) (j) Landings at Doors. . . . Landings shall have a length measured in the direction of travel of not less then 44 inches. If you decide it is more likely true than not true that the State of Alaska obeyed this law, you may still decide the State of Alaska is negligent if you decide that a reasonably careful person under circumstances similar to those shown by the evidence would have taken precautions in addition to those required by the uniform building code.

[120] *fn38 The legislature enacted AS 09.17.010 as part of the 1986 tort reform. See Ch. 139, § 1, SLA 1986. The legislature has subsequently modified the statute, but that modification is inapplicable here because it only applies to injuries occurring after August 7, 1997. See Ch. 26, § 1, SLA 1997.

[121] *fn39 AS 09.17.010 (1996).

[122] *fn40 See, e.g., Owens-Corning v. Walatka, 725 A.2d 579, 585 (Md. Spec. App. 1999); Lewis v. Krogol, 582 N.W.2d 524, 526 (Mich. App. 1998).

[123] *fn41 Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc., 963 P.2d 1055, 1062 (Alaska 1998) (quoting Ben Lomond, Inc. v. Schwartz, 915 P.2d 632, 635 (Alaska 1996)).

[124] *fn42 See School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 279-80 (1987) (approving of the definition of "physical impairment" in 45 C.F.R. § 84.3(j)(2)(i) (1985)).

[125] *fn43 Because we have concluded that the non-economic damages cap does not apply to

Johnson, we need not address Johnson's contention that the damages cap is unconstitutional. See Municipality of Anchorage v. Anchorage Daily News, 794 P.2d 584, 594 n.18 (Alaska 1990).

[126] *fn44 See Thomas Mauet, Fundamentals of Trial Techniques, 275, 277 (2d ed. 1988).

[127] *fn45 On cross-appeal Johnson challenges the superior court's failure to take judicial notice of OSHA regulations that he claims show that the jail violated federal safety standards. The superior court appropriately exercised its discretion when it refused to take judicial notice of the OSHA regulations. The OSHA regulations are "duly published regulations of agencies of the United States." Alaska R. Evid. 202(c)(2). Accordingly, the court's decision to take judicial notice is governed by Rule 202(c), which grants the trial court discretion as to whether to take judicial notice when an attorney does not make a proper request. Because Johnson's counsel made no prior request, the trial court was free to take or refuse to take judicial notice.

20000505

ANNOTATION

RIGHT OF PARTY TO HAVE ATTORNEY OR PHYSICIAN PRESENT DURING PHYSICAL OR MENTAL EXAMINATION AT INSTANCE OF OPPOSING PARTY

by

Thomas M. Fleming, J.D.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

23 Am Jur 2d, Depositions and Discovery § 305

Annotations: See the related matters listed in the annotation.

10A Federal Procedure, L Ed, Discovery and Depositions §§ 26:446, 26:447

8 Federal Procedural Forms, L Ed, Discovery and Depositions §§ 23:351-23:388

8 Am Jur Pl & Pr Forms (Rev), Depositions and Discovery, Forms 601-668; 11A Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 1341-1368

1 Am Jur Trials 357, Investigating the Civil Case, General Principles § 86; 4 Am Jur Trials 615, The Impaired Driver—Ascertaining Physical Condition §§ 2, 26-30; 6 Am Jur Trials 423, Collateral Cross-Examination of Medical Witness § 18; 15 Am Jur Trials 373, Discovery and Evaluation of Medical Records § 11

US L Ed Digest, Depositions and Discovery § 43

ALR Digests, Discovery and Inspection §§ 19, 23.5

Index to Annotations, Absence or Presence; Attorney or Assistance of Attorney; Civil Procedure Rules; Discovery; Physical and Mental Examinations; Physicians and Surgeons

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Del: §§ 2[b], 18, 22[b], 23
Fla: §§ 2[b], 3, 4, 11, 12

Ga: § 11
Idaho: § 11
Ill: §§ 2[b], 3, 17
La: §§ 6-8, 9[a], 10, 13, 15
Mich: §§ 2[b], 3, 17
Minn: §§ 2[b], 6, 7, 13
Mo: §§ 2[b], 6
Mont: §§ 2[b], 5
NY: §§ 2[b], 3, 4, 9[b], 13, 17, 22[c], 23
Ohio: §§ 3, 8, 11, 17-20
Or: § 8
Pa: §§ 3, 11, 17
Wash: §§ 3, 17
Wis: §§ 2[b], 6, 7, 11, 18, 19, 21

I. Preliminary Matters

§ 1. Introduction

[a] Scope

This annotation[1] collects and analyzes those cases in which the courts have considered whether, or under what circumstances, a party to a civil action,[2] subjected to a physical or mental examination at the instance of an opposing party[3] and conducted by a medical expert[4] of the opponent's choice,[5] is entitled or permitted to have his or her own attorney[6] or medical expert present during the examination.

A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments bearing upon this subject. Since these are discussed herein only to the extent that they are reflected in the reported cases within the scope of this annotation, the reader is advised to consult the appropriate statutory or regulatory compilations.

1. This annotation supersedes the one at 64 ALR2d 497.

2. The scope of this annotation is limited primarily to actions seeking the recovery of general damages for physical or mental injury. Other types of cases, such as those involving workers' compensation, domestic relations, or estates, have been included herein only where the annotated issue has been considered and determined pursuant to statutes or rules expressly recognized by the court as applicable to civil actions generally.

3. This annotation includes cases in which the party was compelled to submit to the examination by court order following a motion by the opponent, and cases in which the party submitted to the examination at the defendant's request, without a court order.

4. This includes medical doctors, psychiatrists, psychologists, and any other experts generally deemed qualified to conduct a physical or mental examination of the person for discovery purposes.

5. This includes cases in which the examining expert was independently designated by the opponent, and cases in which the expert was formally appointed by the court based on the opponent's express nomination. Cases involving examination by a neutral expert appointed by the court, without a suggestion or request by a party that that particular person be appointed, are beyond the scope of this annotation. For a collection of cases considering a party's right to have his attorney or physician, or a court reporter, present during his physical or mental examination by a court-appointed expert, see the annotation at 7 ALR3d 881.

6. Cases involving attendance by a legal representative designated by the attorney, such as a law clerk, are included herein.

[b] Related matters

Discovery: right to ex parte interview with injured party's treating physician. 50 ALR4th 714.

Right of accused in criminal prosecution to presence of counsel at court-appointed or -approved psychiatric examination. 3 ALR4th 910.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child. 99 ALR3d 268.

Right of defendant in personal injury action to designate physician to conduct medical examination of plaintiff. 33 ALR3d 1012.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege. 25 ALR3d 1401.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings. 21 ALR3d 912.

Timeliness of application for compulsory physical examination of injured party in personal injury action. 9 ALR3d 1146.

Right of party to have his attorney or physician, or a court reporter, present during his physical or mental examination by a court-appointed expert. 7 ALR3d 881.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident. 89 ALR2d 1001.

Court's power to order physical examination of personal injury plaintiff as affected by distance or location of place of examination. 71 ALR2d 973.

Right to copy of physician's report of pretrial examination where there is no specific statute or rule providing therefor. 70 ALR2d 384.

Power to require physical examination of injured person in action by his parent or spouse to recover for his injury. 62 ALR2d 1291.

Federal Rule of Civil Procedure 35(b)(1, 2) and similar state statutes and rules pertaining to reports of physician's examination, 36 ALR2d 946.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition. 32 ALR2d 434.

Requiring submission to physical examination or test as violation of constitutional rights. 25 ALR2d 1407.

Right of federal indigent criminal defendant to obtain independent psychiatric examination pursuant to subsection (e) of Criminal Justice Act of 1964, as amended (18 USCS § 3006A(e)). 40 ALR Fed 707.

Constitutionality and construction of Federal Civil Procedure Rule 35 and Admiralty Rule 32A, concerning physical and mental examination of persons. 13 L Ed 2d 992.

§ 2. Background, summary, and comment

[a] Generally

Under Rule 35(a) of the Federal Rules of Civil Procedure, as well as

analogous state rules and statutes,[7] a party whose physical or mental condition is in controversy may be ordered by the court to submit to a physical or mental examination by a physician, on motion and for good cause shown, upon notice to all parties specifying the time, place, manner, conditions, and scope of the examination, and the person or persons by whom the examination is to be made.[8] The procedure's purpose is to inform the parties and court regarding the examinee's true condition, and thereby to secure the just, speedy, and inexpensive determination of the action.[9]

Because such an examinations is usually conducted by a physician of the movant's choice, subject to the court's discretion,[10] its objectivity and nonpartisan character is sometimes questioned. This is particularly true in personal injury litigation, where certain medical experts are often perceived as regularly aligned with the defense or the plaintiff's cause. People are also frequently anxious about exposing their bodies or minds to examination by a stranger, especially one associated with a hostile party. Accordingly, the examinee may seek to have his or her attorney or personal physician present during the procedure, for purposes of protection, advice, or comfort. The courts have taken divergent positions as to whether, and under what circumstances, this should be permitted.[11]

A physical examination, while primarily involving external observation, testing, or manipulation of the body, often requires some inquiry by the physician into the examinee's medical history and the events giving rise to the injury. It is this fact which most concerns lawyers about uncounseled examinations of their clients by doctors acting for an opponent. Generally reasoning that counsel's presence may protect the examinee from improper questioning by the doctor on matters pertinent only to liability, or that it may lend the examinee emotional comfort and support, many courts have recognized that a civil litigant physically examined by an opponent's doctor ordinarily may have his or her attorney present during the examination (§ 3). Some of these courts allow the trial judge discretion to require an examination without counsel, if the opponent affirmatively establishes a need for such exclusion (§ 4), while one court has balanced the examinee's and the examining doctor's interests by entitling the former to counsel's presence only during the taking of a medical history or questioning about how the injury occurred

7. For a list of states having rules based on, or substantially similar to, the Federal Rules of Civil Procedure, see Am Jur 2d, Deskbook, Item No. 126.

8. 23 Am Jur 2d, Depositions and Discovery § 282; 10A Federal Procedure, L Ed § 26:425.

9. 23 Am Jur 2d, Depositions and Discovery § 282; 10A Federal Procedure, L Ed § 26:425.

10. 23 Am Jur 2d, Depositions and Discovery § 302; 10A Federal Procedure, L Ed § 26:440.

11. 23 Am Jur 2d, Depositions and Discovery § 305; 10A Federal Procedure, L Ed §§ 26:446, 26:447.

(§ 5). Other courts, reasoning that counsel's attendance at an adverse physical examination is ordinarily unnecessary or undesirable, hold that the examinee generally has no right to an attorney's presence during the procedure (§ 6), unless, as some of these courts recognize, the examinee affirmatively establishes a need for counsel's attendance (§ 7). Finally, several courts, without clearly taking a position generally approving or disfavoring counsel's presence at an adverse physical examination, have held that it is within the trial judge's sound discretion whether to require such examination without attendance by the examinee's attorney (§ 8).

Under particular circumstances in two cases, the courts affirmed orders that a litigant be physically examined by the opponent's doctor without the presence of counsel, because the examinee failed to establish alleged bias or improper conduct on the doctor's part (§ 9[a]). However, two other courts held improper orders that a litigant submit to an adverse physical examination without a lawyer or legal representative in attendance, absent sufficient proof that the attorney or representative would interfere with the examination or had previously attempted to do so (§ 9[b]).

The courts have divided on the effect of attendance at an adverse physical examination by a third person other than the examinee's lawyer. Thus, one court held that a plaintiff was entitled to her lawyer's presence during her examination by defense doctors, notwithstanding the defendant's proposal that a court reporter attend in lieu of counsel, while another court upheld the denial of a plaintiff's request for counsel during her examination by the defendant's physician, finding that the trial judge adequately protected her interests by allowing her husband to attend (§ 10).

Litigants physically examined by an opponent's doctor have also sought, on occasion, to have their own physician present during the examination. A number of courts have recognized that an examinee ordinarily may have his or her personal physician attend (§ 11), although one of these courts allows the trial judge discretion to order an examination without the presence of another doctor, if the examining party affirmatively shows a need for the procedure to be so conducted (§ 12). Several other courts, without taking a clear position generally approving or disapproving attendance by the examinee's physician, have recognized that the trial judge may permit it in "special circumstances" (§ 13). Still another court, however, has held that a personal injury plaintiff has no unqualified right to the presence of his or her own doctor during an adverse physical examination, because attendance by an attorney or court reporter adequately protects the plaintiff's interests (§ 14).

Considering attendance by the examinee's physician in light of particular circumstances, one court has said that a female litigant's objection to physical examination by an unfamiliar doctor acting for the opponent might justify a requirement that the examination be conducted in her own physician's presence; but another court held

that the trial judge in a malpractice action alleging negligent radical hemorrhoidectomy did not abuse his discretion by requiring the female plaintiff to undergo a physical examination of her anal sphincter muscle by the defendants' medical expert, without the presence of her own physicians, because the plaintiff was a registered nurse and did not claim that she needed her doctor to protect her privacy or shield her from embarrassment (§ 15). The court in the latter case also upheld the judge's examination order because the plaintiff's own physician examined her a few hours after the adverse examination, and three other doctors who examined the plaintiff testified in her behalf (§ 16).

Special problems may arise in connection with the presence of third persons at a mental examination, which requires sensitive communication and intensive questioning of the examinee concerning his or her past, subjective feelings, and other matters of significance perhaps not readily discernable by the untrained or casual observer. Generally reasoning that a third person's presence during a mental examination necessarily interferes with the close communication between examinee and physician necessary to the procedure's effectiveness, a number of courts take the position that a civil litigant subjected to a mental examination by an opponent's doctor generally has no right to the presence of his or her attorney during the procedure (§ 18), although some have held that the trial judge may permit the lawyer to attend, if the examinee affirmatively shows good cause for counsel's presence (§ 19). Other courts, however, adhere to the view that the examinee ordinarily may have his or her attorney present during the examination, except, as some have recognized, where the attorney interferes with the examination or the opponent shows a need to conduct the examination without counsel (§ 17). The Ohio courts have taken divergent positions. Thus, one has ruled that except in that portion of the examination seeking information on how the injury occurred and the nature of the damage at that time, an attorney may be excluded from his client's adverse mental examination if the opponent's doctor reasonably objects to his presence (§ 20). In two more recent Ohio cases, however, the courts held that a litigant subjected to a psychiatric examination by an opponent's doctor is entitled to the presence of counsel (§ 20).

A litigant's emotional state at the time of his or her adverse mental examination may be significant in determining the propriety of counsel's attendance during the procedure. Thus, while one court held that a plaintiff claiming emotional injury did not have a right to counsel during her examination by a defense psychiatrist, although she disliked and feared the doctor and her own psychiatrist stated that it might be dangerous for her to be examined without her lawyer's support, another court found it proper for a plaintiff's attorney to attend his client's adverse psychiatric examination, because the plaintiff was tense, anxious, and near tears at the time of the interview (§ 21).

The possibility of inquiry into

private sexual matters during an adverse mental examination has been advanced in some cases as a reason to permit attendance by the examinee's lawyer. Where emotional injury due to sexual harassment at work was alleged, one court ruled that the plaintiff was not entitled to counsel at her mental examination by the defendant's physician, merely because the doctor might improperly inquire into her sexual history; but another court considering such a claim reached the opposite conclusion, without directly discussing the anticipated scope of the doctor's inquiry, finding that attendance by a third person was necessary to assure that the doctor did not probe beyond "permissible limits" (§ 22[a]). In cases involving emotional injury from other kinds of sexual abuse or assault, courts have ruled that the female plaintiff was not entitled to the presence of her attorney during a mental examination by the defendant's psychiatrist, despite claims of possible further trauma due to extensive questioning by a male physician (§ 22[b]), and because of the sensitivity of expected inquiry into a sexually perverted assault on the plaintiff (§ 22[c]).

As with physical examinations, some civil litigants mentally examined by an opponent's physician have sought to have their own doctor present during the examination. The few courts considering the propriety of such a request have held that litigants generally, or particular parties, are or were permitted to have a doctor or other health care practitioner of their choice present during a mental examination by an opponent's designated physician, subject to limitations on the accompanying expert's conduct during the examination or at trial (§ 23).

