COUNCIL ON COURT PROCEDURES

Saturday, October 12, 1991 Meeting
9:30 a.m.

Oregon State Bar Center
Meeting Room No. 2
5200 SW Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Introduction of new members

2. Election of officers

3. Schedule of future meetings

4. Six-person juries (report by Ron Marceau)

5. Matters carried over from past biennium (Executive Director)

6. NEW BUSINESS

# # # # #

September 20, 1991

M E M O R A N D U M

TO: MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill, Executive Director

RE: Matters held over from last biennium

The following is a brief description of matters that came up near the end of 1990 and during the legislative session and were deferred until this biennium. They are listed in chronological order.

1. **LIMITING SECRECY IN PERSONAL INJURY ACTIONS OR SETTLEMENTS.** This matter was raised by a letter from Bernie Jolles, dated August 3, 1990 (attached as Exhibit 1). It was also the subject of SB 579 (attached as Exhibit 2). Ron Marceau wrote to the legislature and asked that they defer action on SB 579 because the Council had the matter scheduled for consideration this biennium. The Senate Judiciary Committee took no action on SB 579.

The issue is whether there should be any limit on court authority to seal records in personal injury cases that might be useful to other similarly situated plaintiffs or the public. This would be most likely to arise in a products liability or environmental contamination cases. If a plaintiff developed strong information from examination of a defendant's records and depositions of defendant's employees showing liability for a defect in defendant's product sold to large numbers of people or the existence of a hazardous condition affecting a large group, the use of ORCP 36 C to impose secrecy on discovery information or a secrecy condition in a settlement interest might not be in the public interest.

Bernie Jolles' letter was directed to secrecy conditions in settlement agreements and revealing information to the public. SB 579 related to secrecy in the discovery process and created a limit on trial court power to control disclosure of discovery results to similarly situated plaintiffs.

2. **COSTS AND ATTORNEY FEES ON DISMISSAL.** We received a letter from B. Kevin Burgess, dated September 10, 1990 (attached as Exhibit 3). He raises several questions about the language in ORCP 54 A(3). I believe that section was added in 1984 because defendants were having some difficulty getting costs and disbursements and attorney fees in voluntary dismissal

situations. ORCP 68 B does allow the court to deny costs and disbursements and attorney fees to the prevailing party, but does not clearly indicate that the court could give them to the non-prevailing party. It also was not clear that the defendant was the prevailing party in a voluntary dismissal situation.

The issue presented to the Council by Mr. Burgess's letter is whether any of the language in 54 A(3) is ambiguous and needs clarification. The use of the word "may" was intentional. If the defendant is generally the prevailing party, the court still should have the same discretion not to award costs and disbursements and attorney fees to the prevailing party. For his second question, I would assume one set of "circumstances" indicating that a defendant would not be the prevailing party would be a settlement situation where the dismissal is pursuant to a settlement agreement. The existence of the circumstances would probably be determined at a hearing on objection to a cost bill under ORCP 68 C.

3. **ATTORNEY FEES JUDGMENT.** We received a letter from Donald V. Reeder dated October 12, 1990, raising objections to having a separate judgment for attorney fees (attached as Exhibit 4). At its meeting on November 19, 1990, the Council decided to defer action on the matter until the next biennium. Mr. Reeder's letter was actually an objection to the proposed amendments to Rule 68 C, which the Council was considering at that time and which were promulgated on December 1990 and go into effect on January 1, 1992. Unless the Council wishes to reconsider its revision of 68 C, the matter raised by Mr. Reeder has been concluded.

4. **WITHDRAWAL OF ATTORNEY.** Peter J. Mozena wrote on October 9, 1990 asking that the Council consider a rule governing the procedure for withdrawal of attorneys and attaching a copy of a California Rule (attached as Exhibit 5). Withdrawal from employment is also regulated by DR 2-110 of the Revised Code of Professional Responsibility (attached as Exhibit 6). The disciplinary rule does not specify when permission is required or cover the actual withdrawal procedure. The subject is not covered in the federal rules or the general rules of procedure for most states. It might be more appropriate to put it in the Uniform Trial Court Rules.

5. **OATHS FOR DEPOSITIONS BY TELEPHONE.** Keith Burns wrote the Council on October 24, 1990 for the Oregon Court Reporters Association (attached as Exhibit 7). Questions have apparently arisen about court reporters administering oaths for depositions by telephone. He suggests adding a cross-reference in ORS 39 C(7) to the oath procedure specified in ORCP 38 C.