[b] Practice pointers

Statutes or rules in particular jurisdictions may accord a litigant the right, or at least the opportunity, to have his or her attorney or physician present during a medical examination by an opponent's doctor.[12]

In jurisdictions where counsel's attendance at the examination is not a matter of right, the examinee's attorney may support a claim that his presence is necessary by presenting evidence of hostility between his client and the proposed examining physician, or reluctance, fear, or extreme emotional distress on the client's part.[13] The attorney may also attempt to show that his client's character, personality, or sophistication are such that counsel's presence would strengthen his confidence and facilitate communication with the physician, so as to improve the chances for an accu-

12. See, for example, McDaniel v Toledo, P. & W. R. Co. (1983, CD Ill) 97 FRD 525, 36 FR Serv 2d 101 (citing Illinois statute); Vinson v Superior Court (1987) 43 Cal 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301 (statute); Nemes v Smith (1971) 37 Mich App 124, 194 NW2d 440 (rule).

13. See, for example, Whanger v American Family Mut. Ins. Co. (1973) 58 Wis 2d 461, 207 NW2d 74; Karl v Employers Ins. of Wausau (1977) 78 Wis 2d 284, 254 NW2d 255.

rate examination.[14] If the proposed physician would not object to counsel's attendance at the examination, the attorney should consider presenting an affidavit from him to that effect.[15] The ease or difficulty of finding a physician who will perform the examination in the presence of a third person, as well as the customs and practices of the local bar and medical community, may also be relevant.[16]

Where the proposed examining physician objects to having the examinee's attorney present during the procedure, on grounds such as the unlikelihood of obtaining candid and complete responses from the examinee with a third person present, counsel for the examining party should consider presenting the physician's affidavit to such effect.[17] The availability of other protective measures may be stressed, such as the examinee's entitlement to a written report of the examination; the opportunity to depose, cross-examine, and contradict the examining physician with the assistance of a favorable medical expert; the right to seek exclusion of statements to the physician by the examinee in response to questions beyond a scope necessary to develop a sensible medical history; and the possibility of having the examination conducted by a different physician, if the court is unsure of the proposed examiner's competence, integrity, or impartiality.[18] Counsel for the examining party may also show the lack of need for counsel's presence by citing to any written medical ethics standards in the jurisdiction restricting the scope of a doctor's permissible questioning into the details of a legally disputed accident.[19] In addition, local standards of attorney conduct discouraging the presence of lawyers at adverse medical examinations may be emphasized.[20]

If the examinee's attorney is not allowed to attend the entire examination, he may still ask for permission to be present while the physician takes a medical history from the client or questions him about details concerning the accident at

14. See, for example, Whanger v American Family Mut. Ins. Co. (1973) 58 Wis 2d 461, 207 NW2d 74.

15. See, for example, Karl v Employers Ins. of Wausau (1977) 78 Wis 2d 284, 254 NW2d 255.

16. See, for example, Bartell v McCarrick (1986, Fla App D4) 498 So 2d 1378, 12 FLW 79.

17. See, for example, Pedro v Glenn (1968) 8 Ariz App 332, 446 P2d 31.

18. See, for example, Edwards v Superior Court of Santa Clara County (1976) 16 Cal 3d 905, 130 Cal Rptr 14, 549 P2d 846; Wood v Chicago, M., S. P. & P. R. Co. (1984, Minn App) 353 NW2d 195.

19. See, for example, Wood v Chicago, M., S. P. & P. R. Co. (1984, Minn App) 353 NW2d 195.

20. See, for example, Wood v Chicago, M., S. P. & P. R. Co. (1984, Minn App) 353 NW2d 195 (interprofessional relations code providing that it was not desirable for a lawyer to be present when his client is being examined by a physician, whether employed on behalf of the client or an adverse party, but permitting discussion between the lawyer and the physician as to any pertinent aspect of the examination).

issue.[21] Another alternative, allowed in some jurisdictions, is to have the examination recorded mechanically or by a stenographer.[22] Counsel may also request that the examinee's own physician be permitted to attend.[23] If such a request is granted, the opposing party may ask that the role of the examinee's doctor be limited to observation, and that he be ordered to refrain from objecting or interrupting.[24] The opponent may also move that the examinee's physician not be permitted to testify in the examinee's case in chief about the procedures and methods used by the opponent's doctor during the examination.[25]

Where a party refuses to comply with a proper order that he submit to an examination by the opponent's physician without the presence of his lawyer, the opponent may ask the court to dismiss the complaint with prejudice.[26]

II. Physical Examination

A. Presence of Examinee's Attorney

1. General Rules

§ 3. View that examinee ordinarily may have attorney present

Generally reasoning that counsel's presence at an adverse medical examination may protect the examinee from improper questioning by the doctor on matters pertinent only to legal liability, or otherwise lend the examinee comfort and support; the courts in the following cases held or recognized that a civil litigant, subjected to a physical examination at an opponent's instance to be conducted by a doctor the opponent has designated, ordinarily may have his or her attorney present during the examination.

Alaska—Langfeldt-Haaland v Sa-

21. See, for example, Mohr v District Court of Fourth Judicial Dist. (1983) 202 Mont 423, 660 P2d 88.

22. See, for example, Di Bari v Incaica Cia Armadora, S.A. (1989, ED NY) 126 FRD 12, 14 FR Serv 3d 1362; Langfeldt-Haaland v Saupe Enterprises, Inc. (1989, Alaska) 768 P2d 1144, 84 ALR4th 547; Gonzi v Superior Court of San Francisco (1959) 51 Cal 2d 586, 335 P2d 97; Rochen v Huang (1988, Del Super) 558 A2d 1108; Bartell v McCarrick (1986, Fla App D4) 498 So 2d 1378, 12 FLW 79; Barraza v 55 West 47th Street Co. (1989, 1st Dept) 156 App Div 2d 271, 548 NYS2d 660.

23. See, for example, Dziwanoski v Ocean Carriers Corp. (1960, DC Md) 26 FRD 595, 4 FR Serv 2d 640 (if examinee informs doctor and attorney for other side); Bartell v McCarrick (1986, Fla App D4) 498 So 2d 1378, 12 FLW 79; Gray v Victory Memorial Hosp. (1989) 142 Misc 2d 302, 536 NYS2d 679 (mental examination).

But see Long v Hauser (1975, 4th Dist) 52 Cal App 3d 490, 125 Cal Rptr 125, in which the court held that a personal injury plaintiff has no unqualified right to the presence of his or her own physician during a physical examination by the defendant's chosen doctor, in addition to an attorney or a court reporter.

24. See, for example, Rochen v Huang (1988, Del Super) 558 A2d 1108.

25. See, for example, Gray v Victory Memorial Hosp. (1989) 142 Misc 2d 302, 536 NYS2d 679.

26. See, for example, Jensen v Wallace (1984, Mo App) 671 SW2d 331.

upe Enterprises, Inc. (1989, Alaska) 768 P2d 1144, 84 ALR4th 547.

Cal—Sharff v Superior Court of San Francisco (1955) 44 Cal 2d 508, 282 P2d 896, 64 ALR2d 494; Gonzi v Superior Court of San Francisco (1959) 51 Cal 2d 586, 335 P2d 97; Edwards v Superior Court of Santa Clara County (1976) 16 Cal 3d 905, 130 Cal Rptr 14, 549 P2d 846; Vinson v Superior Court (1987) 43 Cal 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301 (statute).

Jorgensen v Superior Court of Sonoma County (1958, 3rd Dist) 163 Cal App 2d 513, 329 P2d 550; Durst v Superior Court of Los Angeles County (1963, 2nd Dist) 222 Cal App 2d 447, 35 Cal Rptr 143, 7 ALR3d 874; Whitfield v Superior Court of Los Angeles County (1966, 2nd Dist) 246 Cal App 2d 81, 54 Cal Rptr 505; Munoz v Superior Court of Santa Clara County (1972, 1st Dist) 26 Cal App 3d 643, 102 Cal Rptr 686; Long v Hauser (1975, 4th Dist) 52 Cal App 3d 490, 125 Cal Rptr 125.

Fla—Bartell v McCarrick (1986, Fla App D4) 498 So 2d 1378, 12 FLW 79; High v Burrell (1987, Fla App D5) 509 So 2d 385, 12 FLW 1620; Stakley v Allstate Ins. Co. (1989, Fla App D2) 547 So 2d 275, 14 FLW 1860.

Ill—Eskandani v Phillips (1975) 61 Ill 2d 183, 334 NE2d 146 (statute expressly providing).

Mich—Zawacki v Detroit Harvester Co. (1945) 310 Mich 415, 17 NW2d 234 (statute expressly providing); Feld v Robert & Charles Beauty Salon (1990) 435 Mich 352 (statute expressly providing).

Nemes v Smith (1971) 37 Mich App 124, 194 NW2d 440 (rule expressly providing).[27]

NY—Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612; Ponce v Health Ins. Plan (1984, 2d Dept) 100 App Div 2d 963, 475 NYS2d 102; Lamendola v Slocum (1989, 3d Dept) 148 App Div 2d 781, 538 NYS2d 116; Mertz v Bradford (1989, 4th Dept) 152 App Div 2d 962, 543 NYS2d 786.

Reardon v Port Authority of New York & New Jersey (1986) 132 Misc 2d 212, 503 NYS2d 233; Mosel v Brookhaven Memorial Hospital (1986) 134 Misc 2d 73, 509 NYS2d 754; Gray v Victory Memorial Hosp. (1989) 142 Misc 2d 302, 536 NYS2d 679.

For Ohio cases, see § 8.

Pa—Hess v Lakeshore & M.S.R. Co. (1890) 7 Pa Co 565 (order issued, apparently without dispute, specifying that examination be conducted in presence of counsel for both parties).

Wash—Tietjen v Department of Labor & Industries (1975) 13 Wash App 86, 534 P2d 151.

27. In Feld v Robert & Charles Beauty Salon (1989) 174 Mich App 309, 435 NW2d 474, app gr, in part 433 Mich 879, 446 NW2d 169 and revd on other grounds 435 Mich 352, a later workers' compensation case, the court referred to the general discovery rule cited in Nemes as "then applicable," but did not mention any new or amended rule. Accordingly, the reader is advised to consult the latest compilation of Michigan civil procedure rules to verify the current status of the one applied in Nemes.

In Langfeldt-Haaland v Saupe Enterprises, Inc. (1989, **Alaska**) 768 P2d 1144, 84 ALR4th 547, the court held that a party to a civil action is generally entitled to have his or her attorney present during a physical examination conducted at an opponent's instance by its physician, subject to the trial judge's authority to enter appropriate protective orders. The court reasoned that such examinations are often critical in the litigation process, and that parties are generally entitled to the protection and advice of counsel when they enter the legal arena. The court found support for its position by analogizing to case law recognizing a criminal defendant's right to his attorney's presence at a court-ordered psychiatric examination requested by the prosecution, and noted the existence of a constitutional right to counsel in civil cases arising from the due process clause of the state constitution. The court also reasoned that counsel may observe shortcomings and improprieties in an examination which can be brought out during cross-examination. While observation may be the primary role of counsel attending an examination, the court explained, the attorney may on occasion properly object to questions concerning privileged information.[28]

Likewise, the court in Sharff v Superior Court of San Francisco (1955) 44 **Cal** 2d 508, 282 P2d 896, 64 ALR2d 494, held that a personal injury plaintiff subjected to a court-ordered physical examination by the defendant's chosen physician is generally permitted to have the assistance and protection of an attorney during the examination. The court reasoned that a lay person should not be expected to evaluate at his peril the propriety of all questions that may be asked while he is being examined by a doctor the defendant has selected. The court acknowledged the possibility that an attorney could hinder an examination by making groundless objections, thereby depriving the defendant of the benefit of an informed medical opinion, but commented that the plaintiff should not be left unprotected on the assumption that an attorney would unduly interfere with the examination. Should such interference occur, the court stated, the trial judge may take appropriate steps to provide the doctor with a reasonable opportunity to complete his investigation of the nature and extent of any injuries the plaintiff may have sustained.

Commenting that in a required physical examination of a personal injury plaintiff by the defendant's chosen physician, attendance by the plaintiff's attorney may be as important as his presence at an oral deposition, the court in Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612, held that absent a compelling showing of need for the examination to be conducted without counsel, the plaintiff is entitled to have his or her lawyer present during

28. The court also commented that if the client does not wish his or her attorney to attend all or part of an examination, such wish must govern.

the examination. The court observed that a physician selected by the defendant to examine the plaintiff is not necessarily an impartial medical expert, indifferent to the parties' conflicting interests. The possible adversary status of the examining doctor, the court declared, is ordinarily a compelling reason to permit attendance by the plaintiff's counsel in order to prevent, for example, improper questioning on liability issues. This is not to suggest, the court explained, that counsel may interfere with the conduct of the physical examination, or that the examining room should be turned into a hearing room with lawyers and stenographers from both sides participating. The lawyer's role at the physical examination, the court said, should be limited to protecting the client's legal interests, apart from the actual physical examination. The court further explained that in order to perform his function, the examining physician should be allowed to ask such questions as, in his opinion, are necessary to enable him to determine the nature and extent of the alleged injuries, which may include inquiry into the particular manner in which the injuries were received. The court concluded that if the attorney's participation intrudes upon the examination, the trial judge may take appropriate steps, in light of the facts and circumstances of the case, to provide the doctor with a reasonable opportunity to complete his examination.[29]

§ 4. —But court *may* bar attorney if opponent establishes need for exclusion

In the following cases, the courts held or recognized that although a civil litigant physically examined by an opponent's designated physician may generally have counsel present during the examination, the trial judge has discretion to order that the examination be conducted without an attorney present, if the opponent sustains the burden of establishing a need to exclude counsel.

Fla—Bartell v McCarrick (1986, Fla App D4) 498 So 2d 1378, 12 FLW 79; High v Burrell (1987, Fla App D5) 509 So 2d 385, 12 FLW 1620; Stakley v Allstate Ins. Co. (1989, Fla App D2) 547 So 2d 275, 14 FLW 1860.

NY—Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612 (compelling showing required).

Reardon v Port Authority of New York & New Jersey (1986) 132 Misc 2d 212, 503 NYS2d 233 (same).

The court in Bartell v McCarrick (1986, **Fla** App D4) 498 So 2d 1378, 12 FLW 79, held that while a personal injury plaintiff subjected to a compulsory physical examination by the defendant's chosen physician is ordinarily entitled to have an attorney present during the examination, the trial judge may prohibit attendance by counsel, in his sound discretion, if the defendant sustains its burden of showing a valid reason why the examination should be conducted without counsel. The court observed that an examining physician selected by the defendant is not necessarily indifferent to the parties' conflicting interests, and that he might improperly question the plaintiff as to liability or other issues. However, the court explained, a variety of factors may militate against a hard-and-fast rule regarding attendance by counsel, such as language barriers, inability to engage a physician who will perform the examination in a third person's presence, the patient's particular physical or psychological needs, and the local customs and practices of the bar and medical profession. Accordingly, the court reasoned, trial judges are in the best position to decide the issue of attorney attendance on a case-by-case basis.[30]

§ 5. View that examinee is entitled to attorney's presence only during taking of medical or factual history

The court in the following case held that a personal injury plaintiff subjected to a physical examination by the defendant's designated physician is entitled to have an attorney present only while the doctor takes the plaintiff's medical history or questions him as to how the injury occurred.

In Mohr v District Court of Fourth Judicial Dist. (1983) 202 **Mont** 423, 660 P2d 88, the court held that a personal injury plaintiff physically examined by the defendant's designated physician is entitled to have his attorney present only during that portion of the examination when a medical history is taken from the plaintiff or he is questioned as to how the injury occurred. The court observed that in a number of jurisdictions one subjected to a compulsory examination is allowed to have the protection and assistance of counsel therein, on the theory that a doctor selected by one party to examine the other may ask improper questions which a lay person should not be expected to evaluate. In other jurisdictions, the court noted, the examinee is denied an unqualified right to an attorney's presence on grounds that the examination should be nonadversarial. The court commented that while an attorney might abuse his presence at a physical examination, most lawyers try to cooperate with doctors. Therefore, the court explained, a balance

29. The reader's attention is directed to Lawrence v Samuels (1897) 20 Misc 15, 44 NYS 602, app dismd 20 Misc 278, 45 NYS 743, a case predating modern discovery rules, in which the court declared that an attorney for a female personal injury plaintiff has no right to be present at a court-ordered physical examination of his client, where the statute authorizing such examinations required that a female plaintiff be examined by a female physician.