I think the Council intended that the procedure for administering oath would be one of the "conditions of taking

testimony" designated in the court order under ORCP 37 C(7) allowing a deposition by telephone. It was anticipation of problems of this type that led the Council to require a court order before a deposition could be taken by telephone. On the other hand, the change suggested by Mr. Burns is relatively simple and consistent with court control of the telephone deposition. ORCP 38 states that the oath can be administered by anyone the trial judge designates.

6. **EXCLUSION OF WITNESSES AT DEPOSITION.** Ron Marceau passed along a question raised by a Bend judge by letter of February 6, 1991 (attached as Exhibit 8). The judge felt that the ORCP did not clearly cover the exclusion of witnesses during the deposition. ORCP 39 D provides for oral depositions that "Examination and cross-examination of witnesses may proceed as permitted at trial." I would interpret this as providing that Rule 615 (ORS 40.385) of the Oregon Evidence Code and all other Oregon Evidence Code provisions regulating examination of witnesses at trial apply to the examination of a witness at deposition. Rule 615 provides that at the request of a party the court may order other witnesses excluded from the trial, except (a) a party, (b) an officer or employee of a party which is not a natural person designated as its representative, or (c) a person whose presence is shown by a party to be essential to the presentation of the party's cause (usually an expert).

The federal rules are slightly clearer. FRCP 30(c) says "Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence." We could change our rule to specifically refer to the Oregon Rules of Evidence.

7. **RECOVERY OF COST OF COPYING PUBLIC RECORDS.** Peter E. Baer wrote to the Chief Justice relating to the correct interpretation of "the necessary expense of copying any public record, book or document used in evidence on the trial" which is listed as a recoverable cost and disbursement in ORCP 68 A(2). Mr. Baer apparently felt that he should be allowed to recover the cost of copies of pleadings and some other documents which he submitted, but his claim was disallowed by a trial judge. The Chief Justice passed the letter on to the Council (attached as Exhibit 9).

The reference to public records copies as recoverable disbursements was taken from the former statute governing costs in legal actions, ORS 20.020. The language did not appear in the Field Code and was not in the original 1853 Oregon Code. It was added by Judge Deady in the 1862 revision of the civil code. As far as I can determine in a brief search, the language has never been interpreted by the Oregon appellate courts.

On its face, the key part of the language is "necessary expenses" and "used in evidence on the trial." The copies for which costs are recoverable are those public records where a certified copy must be used at trial; that is, where a party cannot submit an original document because the original must remain in public custody. This is presently covered in the Oregon Evidence Code under Rule 1005, ORS 40.570:

> "The contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 802 of this act."

Rule 803(8), ORS 40.460 of the Evidence Code makes such documents admissible despite the hearsay rule and Rule 802 allows for authentication by certificate. Under this interpretation, only the cost of procuring certified copies of documents admitted into evidence under these provisions of the Evidence Code would be recoverable. This would not cover the pleadings referred to by Mr. Baer. To make this clearer we might change the language to say: "... the necessary expense of securing and copying any public records admitted into evidence pursuant to Rule 1005 of the Oregon Evidence Code."

8. **NONSTENOGRAPHIC DEPOSITIONS.** Thomas E. Cooney wrote to the Council on March 28, 1991, suggesting that the provision allowing for nonstenographic deposition by notice in 39 C(4) be eliminated (attached as Exhibit 10). That provision was included in the original ORCP and was adapted from the Uniform Nonstenographic Deposition Act.

This is the first complaint we have received about abuse in this area. The 1987 legislature amended ORCP 39 to add 39 I and amended ORS 40.450 encouraging use of perpetuation depositions in lieu of live testimony at trial. Presumably many of these perpetuation depositions, which can be used where there is "undue hardship" in production of the live witness, would be done on videotape using the notice provided in ORCP 39 C(4).

The federal rules still do not allow nonstenographic depositions without a court order. FRCP 30(b)(4) was amended in 1980 to add more detailed procedures for using such depositions.

9. **SIX-PERSON JURIES.** Two bills were introduced in the last legislative session to amend ORCP 56 and 57 and provide six-person juries for all civil cases. A copy of HB 3542 is attached as Exhibit 11. Another bill (HB 2885) was almost identical but did not reduce the number of peremptory challenges. HB 2885 passed the house and died in the Senate Judiciary Committee. At the direction of the Council, Ron Marceau wrote to committee chairs in both the House and Senate and asked that action on

adoption of six-person juries be deferred until the Council had an opportunity to study the question.