30. Observing that in the instant case the defendant's designated physician refused to examine the plaintiff when she appeared at his office with a representative from her attorney's office, and that the trial judge thereafter ordered the plaintiff to submit to examination without the attendance of such a representative, the court remanded the case with a suggestion that the order be reconsidered, and that the judge determine whether it was imperative to have the examination performed by the originally designated physician, or whether other doctors were available who would perform it with counsel or other representative present.

may be struck between the litigant's right to counsel and the need for efficiency in the examination by allowing the examinee to have the advice and benefit of an attorney while the doctor is taking a medical history or gathering facts as to how the examinee was injured, while excluding the attorney from the actual physical examination. The court reasoned that counsel's presence during the actual examination is usually not necessary to insure its objectivity because, by nature, the examination is a nonadversarial procedure. The court observed that the trial judge can still remedy any abuses, such as by excluding from evidence any statements elicited from the examinee while the attorney is not present. The court further explained that if the attorney becomes disruptive during the history portion of the examination, the judge may take steps, including the imposition of sanctions, for failure to cooperate in the discovery process.

§ 6. View that examinee generally has no right to presence of attorney

Reasoning that counsel's presence during a physical examination of the client is ordinarily unnecessary or undesirable, the courts in the following cases held or recognized that a civil litigant, subjected to a physical examination at an opponent's instance by a physician the opponent has designated, generally has no right to the presence of his or her attorney during the examination.

US—Dziwanoski v Ocean Carriers Corp. (1960, DC Md) 26 FRD 595, 4 FR Serv 2d 640; Warrick v Brode (1969, DC Del) 46 FRD 427, 13 FR Serv 2d 992; Neumerski v Califano (1981, ED Pa) 513 F Supp 1011; McDaniel v Toledo, P. & W. R. Co. (1983, CD Ill) 97 FRD 525, 36 FR Serv 2d 101; Wheat v Biesecker (1989, ND Ind) 125 FRD 479.

For Louisiana cases, see § 8.

Minn—Wood v Chicago, M., S. P. & P. R. Co. (1984, Minn App) 353 NW2d 195.

Mo—Jensen v Wallace (1984, Mo App) 671 SW2d 331.

Wis—Whanger v American Family Mut. Ins. Co. (1973) 58 Wis 2d 461, 207 NW2d 74; Karl v Employers Ins. of Wausau (1977) 78 Wis 2d 284, 254 NW2d 255.

An attorney may not be present when his client is physically examined by an opponent's designated physician under Rule 35 of the Federal Rules of Civil Procedure, if the examining party objects, ruled the court in Warrick v Brode (1969, DC Del) 46 FRD 427, 13 FR Serv 2d 992. The court reasoned that such an examination should be divested as far as possible of any adversary character, and that the examining doctor is effectively an officer of the court performing a nonadversary duty. The very presence of an attorney for the examinee, the court commented, injects a partisan character into what should be a wholly objective inquiry. The court observed that if an attending lawyer tried to control the examination, he would be invading the physician's province, and that if he wanted his observations to be the basis for possible contradiction of the doctor, he would be making himself a

witness, contrary to standards of professional ethics. The court pointed out that the absence of counsel does not leave the examinee unprotected, since he may have his own physician present if his wish therefor is communicated to the doctor and the opponent's attorney. Moreover, the court noted, the examinee's attorney may challenge the evidentiary use of information obtained during the examination, and may inspect the report he is entitled to demand under Rule 35. If the trial judge finds that the designated physician cannot be trusted to make a fair examination, the court observed, he may deny an examination or designate another doctor in whom he has confidence. Such measures, the court concluded, adequately safeguard the parties in the ordinary case and equalize their opportunity to discover the true nature and extent of the injuries claimed.

In Wood v Chicago, M., S. P. & P. R. Co. (1984, **Minn** App) 353 NW2d 195, the court held that a personal injury plaintiff has no general right to his attorney's presence during a physical examination by the defendant's chosen physician, although the final decision whether to allow attendance by counsel rests in the trial judge's sound discretion. The court observed that in practice defense counsel favor certain physicians for adverse examinations, and that plaintiffs have similarly identified their favorites, thereby casting physicians in the role of advocates, a result unintended by the civil procedure rules and undesirable from the standpoint of medical ethics. To routinely permit the presence of lawyers during adverse medical examinations, the court reasoned, would thrust the adversary process into the examining room, where the most competent and honorable physicians would be the most sensitive to intrusion, and more partisan doctors might feel challenged to outwit the attorney. The court also observed that remedies already exist for any abuse of the procedure. For example, the court explained, the trial judge may refuse to order a requested examination, or decide that the physician selected by the defendant should not perform the examination. The court also noted that in exceptional cases the judge may allow the plaintiff to tape record the examination, or to have a court reporter or his own doctor present. Furthermore, the court observed, the plaintiff's attorney has the right to a detailed report from the examining physician, and may depose the doctor, cross-examine him, or introduce contrary expert evidence. The court also noted that according to the state's code of interprofessional relations, a doctor taking a medical history for a party adverse to the examinee should not attempt to elicit admissions regarding the accident in issue, and a lawyer ordinarily should not be present when his client is being examined by a physician, whether employed on his own or an adverse party's behalf, although he may discuss with the doctor any aspect of the examination that may be pertinent. The court concluded that exercise of the trial judge's sound discretion, in light of these alternatives, provided the most appropriate safeguard against abuse of the examination procedure.

The court in Jensen v Wallace

(1984, Mo App) 671 SW2d 331, held that a personal injury plaintiff is not entitled to have his attorney attend a court-ordered physical examination by the defendant's physician, and that the trial judge may order that the examination be conducted in the absence of counsel. The court explained that while a party does have a constitutional right to be represented by retained counsel at all stages of litigation, the denial of a party's request to be represented by counsel at a particular stage of the proceeding is a violation of due process only if the particular stage is one of "litigation," and the refusal is arbitrary. The court commented that a judge's refusal to allow a plaintiff's attorney to accompany him at a physical examination substantially differs from a refusal to allow the party's attorney to enter an appearance on his behalf, because the former does not deny the plaintiff his right to be heard. The court further stated that a medical examination is not per se an adversary proceeding, or a stage of litigation presumptively requiring the presence of a party's attorney. The court concluded that the presence of a lawyer for one side would inject a partisan note into what should be a wholly objective inquiry.

§ 7. —But court may admit attorney if examinee establishes need for counsel

The courts in the following cases held or recognized that while a civil litigant physically examined by an opponent's designated physician generally has no right to the presence of his or her attorney during the examination, the trial judge has discretion to permit the lawyer to attend, if the examinee sustains the burden of establishing a need for counsel's presence.

US—Dziwanoski v Ocean Carriers Corp. (1960, DC Md) 26 FRD 595, 4 FR Serv 2d 640; Wheat v Biesecker (1989, ND Ind) 125 FRD 479.

For Louisiana cases, see § 8.

Minn—Wood v Chicago, M., S. P. & P. R. Co. (1984, Minn App) 353 NW2d 195.

Wis—Whanger v American Family Mut. Ins. Co. (1973) 58 Wis 2d 461, 207 NW2d 74; Karl v Employers Ins. of Wausau (1977) 78 Wis 2d 284, 254 NW2d 255.

In Whanger v American Family Mut. Ins. Co. (1973) 58 Wis 2d 461, 207 NW2d 74, the court held that when the defendant in a personal injury action seeks a physical examination of the plaintiff by a physician it has nominated, the trial judge has discretion to permit the plaintiff's attorney to attend the examination, with the burden resting on the plaintiff to show a need for counsel's presence or prejudice if the attorney is not allowed to attend. The court pointed out that in the language of the applicable statute, the judge "may" order such an examination, "upon such terms as may be just." The court observed that while medical examinations are not adversary proceedings per se, and counsel's presence ordinarily adds nothing to their adequacy, a particular plaintiff's personality or sophistication may be such that counsel could give him assurance and assist in communicating, thereby aiding the

physician and facilitating a more accurate examination. Also, the court noted, there may be instances of hostility between the physician and the plaintiff, or reluctance or fear on the latter's part. The court declared that in these and other situations, where the plaintiff establishes a need for assistance by an attorney, counsel should be permitted to attend the examination upon such terms as are just.

§ 8. View that attorney's presence during examination is a matter within court's discretion

The courts in the following cases, without clearly taking a position generally approving or disapproving of counsel's presence at the physical examination of a personal injury plaintiff by the defendant's chosen physician, held that it is within the trial judge's sound discretion whether the plaintiff should be compelled to submit to such an examination without attendance by his attorney.

The court in Robin v Associated Indem. Co. (1973, La) 297 So 2d 427, without clearly expressing a view generally approving or disapproving of the presence of counsel at an adverse medical examination, apparently took the position that whether a personal injury plaintiff's lawyer should be allowed to attend a physical examination of his client, conducted at the defendant's instance by a physician of its choice, is a matter for the trial judge's discretion. If the examining physician is selected by defense counsel, the court noted, there is more reason to anticipate partiality than if the physician is court-appointed. The court also observed that discovery devices, though minimizing surprise in litigation, have not completely removed the partisan nature of a trial. The court acknowledged that there may be occasions when the presence of an attorney could prevent an efficient examination, or, as in the case of a psychiatric interview, so inhibit the examination as to destroy its utility. The court commented, however, that while a lawyer's attendance at the examination may ordinarily be of little help in determining the true facts regarding an injured litigant's condition, it is difficult to find good reason to prohibit the plaintiff from having the reassuring presence of his attorney. Certainly, the court reasoned, an attorney's presence would tend to limit such abuses as improper questioning by the examining physician concerning liability matters. For these reasons, the court explained, it should not and would not hold that an injured litigant is not entitled to have his lawyer present during an adverse physical examination.[31] The court con-

31. The court cited for comparison, without comment or express criticism, the case of Simon v Castille (1965, La App 3d Cir) 174 So 2d 660, application den 247 La 1088, 176 So 2d 145 and cert den 382 US 932, 15 L Ed 2d 344, 86 S Ct 325, in which the court took an apparently more restrictive position that a personal injury plaintiff does not have an absolute right to the presence of an attorney during an adverse physical examination, that the lawyer's attendance is a matter of discretion with the trial judge, and that the plaintiff bears the burden to show special circumstances requiring an attorney's presence during the examination. See also Lindsey v Escude (1965,

cluded that under the circumstances of the instant case, the trial judge did not abuse his discretion in denying the personal injury plaintiff's request to have her attorney present during such an examination.

Likewise, the court in Chaisson v Hartford Ins. Co. (1989, La App 3d Cir) 549 So 2d 1297, without specifying the particular circumstances of the case, held that the trial judge in a personal injury action did not abuse his discretion by permitting the plaintiff's attorney to attend a physical examination of his client by the defendant's medical expert.

Apparently overruling earlier authority that the plaintiff in a personal injury action is ordinarily entitled to the presence of counsel at his physical examination by a doctor of the defendant's choice,[32] the court in State ex rel. Lambdin v Brenton (1970) 21 Ohio St 2d 21, 50 Ohio Ops 2d 44, 254 NE2d 681, without itself taking a position generally approving or disapproving of counsel's presence at such examinations, stated that whether the plaintiff should be compelled to submit to an examination without attendance by his attorney is a matter within the trial judge's sound discretion. If the judge determines that counsel's presence would unduly impede the examining physician, the court explained, he has the power to order that the attorney be excluded.

Without clearly taking a position generally approving or disfavoring counsel's presence at adverse medical examinations, the court in Pemberton v Bennett (1963) 234 Or 285, 381 P2d 705, stated that whether a personal injury plaintiff's attorney may attend his client's physical examination by the defendant's designated physician is a matter within the trial judge's dis-

La App 3d Cir) 179 So 2d 505, involving the issue of prior notice to the plaintiff before issuance of an order that he submit to an adverse medical examination, in which the court, citing the Simon Case, observed that the plaintiff "may be able to assert" good cause why his attorney or some other person should be present at the examination.

32. See Kelley v Smith & Oby Co. (1954, CP) 70 Ohio L Abs 202, 129 NE2d 106; Francisco v Hoffman (1955, CP) 60 Ohio Ops 371, 74 Ohio L Abs 420, 131 NE2d 692; and Steele v True Temper Corp. (1961, CP) 16 Ohio Ops 2d 196, 86 Ohio L Abs 276, 174 NE2d 298, app dismd (App, Ashtabula Co) 31 Ohio Ops 2d 185, 91 Ohio L Abs 594, 193 NE2d 196. In S.S. Kresge Co. v Trester (1931) 123 Ohio St 383, 9 Ohio L Abs 349, 175 NE 611, the court affirmed, on other grounds and apparently without dispute on the issue, a trial judge's order providing in part that the personal injury plaintiff, required to submit to a physical examination by a physician whom the defendant suggested, would be permitted to have her counsel present at the examination. And in Carpenter v Dawson (1954, CP) 60 Ohio Ops 373, 74 Ohio L Abs 257, 138 NE2d 172, an unspecified type of civil action, the trial court, without clearly indicating whether the defendant sought to have the plaintiff physically examined by doctors of its own choosing, ruled that under the circumstances of the case, the defendant was entitled to have the plaintiff undergo a reasonable physical examination, with the right of the plaintiff to have his counsel present during the examination.

cretion. The court acknowledged that unlike an oral deposition, a medical examination does not typically require the assistance of counsel because the examining physician, while not always objective and although selected and compensated by the opponent, usually does not seek to establish facts favorable to the party who engaged him. The court also observed that an attorney's presence could prolong the examination or create an atmosphere making it difficult to determine the examinee's true reactions. As a result, the court commented, it might be harder to secure medical examinations by the most desireable physicians, who regard the procedure as an objective attempt to find the facts, regardless of the consequences to any party. On the other hand, the court pointed out, one who retains a lawyer to represent him in litigation ordinarily may have counsel present at all times for advice in any matter affecting the lawsuit. Moreover, the court explained, there are occasions when the trial judge might find reasonable a request for the presence of an attorney during all or part of an adverse physical examination, given the nature of the medical problem to be investigated, as well as of the examinee, the examiner, and the kind of examination proposed.

2. Under Particular Circumstances

§ 9. Bias or improper conduct

[a] Of examining physician

In the following civil cases, the courts affirmed orders by the trial judge that the plaintiff be physically examined by the defendant's designated physician without the presence of the plaintiff's attorney, because the plaintiff failed to establish alleged bias or improper conduct on the designated physician's part.

Finding the proof insufficient to establish that the physician designated by a personal injury defendant to physically examine the plaintiff was biased, hostile, or engaged in improper conduct prejudicial to the plaintiff, the court in Robin v Associated Indem. Co. (1973, La) 297 So 2d 427, held that the trial judge did not abuse his discretion in denying the plaintiff's request that her attorney be present during the examination. The plaintiff claimed that in the past, the doctor had limited examinees to "multiple choice" answers distorting their medical history and symptoms, that his procedures for recording examinations were irregular, that he was engaged in "forensic orthopedics," and that he was rude. The court, however, found no evidence that the physician had used multiple choice questions or answers, commenting that the doctor was entitled to use questions which, if asked by a lawyer, would be considered leading and suggestive. Nor, the court found, did the plaintiff prove bias and hostility on the doctor's part, noting that over a period of time the doctor had examined an equal number of injured litigants at the request of lawyers for both plaintiffs and defendants. The court further observed that by making serious and unsupported accusations against the physician, the plaintiff's attorney himself created an atmo-

sphere of hostility that could only make it more difficult to determine the truth about the plaintiff's physical condition. The court determined that the trial judge adequately protected the plaintiff's interests by requiring the physician to refrain from questioning the plaintiff on matters pertinent only to a determination of liability, by ordering that any recordings made during the examination be preserved for later production at trial, and by allowing the plaintiff's husband to attend the examination.

Despite an affidavit by a personal injury plaintiff's attorney, stating that in his experience doctors conducting physical examinations for defendants sometimes improperly question the plaintiff concerning details germane only to negligence and liability issues, and that the particular physician designated by the instant defendant to physically examine the plaintiff once had a different plaintiff examined by other doctors without authority to do so, the court in Simon v Castille (1965, La App 3d Cir) 174 So 2d 660, application den 247 La 1088, 176 So 2d 145 and cert den 382 US 932, 15 L Ed 2d 344, 86 S Ct 325, held proper the trial judge's order that the examination be conducted without the plaintiff's attorney in attendance. The court commented that the affidavit essentially indicted all physicians conducting physical examinations for defendants as "agents" of those parties, who will conduct their examinations improperly and testify at the trial so as to favor the defendant. The court explained that such a premise cannot be accepted, and that it must be presumed that doctors will conduct their physical examinations properly. The court acknowledged that if for good cause shown the trial judge decides that a particular doctor may act improperly, he may refuse the request for an examination, designate another doctor in whom he has confidence, limit the scope of the examination, or require as a condition that the plaintiff's counsel be present. However, the court concluded, no such cause had been shown in the instant case.[33]

[b] Of attorney or legal representative

The courts in the following cases held improper orders by the trial judge that the plaintiff submit to a physical examination by the defendant's designated physician without attendance by the plaintiff's attorney or legal representative, in the absence of sufficient proof that the attorney or representative would interfere with the examination or had previously attempted to do so.

Noting the absence of proof or findings by the trial judge to support a personal injury defendant's claim that a law clerk employed by the plaintiff's attorney, who accompanied the plaintiff to a physical examination to be conducted by a defense-designated physician, interfered with the examination by refusing to permit the plaintiff to sign various releases, to answer certain questions asked of her by the doctor's secretary, or to remove her clothing at the doctor's request, the court in Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612, held that the judge abused his discretion, following the doctor's termination of the examination, in ordering that the plaintiff submit to further physical examination by the doctor in the absence of the plaintiff's attorneys or anyone representing them.

Finding nothing in the record to indicate that the personal injury plaintiffs' attorney would interfere with the conduct of a physical examination of one of the plaintiffs by the defendants' designated physician, the court in Lamendola v Slocum (1989, 3d Dept) 148 App Div 2d 781, 538 NYS2d 116, held that the trial judge erred in granting the defendants' motion that the examination be conducted without the attorney's presence.

§ 10. Presence of other third person

The court in the following case held that a personal injury plaintiff was entitled to her attorney's presence during her physical examination by the defendant's designated physicians, notwithstanding the defendant's proposal that a court reporter attend the examination in lieu of plaintiff's counsel.

The plaintiff in a personal injury action was entitled to have her attorney present during a pretrial physical examination to be made by doctors on behalf of the defendant, ruled the court in Munoz v Superior Court of Santa Clara County (1972, 1st Dist) 26 Cal App 3d 643, 102 Cal Rptr 686, despite the defendant's proferred stipulation that in lieu of counsel's attendance, a court reporter could be present at the time of examination, with all questions by the doctor subject to objections to be ruled on by the trial judge. The defendant argued that this arrangement, which the plaintiff rejected, would be sufficient to protect the plaintiff from any improper questioning. Rejecting this claim, the court reasoned that while a plaintiff may have a court reporter present to insure the accurate reporting of what occurs during the examination, this does not substitute for an attorney's presence, which serves the different purpose of preventing inquiries not reasonably related to the examination's legitimate scope.

But in Robin v Associated Indem. Co. (1973, La) 297 So 2d 427, the facts of which are more fully discussed in § 9[a], the court held that the trial judge in a personal injury action did not abuse his discretion in denying the plaintiff's request that her attorney be present during her physical examination by the defendant's designated physician, despite allegations that that physician was rude, biased in the defendant's favor, and had conducted examinations of others in an improper manner, finding that the judge adequately protected the plaintiff's interests by allowing her husband to attend the examination.

B. Presence of Examinee's Physician

1. General Rules

§ 11. View that examinee ordinarily may have physician present

In the following cases, the courts

33. This case may have been overruled, to the extent it recognized a general rule against counsel attendance at adverse medical examinations and imposed on plaintiffs the burden to show special need before such attendance could be permitted, in Robin v Associated Indem. Co. (1973, La) 297 So 2d 427, § 8.

held or recognized that ordinarily, a party in a civil action may have his or her own physician present during a physical examination of the party by an opponent's doctor or medical expert.

US—Sanden v Mayo Clinic (1974, CA8 Minn) 495 F2d 221, 18 FR Serv 2d 1439 (attendance by physician usually permitted, subject to court's discretion).

Dziwanoski v Ocean Carriers Corp. (1960, DC Md) 26 FRD 595, 4 FR Serv 2d 640 (if examinee informs doctor and attorney for other side); Warrick v Brode (1969, DC Del) 46 FRD 427, 13 FR Serv 2d 992 (same).

Fla—Bartell v McCarrick (1986, Fla App D4) 498 So 2d 1378, 12 FLW 79 (subject to court's discretion).

Ga—Pollard v Page (1937) 56 Ga App 503, 193 SE 117.

Idaho—Greenhow v Whitehead's, Inc. (1946) 67 Idaho 262, 175 P2d 1007.

Ohio—Francisco v Hoffman (1955, CP) 60 Ohio Ops 371, 74 Ohio L Abs 420, 131 NE2d 692.[34]

The court in Warrick v Brode (1969, DC Del) 46 FRD 427, 13 FR Serv 2d 992, while ruling that an attorney generally may not be present when his client is physically examined by an opponent's designated physician under Rule 35 of the Federal Rules of Civil Procedure, stated that as an alternative means of protecting the examinee's interests, a physician of the examinee's choice may attend, if the examinee communicates his or her wish therefor to the doctor and attorney for the other side.

And the court in Greenhow v Whitehead's, Inc. (1946) 67 **Idaho** 262, 175 P2d 1007, observing that a personal injury plaintiff was entitled to have her own attending physician present during her physical examination by the defendant's doctors, ruled that the trial judge improperly dismissed the case after the plaintiff failed to appear for the examination, because the judge's order fixed the time for the examination as 12:30 p.m. on the very day the order was issued, leaving the plaintiff insufficient time to arrange to have her doctor present.

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See the following additional cases, apparently involving no actual dispute as to whether a personal injury plaintiff could have his or her own doctor present during a physical examination of the plaintiff by the defendant's designated

34. This case may have been overruled by State ex rel. Lambdin v Brenton (1970) 21 **Ohio** St 2d 21, 50 Ohio Ops 2d 44, 254 NE2d 681, § 8, to the extent it recognized that a personal injury plaintiff is generally entitled to have counsel present during his or her physical examination by the defendant's designated physician.

See also Carpenter v Dawson (1954, CP) 60 **Ohio** Ops 373, 74 Ohio L Abs 257, 138 NE2d 172, an unspecified type of civil action, in which the trial court, without clearly indicating whether the defendant sought to have the plaintiff physically examined by doctors of its own choosing, ruled that under the circumstances of the case, the defendant was entitled to have the plaintiff undergo a reasonable physical examination, with the right of the plaintiff to have his physician present during the examination.

physician, in which the courts issued an order, or approved on other grounds an order issued by or proposed to the trial judge, permitting one or more doctors of the plaintiff's choice to attend the examination.

US—Klein v Yellow Cab Co. (1944, DC Ohio) 7 FRD 169, 60 Ohio Ops 369, 74 Ohio L Abs 337.

Ohio—S.S. Kresge Co. v Trester (1931) 123 Ohio St 383, 9 Ohio L Abs 349, 175 NE 611.

Pa—Hess v Lakeshore & M. S. R. Co. (1890) 7 Pa Co 565.

Wis—White v Milwaukee C. R. Co. (1884) 61 Wis 536, 21 NW 524.

§ 12. —But court may bar physician if opponent establishes need for exclusion

The court in the following case held that while a personal injury plaintiff ordinarily may have his or her own doctor present during a physical examination by the defendant's designated physician, the trial judge has discretion to order that the examination be conducted without the examinee's physician present, if the opponent sustains the burden of establishing a need to conduct the examination without him.

In Bartell v McCarrick (1986, **Fla** App D4) 498 So 2d 1378, 12 FLW 79, the court declared that although a personal injury plaintiff subjected to a compulsory physical examination by the defendant's chosen physician ordinarily may have his or her own doctor present during the examination, the trial judge may prohibit attendance by the plaintiff's physician, in his sound discretion, if the defendant sustains the burden of establishing a valid reason why the examination should be conducted without that physician. The court observed that an examining doctor selected by the defendant is not necessarily indifferent to the parties' conflicting interests. However, the court explained, a variety of factors may militate against a hard-and-fast rule regarding attendance by the plaintiff's doctor, such as language barriers, inability to engage a physician who will perform the examination in a third person's presence, the patient's particular physical or psychological needs, and the local customs and practices of the bar and medical profession. Accordingly, the court reasoned, trial judges are in the best position to decide the issue of attendance by the plaintiff's physician on a case-by-case basis.

§ 13. View that attendance by examinee's physician allowable, in special circumstances

While not taking a clear position generally approving or disapproving attendance by a civil party's own doctor at a physical examination of the party by an opponent's physician, the courts in the following cases held or recognized that in special circumstances the trial judge may, in his discretion, permit the examinee to have his or her own physician present during the examination.

The court in Simon v Castille (1965, **La** App 3d Cir) 174 So 2d 660, application den 247 La 1088, 176 So 2d 145 and cert den 382 US 932, 15 L Ed 2d 344, 86 S Ct 325, indicated that whether a personal injury plaintiff may have his

or her own physician attend a physical examination by the defendant's doctor is a matter for the trial judge's discretion, and that the plaintiff must show special circumstances warranting the physician's presence. The court observed that if, for example, a female plaintiff objected to being examined by a strange physician without the presence of her own doctor, a relative, or other person, this might be good cause for requiring, as a condition of the examination, that it be conducted in such third person's presence.[35]

Without taking a clear position generally approving or disapproving attendance by a personal injury plaintiff's own doctor at a physical examination conducted by the defendant's physician, the court in Wood v Chicago, M., S. P. & P. R. Co. (1984, Minn App) 353 NW2d 195, commented that in "exceptional cases" the trial judge may feel compelled to condition an order for such an examination on a requirement that it be performed in the presence of the plaintiff's physician. The court expressed agreement with the proposition that while an examinee does not have a general right to his attorney's presence during the examination, he may properly ask that his personal doctor attend, in order to insure that the examination follows any procedures or conditions specified by the judge.

See Mertz v Bradford (1989, 4th Dept) 152 App Div 2d 962, 543 NYS2d 786, in which the court, without expressing a view generally approving or disfavoring attendance by the examinee's own doctor at a physical examination by an opponent's physician, held that the plaintiffs in an unspecified type of civil action failed to demonstrate "special circumstances" warranting the presence of their own medical representative at a physical examination to be conducted by doctors designated for that purpose by the defendants.

§ 14. View that examinee not entitled to physician's presence

The court in the following case held that a personal injury plaintiff has no unqualified right to the presence of his or her own doctor during a physical examination by the defendant's physician, because attendance by an attorney or court reporter is adequate to protect the plaintiff's interests.

In Long v Hauser (1975, 4th Dist) 52 Cal App 3d 490, 125 Cal Rptr 125, the court held that a personal injury plaintiff has no unqualified right, during a physical examination by the defendant's chosen doctor, to the presence of his or her own physician. The court observed that the plaintiff is entitled to have an attorney and a court reporter attend the examination, and reasoned that their presence adequately discourages inquiries not reasonably related to

35. To the extent the court similarly required of the plaintiff a showing of special circumstances before permitting attendance by his or her attorney, this case may have been overruled by Robin v Associated Indem. Co. (1973, La) 297 So 2d 427, § 8, in which the court apparently took the position that whether a plaintiff's lawyer should be allowed to attend an adverse physical examination of his client is simply a matter for the trial judge's discretion.

the examination's legitimate scope, which is to discover the true nature and extent of the injuries claimed. This purpose can best be achieved, the court explained, by divesting the examination as far as possible of any adversary character, and by strictly limiting the number of unessential participants.

2. Under Particular Circumstances

§ 15. Embarassment of female examinee

In the following case, the court declared that a female personal injury plaintiff's objection to a physical examination by an unfamiliar doctor acting for the defendant, without the presence of her own physician, might justify a requirement that the examination be conducted in that physician's presence.

The court in Simon v Castille (1965, La App 3d Cir) 174 So 2d 660, application den 247 La 1088, 176 So 2d 145 and cert den 382 US 932, 15 L Ed 2d 344, 86 S Ct 325, ruling that it was within the trial judge's discretion whether to allow a personal injury plaintiff's physician to attend the plaintiff's physical examination by the defendant's designated doctor, based on the plaintiff's showing of special circumstances warranting her physician's presence,[36] stated that a female plaintiff's objection to being examined by a strange physician, without the presence of her own doctor, might constitute good cause for imposing a condition on the examination requiring that it be conducted in that doctor's presence.

See Sanden v Mayo Clinic (1974, CA8 Minn) 495 F2d 221, 18 FR Serv 2d 1439, the facts of which are more fully discussed in § 16, in which the court held that the trial judge in a medical malpractice action, involving an allegedly negligent radical hemorrhoidectomy, did not abuse his discretion by requiring the female plaintiff to undergo a mid-trial physical examination and testing of her anal sphincter muscle by the defendants' medical expert, without the presence of her own physicians, where the plaintiff, who was a registered nurse, advanced no argument that a physician of her own choosing was needed to protect her privacy, or to shield her from embarrassment.

§ 16. Subsequent examination by examinee's own doctors

The trial judge in a personal injury action did not prejudicially err in ordering that the plaintiff be physically examined by the defendant's medical expert without a doctor of her choice in attendance, ruled the court in the following case, where the plaintiff's own physician examined her a few hours after the adverse examination, and three other doctors who examined the plaintiff testified in her behalf.

36. To the extent the court similarly required of the plaintiff a showing of special circumstances before permitting attendance by his or her attorney, this case may have been overruled by Robin v Associated Indem. Co. (1973, La) 297 So 2d 427, § 8, in which the court apparently took the position that whether a plaintiff's lawyer should be allowed to attend an adverse physical examination of his client is simply a matter for the trial judge's discretion.

In Sanden v Mayo Clinic (1974, CA8 Minn) 495 F2d 221, 18 FR Serv 2d 1439, the court held that the trial judge in a medical malpractice action did not abuse his discretion by requiring the plaintiff to undergo a physical examination by the defendants' medical expert, without the presence of a physician chosen by the plaintiff, where her own doctor examined her shortly afterward. The plaintiff alleged that the her anal sphincter muscle and associated nerves were permanently damaged through the negligent performance of a radical hemorrhoidectomy, while the defendant hospital and physicians claimed that the plaintiff was feigning the alleged injury. The examination, ordered on the third day of trial, was to include an electromyographic study of the plaintiff's anal sphincter, which distinguishes healthy, intact nerves from damaged ones. The examining physician testified at trial that the electromyograph indicated that the muscles and nerves in question were normal, and that any abnormal reaction displayed by the plaintiff resulted from her purposeful efforts to determine the test's outcome. This doctor's conclusions were contradicted by the testimony of three other physicians who examined the plaintiff and testified in her behalf. The plaintiff argued that the judge's refusal to allow one of her physicians to attend the adverse medical examination was prejudicially erroneous, because of the importance of the electromyographic study in resolving the disputed factual questions, and because of the conflicting testimony elicited regarding the test results. Rejecting this claim, the court pointed out that the plaintiff's own physician examined her a few hours after the adverse examination, and that the jury had before it extensive medical evidence in addition to testimony by the defendants' expert, from a variety of doctors, upon which to base its findings of fact. In this context, the court concluded, no prejudice resulted from the judge's refusal to permit the plaintiff's own physician to attend the adverse examination.

III. Mental Examination

A. Presence of Examinee's Attorney

1. General Rules

§ 17. View that examinee ordinarily may have attorney present

The courts in the following cases held or recognized that a civil litigant subjected to a mental examination by an opponent's designated physician ordinarily may have his or her attorney present during the examination, except, as parenthetically indicated, where the attorney interferes with the examination or the opponent shows a need to conduct the examination without counsel.

US—Zabkowicz v West Bend Co. (1984, ED Wis) 585 F Supp 635, 35 BNA FEP Cas 209, 39 FR Serv 2d 1294, later proceeding (ED Wis) 589 F Supp 780, 35 BNA FEP Cas 610, 35 CCH EPD ¶ 34766, later proceeding (ED Wis) 601 F Supp 139, 36 BNA FEP Cas 1540, 37 CCH EPD ¶ 35242, affd in part and revd in part (CA7 Wis) 789 F2d 540, 40 BNA FEP Cas 1171, 40 CCH EPD ¶ 36089, 4 FR Serv 3d 1229 (disagreed with on other grounds by multiple cases as stated in Huffman v Hains (CA7 Ind) 865 F2d 920).

Alaska—Langfeldt-Haaland v Saupe Enterprises, Inc. (1989, Alaska) 768 P2d 1144, 84 ALR4th 547.

Ill—Eskandani v Phillips (1975) 61 Ill 2d 183, 334 NE2d 146 (statute expressly providing).

Mich—Nemes v Smith (1971) 37 Mich App 124, 194 NW2d 440 (rule expressly providing).[37]

NY—Ponce v Health Ins. Plan (1984, 2d Dept) 100 App Div 2d 963, 475 NYS2d 102 (as long as attorney does not interfere with examination); Nalbandian v Nalbandian (1986, 2d Dept) 117 App Div 2d 657, 498 NYS2d 394.

Reardon v Port Authority of New York & New Jersey (1986) 132 Misc 2d 212, 503 NYS2d 233 (absent compelling showing of need for examination without attorney); Gray v Victory Memorial Hosp. (1989) 142 Misc 2d 302, 536 NYS2d 679.

For Ohio cases, see § 20.

Pa—Koch v Galardi (1979, Pa CP Allegheny Co) 11 D&C 3d 750 (absent showing that counsel's presence will interfere with examination).

Wash—Tietjen v Department of Labor & Industries (1975) 13 Wash App 86, 534 P2d 151.

In Zabkowicz v West Bend Co. (1984, ED Wis) 585 F Supp 635, 35 BNA FEP Cas 209, 39 FR Serv 2d 1294, later proceeding (ED Wis) 589 F Supp 780, 35 BNA FEP Cas 610, 35 CCH EPD ¶ 34766, later proceeding (ED Wis) 601 F Supp 139, 36 BNA FEP Cas 1540, 37 CCH EPD ¶ 35242, affd in part and revd in part (CA7 Wis) 789 F2d 540, 40 BNA FEP Cas 1171, 40 CCH EPD ¶ 36089, 4 FR Serv 3d 1229 (disagreed with on other grounds by multiple cases as stated in Huffman v Hains (CA7 Ind) 865 F2d 920), in which a female employee and her husband sought damages from the wife's employer and co-workers for emotional distress caused by sexual harassment on the job, the court ruled that the plaintiffs were entitled to have legal counsel present during their mental examination by a defense psychiatrist. The plaintiffs argued that attendance by a third party was necessary to assure that the defendants' expert did not probe beyond permissible limits, and that an unsupervised examination could easily be transformed into a de facto deposition. The defendants asserted that a third party's presence might create inhibitions detrimental to a psychiatric interview. The court explained that in the context of an adversary proceeding, the plaintiffs' interest in protecting themselves from unsupervised interrogation by their oppo-

37. In Feld v Robert & Charles Beauty Salon (1989) 174 Mich App 309, 435 NW2d 474, app gr, in part 433 Mich 879, 446 NW2d 169 and revd on other grounds 435 Mich 352, a later workers' compensation case, the court referred to the general discovery rule cited in Nemes as "then applicable," but did not mention any new or amended rule. Accordingly, the reader is advised to consult the latest compilation of Michigan civil procedure rules to verify the current status of the one applied in Nemes.

nents' agent outweighed the defendants' interest in making the most effective use of their expert. The court observed that this expert was being engaged to advance the defendants' interests, and therefore could not be considered a neutral party. The court also found that the defendants might derive numerous advantages from an unsupervised examination, unrelated to the emotional damage issue. The court concluded that the role of the defendants' expert in the truth-seeking process was not sufficiently impartial to justify the license which the defendants sought.

See Barraza v 55 West 47th Street Co. (1989, 1st Dept) 156 App Div 2d 271, 548 NYS2d 660, in which the court, citing Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612, § 3, but not expressing a view as to an examinee's general right to the presence of counsel or an opponent's burden to establish the need for examination without counsel, stated that a decision whether to exclude the examinee's attorney, on the ground that his presence might interfere with the examination, must be considered in the light of the facts and circumstances of each case.

The plaintiff in a personal injury action may have his or her attorney present during a mental examination conducted at the defendant's instance by a physician of its choice, absent a compelling showing that the examination needs to be conducted outside the attorney's presence, ruled the court in Reardon v Port Authority of New York & New Jersey (1986) 132 Misc 2d 212, 503 NYS2d 233. Citing Jakubowski v Lengen (1982, 4th Dept) 86 App Div 2d 398, 450 NYS2d 612, § 3, the court reasoned that the possible adversary status of the defendant's examining doctor is ordinarily a compelling reason to permit attendance by plaintiff's counsel, so as to guarantee, for example, that the doctor does not interrogate the plaintiff on liability questions in order to obtain damaging admissions. In addition, the court explained, information obtained by the plaintiff's attorney at the examination, concerning the way in which it was conducted, may be helpful on cross-examination. The court noted an affidavit in the instant case by the defendant's proposed examining psychiatrist, stating that the presence of the plaintiff's attorney during the examination, as an interested third party, would be inappropriate and would invalidate the examination. The court, however, found such claims conclusory, self-serving, and not supported by any independent authority. In any event, the court stated, conduct by an attorney amounting to actual interference with the examination may be dealt with by the trial judge.

And in Tietjen v Department of Labor & Industries (1975) 13 Wash App 86, 534 P2d 151, the court held that a plaintiff required to submit to a psychiatric examination by the defendant's designated physician, pursuant to the state's counterpart to Rule 35 of the Federal Rules of Civil Procedure, is entitled to have his attorney present at the examination.[88] The court observed that a plaintiff is generally entitled to have his attorney present during a physical examination requested by the defendant, and found no basis for applying a different rule to psychiatric examinations. The court reasoned that such an examination is a legal proceeding, at which the plaintiff is entitled to representation. The court pointed out that a confidential or privileged physician-patient relationship does not exist where the plaintiff in a personal injury action is examined by a physician at the defendant's request. Moreover, the court noted, there may be questions which the plaintiff may refuse to answer, such as those involving possible self-incrimination. An attorney insures that the procedure, tests, and results are reported accurately, the court explained, and that the examination does not become a deposition as to the facts in issue. The court commented that any unnecessary interference caused by an attorney can be alleviated by specific court order.

§ 18. View that examinee generally has no right to presence of attorney

Generally reasoning that a third person's presence during a mental examination necessarily interferes with the close communication between examinee and physician necessary to the procedure's effectiveness, the courts in the following cases held or recognized that a civil litigant, subjected to a mental examination at an opponent's instance by a physician of the opponent's choice, generally has no right to the presence of his or her attorney during the examination.

US—Brandenberg v El Al Israel Airlines (1978, SD NY) 79 FRD 543, 25 FR Serv 2d 18; Neumerski v Califano (1981, ED Pa) 513 F Supp 1011; Lowe v Philadelphia Newspapers, Inc. (1983, ED Pa) 101 FRD 296, 44 BNA FEP Cas 1224, 37 FR Serv 2d 1154, later proceeding (ED Pa) 594 F Supp 123, 79 ALR Fed 207; Cline v Firestone Tire & Rubber Co. (1988, SD W Va) 118 FRD 588; Wheat v Biesecker (1989, ND Ind) 125 FRD 479.

Ariz—Pedro v Glenn (1968) 8 Ariz App 332, 446 P2d 31; Burton v Industrial Com. (1990, Ariz App) 67 Ariz Adv Rep 28.

Cal—Edwards v Superior Court of Santa Clara County (1976) 16 Cal 3d 905, 130 Cal Rptr 14, 549 P2d 846; Vinson v Superior Court (1987) 43 Cal 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301.

Whitfield v Superior Court of Los Angeles County (1966, 2nd Dist) 246 Cal App 2d 81, 54 Cal Rptr 505.

Del—Rochen v Huang (1988, Del Super) 558 A2d 1108.

For Ohio cases, see § 20.

Wis—Karl v Employers Ins. of Wausau (1977) 78 Wis 2d 284, 254 NW2d 255.

88. While the particular matter before the court involved a workers' compensation claim, the court ruled that the state's Rule 35 counterpart applied in all civil proceedings.

The court in Pedro v Glenn (1968) 8 Ariz App 332, 446 P2d 31, recognized that a civil litigant mentally examined at an opponent's instance by its designated physician is not generally entitled to have an attorney present during the examination, and ruled that the trial judge in a personal injury action abused his discretion by conditioning the defendants' right to discovery, through a psychiatric examination of the plaintiffs under the state's counterpart to Rule 35 of the Federal Rules of Civil Procedure, on a requirement that the examination be conducted in the "unobtrusive" presence of the plaintiffs' counsel or a court reporter. The plaintiffs urged that the presence of their attorney or a court reporter during the examination was a matter of right, that it was necessary to protect them from improper questions on privileged matters,[39] and that the trial judge's order was authorized by language in the applicable rule permitting the judge to specify the "conditions" of the examination. The defendants, on the other hand, presented an affidavit by the appointed examining physician, who stated that a third person's presence during the examination would cause the examinees to consciously or unconsciously alter or disguise their responses, and that this would undermine the validity of any psychiatric evaluation based on the interview. Agreeing with the defendants, the court explained that while a judge has broad discretion to condition examinations under the rule, his actions must be reasonable under the circumstances of the case. The court commented that given the avowed purpose for having an attorney present during the examination, it was difficult to visualize his "unobtrusive presence" as contemplated by the judge's order. A psychiatric interview is useless, the court declared, if it cannot be carried out in an atmosphere conducive to the formulation of a sound professional opinion. The court observed that certain questions are necessary in such an interview which go beyond those usually asked of a patient in a physical examination. The court also rejected the notion that merely because an appointed physician is suggested by a defendant, his testimony is necessarily suspect. As an alternative to a lawyer's presence, the court explained, the examinee may request a copy of the physician's report, and may thereafter take the doctor's deposition, where he has an opportunity to lay a foundation for objections before and during presentation of the medical evidence at trial. Another possible alternative, the court commented, is to withdraw claims for psychiatric damage.

In Edwards v Superior Court of Santa Clara County (1976) 16 Cal 3d 905, 130 Cal Rptr 14, 549 P2d 846, a personal injury action claiming emotional damages, the court held that a civil litigant is not entitled to have his or her attorney present during a psychiatric examination conducted of the litigant by an opposing party's chosen physician. The court observed that the statute authorizing such examinations neither expressly nor impliedly required the presence of counsel for the examinee. The court acknowledged its earlier holding in Sharff v Superior Court of San Francisco (1955) 44 Cal 2d 508, 282 P2d 896, 64 ALR2d 494, § 3, that a personal injury plaintiff may not be required to submit to a physical examination by the defendant's doctor without the presence of an attorney, but declared that this rule does not apply to mental examinations. The court reasoned that unlike a physical examination, a psychiatric interview is almost wholly devoted to a careful probing of the examinee's mind in order to accurately determine his mental condition, requiring a degree of rapport between the physician and examinee that may be hindered by the presence and participation of counsel. Therefore, the court said, a psychiatric examination should ordinarily be conducted without an attorney if it is to be an effective device for ascertaining the truth. The court further found that the presence of counsel is not an appropriate means to protect the examinee from "improper" questions, because an attorney lacks the specialized knowledge and skill necessary to discern the value of questions which might be legally objectionable if posed in a courtroom, but are very relevant in the formulation of a sound psychiatric judgment. The court also explained that permitting the lawyer to attend a psychiatric examination for purposes of lending the examinee comfort or support presents difficult questions of limitation, since a relative, religious adviser, or psychiatric counselor might furnish still better support, yet reduce the likelihood of establishing the rapport necessary to a meaningful interview. Nor is counsel's presence required to assure accuracy in reporting the examination, said the court; if the examinee knows his statements are being recorded verbatim, he might react defensively, thereby preventing the free, open, and objective communication essential to an effective psychiatric examination. The court stressed the availability of other procedural devices to protect the examinee's interests, such as deposition of the examiner and discovery of his notes and records; the assistance of a favorable psychiatric expert to contradict the examiner's conclusions or prompt the attorney before or during trial into every conceivable area of legitimate inquiry; and the availability of cross-examination to test the examiner's conclusions and reasoning, and to reveal the specific questions and answers exchanged between the examiner and examinee. The court concluded that, particularly where the examinee's own psychiatrist has had prolonged and unlimited access to the examinee for analysis and treatment, fundamental fairness requires that a similar unrestricted professional exposure for a brief period be allowed to the other side.[40]

39. The plaintiffs specifically claimed that without their lawyer in attendance, they might be questioned in violation of their right against self-incrimination regarding possibly excessive narcotics use by one of the plaintiffs due to his injuries.

40. The rule announced in this case was clarified in Vinson v Superior Court (1987) 43 Cal 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301, § 19.

§ 19. —But court may admit attorney if examinee shows good cause for counsel's presence

In the following cases, the courts held or recognized that while a civil litigant mentally examined by an opponent's designated physician generally has no right to the presence of his or her attorney during the examination, the trial judge has discretion to permit the lawyer to attend, if the examinee sustains the burden of establishing good cause for counsel's presence.

The court in Cline v Firestone Tire & Rubber Co. (1988, SD W Va) 118 FRD 588, a personal injury action, stated that a civil litigant mentally examined by an opponent's physician, pursuant to Rule 35 of the Federal Rules of Civil Procedure, should not be allowed to have his or her attorney present during the examination, unless the examinee shows good cause for the lawyer's attendance.

In Vinson v Superior Court (1987) 43 Cal 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301, the court declared that while a civil litigant is not generally entitled to the presence of counsel at his or her mental examination by an opponent's physician, it is within the trial judge's discretion to allow attendance by the attorney in an individual case, where the examinee shows good cause to permit such attendance. The court stated that its earlier holding in Edwards v Superior Court of Santa Clara County (1976) 16 Cal 3d 905, 130 Cal Rptr 14, 549 P2d 846, § 18, should be viewed as standing for the proposition that the presence of an attorney is not required during a mental examination. The court explained that in light of their broad discretion in discovery matters, trial judges retain the power to permit counsel's presence, or to take other prophylactic measures when needed.

For Ohio cases, see § 20.

And in Karl v Employers Ins. of Wausau (1977) 78 Wis 2d 284, 254 NW2d 255, the court held that while counsel generally will not be allowed to attend a personal injury plaintiff's mental examination by a physician of the defendant's choice, the matter of such attendance remains within the trial judge's sound discretion, and may be permitted if the plaintiff sustains the burden of showing need for the attorney's presence or prejudice if counsel is not allowed to attend. The court adopted the reasoning of Whanger v American Family Mut. Ins. Co. (1973) 58 Wis 2d 461, 207 NW2d 74, § 7, in which it was observed that while medical examinations are not adversary proceedings per se, and counsel's presence ordinarily adds nothing to their adequacy, a particular plaintiff's personality or sophistication may be such that counsel could give him assurance and assist in communicating, thereby aiding the physician and facilitating a more accurate examination, and that there may be instances of hostility between the physician and the plaintiff, or reluctance or fear on the latter's part.

§ 20. Ohio cases

Ohio courts have taken divergent positions on the extent of a civil litigant's right to the presence of counsel during a mental examination by the opponent's physician. In the following case, the court held that a personal injury plaintiff's attorney may be excluded from a mental examination of the client conducted by the defendant's doctor, if the doctor reasonably objects to the lawyer's presence, except that counsel may attend that portion of the examination seeking information on the facts of the accident and the plaintiff's injuries at that time.

In Kelley v Smith & Oby Co. (1954, CP) 70 Ohio L Abs 202, 129 NE2d 106, the court held that absent preponderating evidence that the best psychiatric practice permits or precludes the attendance of third persons at a psychiatric interview, a personal injury plaintiff's attorney may be excluded from a mental examination of the plaintiff conducted by a physician on the defendant's behalf, if such physician reasonably objects to the attorney's presence, except that counsel may attend that portion of the examination seeking information as to the facts of the accident and injuries sustained by the plaintiff at that time. The court acknowledged that a plaintiff's counsel may generally attend a physical examination conducted at the defendant's instance, but noted an affidavit by the instant defendant's psychiatric expert that a mental examination cannot be properly performed in the presence of interested third persons, which causes a patient to consciously or unconsciously guard, alter, or disguise his responses, and that any diagnosis or evaluation of a patient's condition is of questionable validity where the examination is performed with such persons present. The plaintiff, on the other hand, submitted an affidavit by another psychiatrist, who stated that the exclusion of third persons is not necessary for a proper psychiatric examination. The court stated that given this conflict, the controlling criterion should be the reasonable wishes of the examining psychiatrist, who bears the responsibility of rendering an honest and authentic appraisal of the plaintiff's condition. The court found reasonable the defense psychiatrist's insistence that a third person's presence during the interview would result in distorted responses, given the purely subjective nature of a psychiatric examination. Nevertheless, the court concluded, such an examination must be limited to the plaintiff's claims of physical or mental injury, pain, and suffering, and the prior physical and mental history of the plaintiff and his family. Questions regarding the facts of the accident are permissible only in so far as they relate to the nature and extent of the injuries sustained at that time, the court emphasized, and such questions must be put to the plaintiff in his attorney's presence.[41]

But in Nomina v Eggeman

41. The court distinguished neurological examinations, involving nervous and muscular reactions not subject to the patient's will nor influenced by the presence of a third party, which, the court said, must be open to the plaintiff's counsel like other physical examinations. However, this case may have been overruled by State ex rel. Lambdin v Brenton (1970) 21 Ohio St 2d 21, 50 Ohio Ops 2d 44, 254 NE2d 681, § 8, to the extent it recognized

(1962, CP) 26 **Ohio** Ops 2d 122, 90 Ohio L Abs 57, 188 NE2d 440, the court held that a personal injury plaintiff subjected to a psychiatric examination by the defendant's doctor is entitled to have his or her attorney present during the examination. The court acknowledged the ruling in Kelley v Smith & Oby Co. (1954, CP) 70 **Ohio** L Abs 202, 129 NE2d 106 (this section), that the plaintiff can be compelled to undergo a psychiatric examination without counsel's presence, based on the examining physician's opinion that the interview can be effective only on that basis, but found no legal authority supporting that view. Instead, the court expressed its agreement with the reasoning of Sharff v Superior Court of San Francisco (1955) 44 **Cal** 2d 508, 282 P2d 896, 64 ALR2d 494, § 3, that the plaintiff's attorney should be allowed to attend an examination by the defendant's physician in order to protect his client from improper questioning as to medically irrelevant or confidential matters, and stated that in a compelled psychiatric examination by the defendant's physician, the plaintiff is required only to answer such questions as may be properly asked of him at a deposition with counsel present. The court commented that while this rule might restrict psychiatric examinations to some degree, it represented a reasonable compromise between the utmost discovery and the rights of the plaintiff.

Likewise, the court in State ex rel. Staton v Common Pleas Court (1964, Franklin Co) 4 **Ohio** App 2d 10, 33 Ohio Ops 2d 9, 211 NE2d 63, relying on the Nomina Case and agreeing with its opinion that the holding in Kelley v Smith & Oby Co. (1954, CP) 70 **Ohio** L Abs 202, 129 NE2d 106 (this section), lacked decisional authority, ruled that a plaintiff could not be compelled to submit to a psychiatric examination, apparently sought by the defendant in a personal injury action, without the presence of her attorney.

2. Effect of Particular Circumstances or Claims

§ 21. Examinee's emotional state[42]

The court in the following case held that a plaintiff claiming emotional injury did not have a right to her lawyer's presence during her mental examination by the defendant's psychiatrist, although she expressed dislike and fear of the doctor, and despite her own psychiatrist's affirmation that it might be dangerous for her to be examined without the support of counsel, given her history of severe depression.

In Edwards v Superior Court of Santa Clara County (1976) 16 **Cal** 3d 905, 130 Cal Rptr 14, 549 P2d 846, the court held that a personal injury plaintiff alleging emotional damages was not entitled to have her attorney present during her mental examination by the defendant's designated psychiatrist, despite her expressed dislike and fear of that doctor, and although her own psychiatrist submitted an affidavit stating that given the plaintiff's history of severe depression, it might be dangerous to subject her to a psychiatric examination without the presence of someone with whom she could identify as a supporting force, such as her attorney. The plaintiff argued that counsel's presence would give her comfort, assurance, and emotional support when facing a hostile examination. The court, however, reasoned that depending on the examinee's mental condition, any psychiatric examination, including one by the examinee's own expert, might be viewed by the examinee as hostile. The court further explained that to permit the presence of others at a psychiatric examination for purposes of comfort and support presented difficult questions of limitation. The court stated that while a family member, religious adviser, or the examinee's own psychiatric counselor might furnish the best comfort and emotional support, the prospects of establishing that degree of rapport necessary to a meaningful psychiatric examination declined as the number of persons attending the examination increased. The court commented that while trial judges have discretion to issue protective orders when necessary to safeguard the examinee's physical or mental condition, authorizing the addition of other persons in the examining room would be distracting or disruptive. The court concluded that since the plaintiff's own psychiatrist had had months or years of unlimited private access to the plaintiff for analysis and treatment, fundamental fairness required that a similar unrestricted professional exposure for a brief period be allowed to the other side.

However, the court in Karl v Employers Ins. of Wausau (1977) 78 **Wis** 2d 284, 254 NW2d 255, found it proper for a personal injury plaintiff's attorney to attend his client's psychiatric examination by the defendants' physician, because of the plaintiff's distressed emotional state at the time of the examination, and ruled that the trial judge did not err in refusing to preclude cross-examination of the physician at trial concerning portions of the examination that plaintiff's counsel had observed, although his attendance was unknown to the defendants when the examination took place. The court acknowledged that while counsel's presence at the examination may be appropriate where the plaintiff's character, personality, or sophistication are such that an attorney could give him assurance and confidence, and assist him in communicating, the plaintiff bears the burden of showing a need for counsel's presence. Noting that the examination had been arranged by stipulation rather than court order, the court reasoned that while the defendants had a right to assume that plaintiff's counsel would not be present at the examination absent notice to the contrary, evidence that the plaintiff was tense, anxious, and near tears during the interview for reasons other than counsel's presence, together with the physician's failure to express any dissatisfaction with his attendance, would have justified the trial judge in allowing the attorney to attend had a request been made in advance.

that a personal injury plaintiff is generally entitled to have counsel present during his or her physical examination by the defendant's designated physician.

42. For cases involving emotional distress due to possible inquiry into sexual matters, see § 22.

§ 22. Inquiry into sexual matters[43]

[a] Cases alleging sexual harassment at work

In the following case, the court ruled that a female plaintiff alleging emotional trauma from sexual harassment at work is not entitled to the presence of counsel at her mental examination by the defendant's physician, merely because the doctor might improperly question the plaintiff as to her sexual history.

Declaring that a civil litigant is not entitled to the presence of counsel at his or her mental examination by an opponent's physician, absent a showing of good cause to permit such attendance, the court in Vinson v Superior Court (1987) 43 Cal 3d 833, 239 Cal Rptr 292, 740 P2d 404, 44 BNA FEP Cas 1174, 2 BNA IER Cas 727, 43 CCH EPD ¶ 37301, ruled that no exception is warranted for cases involving emotional trauma allegedly resulting from sexual harassment on the job, and held proper in such a case an order requiring the plaintiff to submit to a mental examination without the presence of her attorney, despite the plaintiff's claims that counsel's presence was necessary to shield her from inappropriate interrogation as to her sexual history, and for support in an alien and hostile environment. The plaintiff pointed out that psychiatric examinations for sexual assault victims have been widely viewed as inhibiting rape prosecutions by implicitly placing the victim on trial. The plaintiff argued that a sexual harassment victim is analogous to the prosecutrix in a rape case, and noted legislative findings that discovery regarding the sexual aspects of harassment plaintiffs' lives may tend to discourage such complaints. The court, however, explained that while the state has a strong interest in eradicating the evil of sexual harassment, and although the threat of an uncounseled mental examination could dampen a plaintiff's resolve to bring suit, such plaintiffs have substantial protection under existing procedural rules. The court found it unlikely that the typical sexual harassment suit would justify a mental examination, which would ordinarily be considered only where the alleged mental or emotional distress is claimed to be ongoing. The court further reasoned that when an examination is permitted, investigation by a psychiatrist into the plaintiff's private life is severely constrained, and sanctions are available to guarantee that such restrictions are obeyed. Noting an absence of proof that the defendants' expert would not respect the plaintiff's legitimate rights to privacy, or that he might disobey any court-imposed restrictions, the court commented that the plaintiff's apprehension appeared to stem less from the reality of the proposed analysis, than from the popular image of mental examinations.

But see Zabkowicz v West Bend Co. (1984, ED Wis) 585 F Supp 635, 35 BNA FEP Cas 209, 39 FR Serv 2d 1294, later proceeding (ED Wis) 589 F Supp 780, 35 BNA FEP Cas 610, 35 CCH EPD ¶ 34766, later proceeding (ED Wis) 601 F Supp 139, 36 BNA FEP Cas 1540, 37 CCH EPD ¶ 35242, affd in part and revd in part (CA7 Wis) 789 F2d 540, 40 BNA FEP Cas 1171, 40 CCH EPD ¶ 36089, 4 FR Serv 3d 1229 (disagreed with on other grounds by multiple cases as stated in Huffman v Hains (CA7 Ind) 865 F2d 920), more fully discussed in § 17, in which the court, considering an emotional damage claim by a female employee and her husband against the wife's employer and co-workers arising out of alleged sexual harassment on the job, ruled that the plaintiffs were entitled to have legal counsel present during their mental examination by a defense psychiatrist. Without directly addressing the significance of the nature of the claim, or the anticipated scope of the doctor's inquiry, the court agreed with the plaintiffs' argument that attendance by a third party was necessary to assure that the doctor did not probe beyond "permissible limits."

[b] Other sexual abuse or assault cases—attorney excludable despite questioning by male physician

Although several female plaintiffs claiming emotional injury due to sexual abuse by the defendant doctor argued that they might be further traumatized through extensive questioning by another male physician, the court in the following case held that the plaintiffs could not have legal counsel present during their mental examination by the defendant's designated psychiatrist.

In Rochen v Huang (1988, Del Super) 558 A2d 1108, the court held that 4 female plaintiffs allegedly suffering from posttraumatic stress disorder due to sexual abuse inflicted on them by the defendant physician would not be allowed to have an attorney present during their mental examination by the defendant's designated psychiatrist, despite their complaint that they had already been traumatized by the incidents at issue, as well as by the legal discovery process, and that they might be further traumatized through extensive interrogation by another male physician. The court, while expressing full confidence that the plaintiffs' counsel would not interrupt the examination if so directed by the court, nevertheless found that any attorney's presence during the intense discussions involved in a psychiatric interview would be disruptive and intimidating, and could impair the defendant's ability to obtain a complete and fair mental evaluation of the plaintiffs. The court concluded that the plaintiffs' emotional state could be adequately safeguarded by allowing them to have a health care practitioner of their choice present during the examination, and that their legal interests could be protected by requiring that the interview be electronically recorded.

[c] —Attorney excludable due to sensitive nature of questioning

In the following case, the court held that the trial judge in a premises liability action properly ordered that the female plaintiff be mentally examined by the defendant's physician without the presence of the plaintiff's attorney, based on the physician's affirma-

43. For cases involving emotional distress due to circumstances other than possible inquiry into sexual matters, see § 21.

tion that the inquiry would be sensitive in nature due to the alleged injury.

Where the defendant in a premises liability action involving a rape and sodomization of the female plaintiff sought a mental examination of the plaintiff, in order to ascertain the extent of her alleged posttraumatic distress disorder, the court in Barraza v 55 West 47th Street Co. (1989, 1st Dept) 156 App Div 2d 271, 548 NYS2d 660, held that the trial judge did not abuse his discretion in ordering that the examination be conducted by the defendant's physician without the plaintiff's attorney in attendance, where the order was based on affidavits by the proposed examining physician that the inquiry would be of a sensitive nature, due to the injury alleged.

B. Presence of Examinee's Physician

§ 23. Physician's attendance allowed or generally permissible

The courts in the following cases held that civil litigants generally, or particular parties, are or were permitted to have a physician or other health care practitioner of their choice present during a mental examination by an opponent's designated physician, subject to limitations on the accompanying expert's conduct during the examination or at trial.

In Lowe v Philadelphia Newspapers, Inc. (1983, ED Pa) 101 FRD 296, 44 BNA FEP Cas 1224, 37 FR Serv 2d 1154, later proceeding (ED Pa) 594 F Supp 123, 79 ALR Fed 207, an employment discrimination action in which damages for mental injury were claimed, the court held that in the plaintiff's psychiatric examination by the defendant's chosen physician, the plaintiff could have a psychiatrist or other medical expert of her own choosing present during the examination, who would be permitted to make notes of his or her observations, but would not be allowed to advise the plaintiff during the examination.

The court in Rochen v Huang (1988, Del Super) 558 A2d 1108, ruled that in order to safeguard the emotional state of 4 female plaintiffs allegedly suffering from posttraumatic stress disorder due to sexual abuse inflicted on them by the defendant physician, the plaintiffs would be allowed to have a health care practitioner of their choice present during their mental examination by the defendant's designated psychiatrist. The court emphasized that this person, while free to observe the examination, would not be allowed to participate by way of objection or interruption.

And in Gray v Victory Memorial Hosp. (1989) 142 Misc 2d 302, 536 NYS2d 679, the court held that a personal injury plaintiff may have his or her own psychiatrist present to observe the plaintiff's mental examination by the defendant's designated physician, absent a compelling showing of why the plaintiff's doctor should not be allowed to attend the interview. Noting other cases recognizing a plaintiff's right to an attorney's or physician's presence at an adverse physical examination, the court discerned a strong predisposition to

permit the plaintiff to be accompanied to an examination. The court observed that such an examination is part of the adversarial process, and explained that to deny the plaintiff the accompaniment of his or her choice, be it an attorney or a psychiatrist sent by an attorney, is to infringe on the right to be assisted by counsel. The court concluded, however, that while the plaintiff may have his or her own psychiatrist present, that physician is not permitted to testify on the plaintiff's direct case about the procedures and methods used by the defendant's psychiatrist during the examination. On the other hand, the court said, observations by the plaintiff's psychiatrist may furnish counsel with material for cross-examination that would not otherwise be available.

Consult POCKET PART in this volume for later cases

Partnership (1990, CA2 Conn) 912 F2d 23 (applying Conn law), § 12.

Lease of commercial laundry equipment to lessee who opened and began to operate laundry business constituted "business opportunity" within meaning of Sale of Business Opportunities Act, which defined "business opportunity" as "the sale or lease of, or offer to sell or lease, any products, equipment, supplies, or services for the purpose of enabling the purchaser to start a business and in which the seller or company represents . . . [t]hat, in conjunction with any agreement which requires a total initial payment . . . exceeding $500.00, the purchaser may or will derive income from the business opportunity which exceeds the initial payment from the business opportunity . . . ," where there was evidence that, in negotiating lease, lessor's agent made such representation to lessee regarding income to be derived from operating laundry. Park Leasing Co. v TWS, Inc. (1992) 206 Ga App 864, 426 SE2d 620.

§ 7. Goods or services supplied by seller

[b] Found not to be supplied by seller

Supplier of lift trucks did not violate Maine statute regulating sale of business opportunities when entering into sales and service agreement with dealer; complaining dealer purchased ongoing dealership directly from owner, rather than supplier, while statute applied to new businesses, and dealer had not made required payment for goods needed to start new business called for under statute. 32 M.R.S.A. §§ 4691, subds. 3, 6, 4696, 4699, 4700, subd. 6. Mitsubishi Caterpillar Forklift America, Inc. v. Superior Service Associates, Inc., 81 F. Supp. 2d 101 (D. Me. 1999).

§ 12. "Seller"

In case in which plaintiff's father owned 20 McDonalds' restaurants, originally intended to transfer to plaintiff all 20 restaurants plus exclusive rights to expand new reastaurants in area, but sold 18 of restaurants and exclusive rights to defendants in reliance on allegedly false statement by defendant that plaintiff would be considered for future expansion in county, defendant did not violate state business opportunity statute where plaintiff purchased remaining two franchises from father, not from defendant. Schubot v McDonalds Corp. (1990, SD Fla) 757 F Supp 1351.

In action under state business opportunity investment act by ophthalmic care corporation, which bought marketing rights to outstanding bill recovery system, against developer of system, court erred in granting summary judgment in favor of developer on grounds that it was not "seller" within meaning of act; under plain language of act, developer "engaged in business of selling" when it entered into marketing agreement with corporation disposing of all its marketing rights in Connecticut; in determining that developer was not seller because it thought agreement arose from mutually beneficial business arrangement between it and corporation, under which developer had provided recovery services for corporation, court incorrectly read in requirement that developer must have solicited corporation in order for it to have sold business opportunity; substantial evidence also existed that developer planned to start new business as result of its dealing with corporation; on remand, jury would be required to consider whether marketing plan, advertisement placed in newspaper by developer seeking sales/marketing professional for Connecticut, and oral statements allegedly made by developer's executive officers prior to execution of marketing agreement supported finding that under agreement developer contracted to supply sales or marketing program, as required by statute. Eye Assoc. P.C. v Incomrx Systems Ltd. Partnership (1990, CA2 Conn) 912 F2d 23 (applying Conn law).

Corporation that developed "video magazine" for floor covering industry by which corporation would sell monthly video to floor covering distributors, who would in turn sell subscriptions to program to retailers, was "seller" within meaning of Connecticut business opportunity investment act, and distributorship arrangement for sale constituted "sales program" or "marketing program" within Act, and corporation was therefore required to comply with requirement of Act that it register with state banking commissioner and where corporation failed to do so, it could not bring suit against defendant for tortious interference with prospective contract between it and distributor. Fineman v Armstrong World Industries, Inc. (1991, DC NJ) 774 F Supp 225, 1991-2 CCH Trade Cases ¶ 69595, supp op, motion gr (DC NJ) 774 F Supp 266, 1991-2 CCH Trade Cases ¶ 69600 (applying Conn law).

§ 15. Recision of contract—provision of notice to seller

Statutory right to rescind a transaction and recover the investment pursuant to the Sale of Business Opportunities Act (SBOA) is not available to a plaintiff who has not notified the seller of the exercise of that right within one year. O.C.G.A. § 10-1-417(a). League v. U.S. Postamatic, Inc., 235 Ga App 171, 508 S.E.2d 210 (1998), cert. denied, (Feb. 26, 1999).

84 ALR4th 419-454

Research References

Electronic Search Query

constru! or interpret! or valid! or invalid! or constitution! or unconstitution! or appli! w/100 resolution or provision or ordinance or statut! or law or regulation or code or act w/30 (preferen! w/5 domestic or local) or (buy american).

West Digest Key Numbers

Commerce 10, 54.

Constitutional Law 70(1), 89(1), 207(1), 210(1), 213.1(1), 213.1(2), 225, 225.4.

Mun Corporations 282(4), 330(3), 513(7).

Public Contracts 2.

Statutes 64(2), 79(2), 88.

§ 1. Introduction

[b] Related matters

Authority of state, municipality, or other governmental entity to accept late bids for public works contracts. 49 ALR5th 747.

What projects involve work subject to state statutes requiring payment of prevailing wages on public works projects. 10 ALR5th 337.

Employees' private right of action to enforce state statute requiring payment of prevailing wages on public works projects. 10 ALR5th 360.

What are "prevailing wages," or the like, for purposes of state statute requiring payment of prevailing wages on public works projects. 7 ALR5th 400.

Employers subject to state statutes requiring payment of prevailing wages on public works projects. 7 ALR5th 444.

What entities or projects are "public" for purposes of state statutes requiring payment of prevailing wages on public works projects. 5 ALR5th 470.

Who is "employee," "workman," or the like, of contractor subject to state statute requiring payment of prevailing wages on public works projects. 5 ALR5th 513.

Validity, construction, and effect of requirement under state statute or local ordinance giving local or locally qualified contractors a percentage preference in determining lowest bid. 89 ALR4th 587.

84 ALR4th 462-525

Research References

19 Am Jur Proof of Facts 3d 335, AIDS Dementia—Incapacity to Execute Will.

17 Am Jur Proof of Facts 3d 219, Alzheimer's and Multi-Infarct Dementia—Incapacity to Execute Will.

Electronic Search Query

guardian! w/50 (ademption or adeem! or revocation or revoke) w/50 (devise or bequest) w/50 (incompetent w/10 testator or testatrix).

West Digest Key Numbers

Mental Health 273.

Wills 765, 767, 768, 770.

84 ALR4th 531-545

Research References

Electronic Search Query

(revok! or revocation or nonrevocation) w/60 codicil.

West Digest Key Numbers

Wills 195, 206, 207, 233, 290, 302(8), 306, 386, 90.

84 ALR4th 558-599

Research References

Electronic Search Query

lawyer or counsel or attorney or doctor or physician or surgeon or psychologist or psychiatrist w/10 right or entitl! w/10 physical or mental or psycholog! or psychiatr! or health w/2 test! or screen! or exam!.

West Digest Key Numbers

Damages 206(1), 206(5), 206(6), 206(7), 206(8).

Federal Civil Procedure 1651.

Pretrial Procedure 455.

New sections and subsections added:

§ 24. Physician's attendance not allowed

§ 1. Introduction

[b] Related matters

Right of convicted defendant or prosecution to receive updated presentence report at sentencing proceedings. 22 ALR5th 660.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence. 12 ALR5th 577.

§ 3. View that examinee ordinarily may have attorney present

Also holding or recognizing that civil liti-

gant subjected to physical examination at opponent's instance, and to be conducted by doctor designated by opponent, ordinarily has right to have attorney present during examination:

NY—Grady v Phillips (1993, Sup) 159 Misc 2d 848, 606 NYS2d 877.

Plaintiff had right to have his attorney present during independent medical examination of plaintiff requested by defendant, considering Pennsylvania civil procedure rule permitting attorneys to be present at examinations. Fed.Rules Civ.Proc.Rule 35(a), 28 U.S.C.A.; Pa.Rules Civ.Proc., Rule 4010(a)(4)(i), 42 Pa.C.S.A. Gensbauer v. May Dept. Stores Co., 184 F.R.D. 552 (E.D. Pa. 1999).

See McCorkle v Fast (1992, Fla App D2) 599 So 2d 277, 17 FLW D 1368, § 4.

§ 4. —But court may bar attorney if opponent establishes need for exclusion

Trial court erred in prohibiting plaintiffs' attorney from attending orthopedic examination that had been scheduled by defendant, despite fact that designated doctor refused to perform examination under such conditions. Absent any valid reason to exclude counsel or other representative, their presence should be allowed, and doctor's objections, standing alone, were insufficient since he had not been shown to be uniquely qualified to perform examination or otherwise essential to preparation of defendant's case. Although defendant's counsel stated he was unable to locate another examiner willing to accept attendance by third parties, plaintiffs disputed this assertion and contended that substitutes were available in same locality. McCorkle v Fast (1992, Fla App D2) 599 So 2d 277, 17 FLW D 1368.

Plaintiff has the right to have his counsel, a court reporter, or both present at compelled independent medical examination, unless a valid, case-specific reason is given by the examining doctor why such would be unreasonably disruptive, and evidence is presented further that no other medical specialist is available who will conduct the examination under those circumstances. West's F.S.A. RCP Rule 1.360(a), Lunceford v. Florida Cent. R. Co., Inc., 728 So. 2d 1239 (Fla. Dist. Ct. App. 5th Dist. 1999).

§ 6. View that examinee generally has no right to presence of attorney

Also holding or recognizing that civil litigant, subjected to physical examination at opponent's instance by physician opponent had designated, generally has no right to presence of his or her attorney during examination:

W Va—State ex rel. Hess v Henry (1990, W Va) 393 SE2d 666.

Absent some compelling showing of need, district court would not allow attorney who was representing personal injury claimant to attend mental and psychiatric examinations of claimant, in order to avoid converting what were intended to be medical examinations into adversary proceedings. Fed.Rules Civ.Proc.Rule 35, 28 U.S.C.A. McKitis v. Defazio, 187 F.R.D. 225 (D. Md. 1999).

Counsel for patient who sued government for medical malpractice was not entitled to be present during patient's physical examination by government's expert witness. Fed. Rules Civ. Proc. Rule 35(a), 28 U.S.C.A. Holland v. U.S., 182 F.R.D. 493 (D.S.C. 1998).

§ 8. View that attorney's presence during examination is a matter within court's discretion

Also recognizing that it is within trial judge's sound discretion whether plaintiff should be compelled to submit to examination without attendance of attorney:

Tex—Simmons v Thompson (1995, Tex App Texarkana) 900 SW2d 403; Simmons v Thompson (1995, Tex App Texarkana) 900 SW2d 403.

§ 11. View that examinee ordinarily may have physician present

Also recognizing that ordinarily, party in civil action may have his or her own physician present during physical examination of party by opponent's doctor or medical expert:

US—Bennett v White Lab. (1993, MD Fla) 841 F Supp 1155.

§ 14. View that examinee not entitled to physician's presence

Also holding or recognizing that civil litigant, subjected to physical examination at opponent's instance by physician opponent had designated, generally has no right to presence of his or her own doctor during examination:

W Va—State ex rel. Hess v Henry (1990, W Va) 393 SE2d 666.

§ 18. View that examinee generally has no right to presence of attorney

Plaintiff did not carry burden of establishing special needs to support her request that her attorney be present during court-ordered mental examination, based on the fact that she did not have an expert witness; moreover, allowing plaintiff's attorney to be present would only increase the likelihood of creating an adversarial atmosphere. Fed.Rules Civ.Proc.Rule 35(a), 28 U.S.C.A. Bethel v. Dixie Homecrafters, Inc., 192 F.R.D. 320, 82 Fair Empl. Prac. Cas. (BNA) 345, 77 Empl. Prac. Dec. (CCH) ¶ 46303 (N.D. Ga. 2000).

§ 19. —But court may admit attorney if examinee shows good cause for counsel's presence

Court would not exercise its discretionary authority under discovery rule to permit plaintiff's attorney or a legal assistant or paralegal to be present at her court-ordered examination by defendant's psychiatrist, absent evidence that examiner would engage in any impropriety. Fed.Rules Civ.Proc.Rules 26(c), 35(a), 28 U.S.C.A. Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 80 Fair Empl. Prac. Cas. (BNA) 355 (D. Kan. 1999).

In absence of good cause, party undergoing mental examination requested by other party is not permitted to have attorney present during examination. Stoughton v B.P.O.E. #2151 (1995, App Div) 281 NJ Super 605, 658 A2d 1335.

§ 24. [New] Physician's attendance not allowed

Court would not exercise its discretionary authority under discovery rule to permit plaintiff's treating physician to be present at court-ordered examination of plaintiff by defendant's psychiatrist, absent evidence that examiner would improperly question plaintiff or use harmful techniques in the examination. Fed.Rules Civ.Proc.Rules 26(c), 35(a), 28 U.S.C.A. Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 80 Fair Empl. Prac. Cas. (BNA) 355 (D. Kan. 1999).

84 ALR4th 620-625

Research References

Electronic Search Query

forfeit! w/100 (controlled w/3 substance or cocaine or mariju or cannabis| heroin or drugs or narcotics or contraband) and (statut! or act or code or provision!) and (property w/2 community) or (property w/3 marital) or (tenancy w/3 entirety) or marital estate or husband or wife or spouse.

West Digest Key Numbers

Drugs and Narcotics 191, 192, 193.

Forfeitures 3, 4, 6.

Husband and Wife 14.2(5).

Attention is directed to the following cases or annotations decided after the original publication of this annotation:

In proceeding seeking forfeiture of property containing pharmacy, which was owned by pharmacist and his wife as tenancy by entireties but had been used by pharmacist, without wife's knowledge, for illegal diversion of pharmaceutical drugs, wife's innocent-owner defense under 21 U.S.C.A. § 881(a)(7) did not bar government from forfeiting husband's interest in property. District court was required to determine whether husband's interest was subject to forfeiture irrespective of wife's innocent-owner defense. If court decided accordingly, it was then required to enter order forfeiting that interest but preserving wife's right to full and exclusive use and possession of property during her life, her protection against conveyance of or execution by third parties on her husband's former interest, and her survivorship right. United States v Parcel of Real Property Known as 1500 Lincoln Ave. (1991, CA3 Pa) 949 F2d 73.

Absent consent from both spouses, entireties property may properly be the subject of a criminal forfeiture only when both spouses acting together are guilty of some criminal misconduct. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 413, as amended, 21 U.S.C.A. § 853; Fed.Rules Cr.Proc.Rule 41(e), 18 U.S.C.A. Christunas v. U.S., 61 F. Supp. 2d 642 (E.D. Mich. 1999).

Wife of defendant convicted of narcotics offense sustained her burden of proving that she was innocent owner who neither had knowledge of nor consented to her husband's illicit use of their jointly owned real estate to facilitate his commission of narcotics trafficking offenses; hence, property was not subject to forfeiture. Inter alia, wife had told defendant that she would divorce him if he continued to engage in drug dealing; drug deals almost never took place at house, and one deal that was conducted on premises was conducted in garage and out of wife's presence; and wife denied having any knowledge of defendant's drug activities during time period relevant to his conviction. United States v 44133 Duchess Drive (1994, ED Mich) 863 F Supp 492 (applying Mich law).

Under "innocent owner" provision of Controlled Substances Forfeiture Act, pickup truck that was used by husband to transport quantity of cocaine could not be forfeited where truck was owned by husband and wife as tenants by entirety and where wife established that husband's drug activities were committed without her knowledge or consent. Commonwealth v One 1988 Toyota Truck (1991, Pa Cmwlth) 596 A2d 1230.

U.S. Security Insurance Co. v. Cimino, No. SC93932 (Fla. 03/09/2000)

[1] Supreme Court of Florida

[2] No. SC93932

[3] 2000.FL.0043550 <http://www.versuslaw.com>

[4] March 9, 2000

[5] **U.S. SECURITY INSURANCE COMPANY A/K/A U.S. SECURITY INSURANCE COMPANY, INC., PETITIONER,**
V.
JEANNI M. CIMINO, RESPONDENT.

[6] Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions First District - Case No. 1D97-4373 (Leon County)

[7] David B. Pakula of Fazio, Dawson, DiSalvo, Cannon, Abers, Podrecca & Fazio, Fort Lauderdale, Florida, for Petitioner Tari Rossitto-Van Winkle, Tallahassee, Florida, for Respondent

[8] The opinion of the court was delivered by: Quince, J.

[9] We have for review Cimino v. U.S. Security Insurance Co., 715 So. 2d 1092 (Fla. 1st DCA 1998), wherein the district court certified conflict with Klipper v. Government Employees Insurance Co., 571 So. 2d 26 (Fla. 2d DCA 1990). We have jurisdiction. See Art. V, § 3(b)(3), Fla. Const. We approve the First District's decision in Cimino, because we find that absent a valid reason for denial, an insured is entitled to have an attorney or videographer present at a physical examination. We disapprove the opinion in the conflicting case of Klipper.

[10] Jeanni M. Cimino (Cimino) was injured in an automobile accident and sought benefits pursuant to her personal injury protection (PIP) automobile insurance policy with U.S. Security Insurance Company (Security). Security scheduled a medical examination for Cimino. Pursuant to section 627.736(7), Florida Statutes (1997), and as provided for in a provision in the insurance policy, Security chose the physician. Cimino responded with a request that her attorney be present to videotape the examination with a small, hand-held video camera. Cimino and her attorney reported for the September 2, 1997, examination; however, the physician refused to perform the examination. The physician stated she had

been instructed by Security that the attorney could not be present and the examination could not be videotaped. *fn1 Security rescheduled the examination for September 30, 1997, but warned Cimino that her attorney would not be allowed to attend. Security also advised Cimino that failure to attend the scheduled examination or failure to comply with the required conditions would result in termination of her benefits.

[11] Cimino filed an action for declaratory judgment, seeking to have the trial court determine her rights under the insurance policy and under section 627.736. She also filed a motion for a temporary injunction. On September 29, 1997, an emergency hearing was held, via telephone, on the motion for temporary injunction. The trial court granted the injunction pursuant to a stipulation and with the understanding that the matter would be reconsidered when the parties had sufficient time to prepare. The temporary injunction relieved Cimino of her obligation to attend the rescheduled examination and prohibited Security from terminating benefits or scheduling any further examinations unless Cimino's counsel was allowed to attend and videotape the examination.

[12] Security moved to dissolve the injunction. At a hearing on that motion, Security's primary argument was that the temporary injunction was improperly granted because Cimino had not demonstrated that she would likely prevail on the merits. See City of Jacksonville v. Naegele Outdoor Adver. Co., 634 So. 2d 750 (Fla. 1st DCA 1994). Relying upon Klipper v. Government Employees Insurance Co., 571 So. 2d 26 (Fla. 2d DCA 1990), where the district court found the insured was not entitled to have a court reporter present during a medical examination conducted pursuant to section 627.736, the trial court ordered the temporary injunction dissolved. Cimino appealed. The First District Court of Appeal reversed the trial court's decision and certified conflict with Klipper. See Cimino v. ***U.S. Security Ins. Co.***, 715 So. 2d at 1094.

[13] The First District was correct in its finding that Cimino's attorney could be present at her PIP independent medical examination. The presence of an attorney during a medical examination is an issue of first impression that has not be ruled on by this Court. However, the presence of an attorney and other third parties at medical examinations has been addressed in a number of cases in the district courts, at least in the context of Florida Rule of Civil Procedure 1.360 *fn2 and workers' compensation examinations. *fn3

[14] As the First District pointed out, the issue of who may be present during medical examinations first arose in the context of examinations pursuant to rule 1.360. See Touchet v. Big Bend Moving & Storage, Inc., 581 So. 2d 952 (Fla. 1st DCA 1991)(holding the trial court departed from the essential requirements of the law by prohibiting plaintiff's counsel from attending a rule 1.360 examination); Stakley v. Allstate Insurance Co., 547 So. 2d 275 (Fla. 2d DCA 1989)(holding absent a valid reason for denial, a person being examined pursuant to rule 1.360 can have a third party present); Bartell v. McCarrick, 498 So. 2d 1378 (Fla. 4th DCA 1986)(holding burden is on the party opposing the presence of a third person at a compulsory medical examination to show why presence should be denied). The Second District additionally found in Broyles v. Reilly, 695 So. 2d 832 (Fla. 2d DCA 1997), that the person being examined could have a videographer present during an examination pursuant to rule 1.360. See also Wilkins v. Palumbo, 617 So. 2d 850 (Fla. 2d DCA 1993); Collins v.

Skinner, 576 So. 2d 1377 (Fla. 2d DCA 1991)(both holding a plaintiff in a personal injury suit is entitled to have a court reporter present during a compulsory medical examination). The presence of a third party has also been litigated in the workers' compensation context. See McClennan v. American Building Maintenance, 648 So. 2d 1214 (Fla. 1st DCA 1995)(finding that an employer/carrier would have to demonstrate a valid reason to exclude a claimant's attorney from a workers' compensation examination).

[15] On the other hand, there has been little litigation on the issue of third-party attendance at a medical examination conducted pursuant to the terms of the insured's contract with the insurer and section 627.736, Florida Statutes. See Cimino; Klipper. The examination requirements contained within section 627.736(7)(a)-(b), Florida Statutes (1997), are, in pertinent part, as follows:

[16] (a) Whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future personal injury protection insurance benefits, such person shall, upon the request of an insurer, submit to mental or physical examination by a physician or physicians. The costs of any examinations requested by an insurer shall be borne entirely by the insurer. Such examination shall be conducted within the municipality of residence of the insured or in the municipality where the insured is receiving treatment. If the examination is to be conducted within the municipality of residence of the insured and if there is no qualified physician to conduct the examination within such municipality, then such examination shall be conducted in an area of the closest proximity to the insured's residence. Personal protection insurers are authorized to include reasonable provisions in personal injury protection insurance policies for mental and physical examination of those claiming personal injury protection insurance benefits. An insurer may not withdraw payment of a treating physician without the consent of the injured person covered by the personal injury protection, unless the insurer first obtains a report by a physician licensed under the same chapter as the treating physician whose treatment authorization is sought to be withdrawn, stating that treatment was not reasonable, related, or necessary.

[17] (b) . . . If a person unreasonably refuses to submit to an examination, the personal injury protection carrier is no longer liable for subsequent personal injury protection benefits.

[18] The "Conditions" section of Cimino's insurance policy reads:

[19] [The insured] shall submit to mental and physical examinations at the Company's expense when and as often as the Company may reasonably require. A copy of the medical report shall be forwarded to such person if requested. If the person unreasonably refuses to submit to an examination the Company will not be liable for subsequent personal injury protection benefits.

[20] Additionally, the "Duties After an Accident of Loss" section provides:

[21] A person seeking any coverage or benefit must:

[22] 1. Cooperate with us in the investigation, evaluation, settlement of defense of any first party or third party claim or suit. Cooperation includes but is not limited to providing oral, sworn or written statements and submitting, to physical examinations by physicians selected by the company.

[23] The combined effect of the statute and the policy is to allow Security to require Cimino to attend a PIP examination in order to continue receiving her benefits.

[24] In Klipper, the Second District was asked to decide whether a court reporter could be present at such a PIP examination. The Second District declined to draw a parallel between a PIP examination and a rule 1.360 examination. The court reasoned that a rule 1.360 examination presupposes that litigation has been initiated and that the parties are "in an adversarial posture." Klipper, 571 So. 2d at 27. The court went on to say this type of examination, provided for under the statute and which arose from the contract of insurance, is conducted to assist the insurer in evaluating the claim made by the insured. Therefore, the court opined PIP examinations were distinguishable from rule 1.360 examinations. See id.

[25] Conversely, in Cimino, the First District relied upon rule 1.360 and workers' compensation examination cases to support the insured's right to have an attorney present at a PIP examination. Citing Toucet v. Big Bend Moving & Storage, 581 So. 2d at 953, the court reasoned the adversarial nature of a rule 1.360 examination was a compelling reason to permit counsel to be present. See Cimino, 715 So. 2d at 1093. The court noted that the same rationale had been applied in the workers' compensation context. See id. Unable to distinguish a PIP examination from a rule 1.360 or workers' compensation examination, as the Second District had done in Klipper, the First District held an insured had a right to have an attorney present during a required PIP examination. In so holding the court said:

[26] With reference to the first quoted paragraph from Klipper, in Adelman Steel Corp. v. Winter, 610 So. 2d 494 (Fla. 1st DCA 1992), we explained, "When resort to an [independent medical examination] is necessary by either party, the parties' relationship is clearly adversarial, and a physician performing an IME should be treated as the requesting party's expert witness . . . ." Id. at 505. We recently reaffirmed this position in Reed v. Reed, 643 So. 2d 1180 (Fla. 1st DCA 1994). Id. at 1094. The First District also certified conflict with Klipper.

[27] The questions underlying the certified conflict between Cimino and Klipper are whether a PIP examination is adversarial in nature, making it analogous to rule 1.360 and workers' compensation examinations, and whether the contract of insurance precludes the insured from making the attendance of a third party a condition of the examination. See Cimino, 715 So. 2d at 1094 (reasoning that when a PIP examination is necessary, the relationship is clearly adversarial and finding the presence of a third party not precluded under the statute or contract). But see Klipper, 571 So. 2d at 27 (reasoning a PIP examination is not necessarily detrimental or merely a prelude to litigation and holding the insured is not entitled under

statute or contract to set additional conditions).

[28] Security argues a PIP examination is non-adversarial in nature. It submits that a PIP examination's main purpose is to assist the insurer in determining whether treatment should continue. See Tindall v. Allstate Ins. Co., 472 So. 2d 1291 (Fla. 2d DCA 1985). Conversely, Cimino argues a PIP examination is entirely adversarial in nature because it only comes about when an insurance company is trying to terminate or at the very least is questioning the continuation of an insured's benefits, and the presence of an attorney will level the playing field.

[29] It is well established that Florida follows a liberal view when determining whether attorneys may attend examinations. *fn4 See Bartell v. McCarrick, 498 So. 2d 1378 (Fla. 4th DCA 1986). As a result, the First District concluded the burden should fall on the insurer to exclude an observer. See Broyles v. Reilly, 695 So. 2d 832, 834 (Fla. 2d DCA 1997). *fn5 We agree with this approach. Given Florida's liberal posture with regard to rule 1.360 and workers' compensation examinations, there is no valid reason to require the trial court to apply a different standard for PIP examinations. A PIP examination is a potential step in the direction of litigation. The insured is claiming an entitlement to continued benefits and the insurer is questioning the necessity for same. In order to continue receiving benefits the insured must comply with the requirements of the insurance contract and section 627.736. The insured is required to comply with a PIP examination in order to continue to receive the contractual benefits. The insured and the insurer are certainly not in agreement at this point. Because the potential is there for an adversarial contest, the insured should be afforded the same protections as are afforded to plaintiffs for rule 1.360 and workers' compensation examinations.

[30] We are persuaded by the fact that the doctor conducting the examination will provide a report to the insurance company, which will be the basis of the insurance company choosing to either continue or discontinue benefits. In cases where benefits are terminated based upon the doctor's recommendation and the insured contests the termination, the report, including statements made by the insured to the doctor during the examination, and potentially the doctor's own live testimony about the examination, may be used against the insured. Therefore, it is unfair to place insureds in a position where anything they say may be used to terminate their benefits, but they are not allowed an opportunity to protect themselves. As the court said in Sharff v. Superior Court, 282 P.2d 896 (Cal. 1955):

[31] Whenever a doctor selected by the defendant conducts a physical examination of the plaintiff, there is a possibility that improper questions may be asked, and a lay person should not be expected to evaluate the propriety of every question at his peril. The plaintiff, therefore, should be permitted to have the assistance and protection of an attorney during the examination. See Williams v. Chattanooga Iron Works, 1915, 5 Tenn. Civ. App. 10, 20-21, affirmed 131 Tenn. 683, 176 S.W. 1031. 282 P.2d at 897.

[32] Of course, the attorney's presence during the examination is premised upon a requirement that the attorney not interfere with the doctor's examination.

[33] Security argues that such a decision will make it impossible for insurance companies to find doctors who are willing to perform PIP examinations. However, we find this argument unconvincing in light of the fact that there have been no such problems with rule 1.360 or workers' compensation examinations. See Bartell v. McCarrick (finding an examinee has a right to have a representative present at an examination). Moreover, we are further convinced that any chilling effect on doctors is far outweighed by the positive effects of this decision. The Third District correctly noted "the potential for fraud at the confluence of the medical, legal and insurance industries is virtually unlimited." ***U.S. Security Ins. Co.*** v. Silva, 693 So. 2d 593, 596 (Fla. 3d DCA 1997). However, by allowing the examination to be observed by a third party or videotaped, the potential for harm to either party is reduced, not increased. As the Second District noted when discussing a rule 1.360 examination in Wilkins v. Palumbo, 617 So. 2d at 852:

[34] There is nothing inherently good or bad about the credibility function of an IME. If there is no court reporter or other third party present at the examination, however, a disagreement can arise between the plaintiff and the doctor concerning the events at the IME. Plaintiffs' attorneys are understandably uncomfortable with a swearing contest at trial between an unsophisticated plaintiff and a highly trained professional with years of courtroom experience. They have searched for ways to level the playing field on the credibility issues arising from such examinations.

[35] The same considerations are applicable to a medical examination required by the insured to continue PIP benefits.

[36] The concerns of physicians for conducting examinations without the distraction of third persons cannot outweigh the insured's rights. As the Fourth District noted in Bartell v. McCarrick:

[37] As this court said in Gibson v. Gibson, 456 So. 2d 1320, 1321 (Fla. 4th DCA 1984), a case in which we held that the presence of a court reporter should have been allowed at a psychiatric examination: "It is important to note also, that it is the privacy of the petitioner that is involved, not that of the examiner, and if the petitioner wants to be certain that this compelled, although admittedly reasonable, intrusion into her privacy be accurately preserved, then she should be so entitled." 498 So. 2d at 1379. Cimino's rights must prevail over the concerns of the examining physician.

[38] Secondly, Security argues that under the terms of the insurance contract the insured cannot set additional conditions for the taking of the examination. On the other hand, Cimino argues there is nothing in the insurance contract or the statute which prevents her from having her attorney present. Cimino's argument is persuasive. The language of the contract at issue here and section 627.736 contemplate a situation, such as this one, where the insured "reasonably refuses to submit" to an examination. By using the term "unreasonably refuses to submit" in both the conditions section of the policy and subsection 627.736(b), it is logical to deduce

there are scenarios where the insured "reasonably refuses to submit" to the examination. In a situation where the insured wants an attorney or other third party present at the examination, the burden is on the party opposing the third party's presence to prove that the presence is unreasonable.

[39] For these reasons, the First District's opinion in Cimino v. U.S. Security Insurance Co. is approved, and the opinion in Klipper v. Government Employees Insurance Co. is disapproved.

[40] It is so ordered.

[41] HARDING, C.J., and SHAW, WELLS, ANSTEAD, PARIENTE and LEWIS, JJ., concur.

Opinion Footnotes

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[42] *fn1 This fact is fervently disputed by Security. They claim it was the IME physician, without direction from Security, who refused to perform the examination in the presence of the attorney and video camera.

[43] *fn2 Florida Rule of Civil Procedure 1.360(a) provides the discovery mechanism by which a party may request that another party submit to an examination when the condition that is the subject of the requested examination is in controversy.

[44] *fn3 Section 440.25(7), Florida Statutes (1997), provides: (7) An injured employee claiming or entitled to compensation shall submit to such physical examination by a certified expert medical advisor approved by the division or the judge of compensation claims as the division or the judge of compensation claims may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation shall be payable for any period during which the employee may refuse to submit to examination.

[45] *fn4 In the context of a rule 1.360 examination, or similar procedure, a survey of the states reveals three distinct approaches to third-party attendance. First, some states have found an absolute right to have an observer present during an examination. See Acosta v. Tenneco Oil Co., 913 F.2d 205 (5th Cir. 1990); Langfeldt-Haaland v. Saupe Enters., Inc., 768 P.2d 1144 (Alaska 1989); Tietjen v. Department of Labor & Indus., 534 P.2d 151 (Wash. Ct. App. 1975). The second approach holds that there is no presumptive right to have counsel present at an exam. See McDaniel v. Toledo, Peoria & Western R.R., 97 F.R.D. 525 (C.D. Ill. 1983);

Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (D. Md. 1960). Finally, the third approach grants discretion to the trial court to examine the facts and make a ruling on a case by case basis. See Hayes v. District Court, 854 P.2d 1240 (Colo. 1993); Wood v. Chicago, Milwaukee, St. Paul & Pac. R.R., 353 N.W. 2d 195 (Minn. Ct. App. 1984).

[46] *fn5 As explained in Wilkins, a physician must provide a case- specific reason why an attorney's attendance would disrupt the examination. This reason must be submitted in an affidavit. Then, the insurer must prove, at an evidentiary hearing conducted by the trial court, that no other qualified physician in the area would be willing to perform the exam with the third party present. See Wilkins v. Palumbo, 617 So. 2d 580, 854 (Fla. 2d DCA 1993); see also Broyles, 695 So. 2d at 834.

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