The desirability of adoption of a six-person jury rather than a 12-person jury for circuit court civil cases is very complex. The federal system and a number of states have successfully shifted to six-person juries. Use of six-person juries clearly would save some money. The legislative fiscal office issued a statement estimating savings of $350,000 every two years (attached as Exhibit 12). There have been a large number of statistical and empirical studies done to determine the effect of changing jury size, and there is substantial disagreement in the conclusions reached among the reports of these studies. The legislature did not have time to make a systematic examination of the likely effect of the change other than the cost savings. We need to determine the best way to do this.

10. **SERVICE OF SUMMONS AT EMPLOYER'S OFFICE.** HB 3156 (attached as Exhibit 13) was introduced during the legislative session to amend ORCP 7 D(2)(c) and allow service of summons by leaving it at the office of an employer. At the direction of the Council, Ron Marceau asked that the legislature defer any consideration until the Council could study the matter. On that understanding the bill was held by the House Judiciary Committee. The Oregon Association of Process Servers, which sponsored the bill, has asked us to go ahead and consider the matter.

The problem with the original bill was that it literally would allow service upon an employee by service at any office maintained by his employer. The employer would become a general agent for service of process for all employers. There may be some value to service at an employer's office, if the employee involved actually is based at or works out of or at that office. It is also true that the existing language referring to a defendant "maintaining" an office is ambiguous. If the Council wishes to proceed with this, we need to work out some limiting language.

11. **INSURANCE FOR PROCESS SERVERS.** The Association of Process Servers also introduced HB 3155 that would have amended ORCP 4 and required a $100,000 errors and admissions policy before anyone could serve a summons. At Council direction, Ron Marceau wrote the legislature and asked that no action be taken pending review by the Council. The Process Servers again wish us to consider the matter.

The original bill would have prohibited any service of summons by clerks or employees of attorneys or by friends of poor litigants. It also seemed more like a matter of licensing professional process servers than a procedural consideration. The Process Servers submitted an amended version of the bill,

which took it out of the ORCP and put the requirement in an ORS section. It also limited application to persons serving summons for a fee (a copy of the A-engrossed bill is attached as Exhibit 14). The bill still died in the House Judiciary Committee. I believe the bar had some concerns about application to out-of-state process servers.

12. **ARIZONA RULE AMENDMENTS.** On March 27, 1991, The Chief Justice wrote to the Council sending along some information about rule changes for the Arizona Rules of Civil procedure (attached as Exhibit 15). The material sent included some changes for appellate and local court rules that go beyond the areas of Council interest. The material that describes adopted and proposed changes to Arizona's general rules of civil procedure is attached as Exhibit 16.

13. **PLEADING MITIGATION OF DAMAGES AND AVOIDABLE CONSEQUENCES AS AFFIRMATIVE DEFENSES.** The Council received letters from Henry Kantor dated May 6, 1991 (attached as Exhibit 17) and from Garry Kahn dated June 26, 1991 (attached as Exhibit 18) suggesting that a decision by the Court of Appeals in Marcoulier v. Umsted should be changed by amending ORCP 19 B.

A copy of the applicable part of the Marcoulier opinion is attached as Exhibit 19. It appears that the pleading burden discussed was actually established in two pre-ORCP cases in 1963 and 1973. The Council would, however, have the authority to change the burden of pleading if it wished.

14. **SUMMONS WARNING.** The State Bar Lawyer Referral Committee is suggesting a change in the warning to defendants in the summons which is required by ORCP 7 C(3). This was transmitted to us by a letter from Ann Bartsch dated May 21, 1991 (attached as Exhibit 20). The idea apparently came from the New Jersey summons form. Since the most useful thing in the summons language is the suggestion that an attorney be contacted, this may be a good idea. Are there other referral services that should be mentioned? Should there be a specific reference to legal aid? The New Jersey language has several numbers.

15. **BIFURCATION OF ISSUES IN MALPRACTICE CASES.** Thomas E. Cooney wrote on May 22, 1991 suggesting that a special provision be put in ORCP 53 B requiring bifurcation of the issue of underlying liability in a legal malpractice case (attached as Exhibit 21). Since this type of separate trial appears authorized by the broad language of ORCP 53 B, what he is suggesting is that this type of segregation be mandatory and not at the trial judge's discretion. Is use of a separate trial in the suggested instance so compelling that it deserves this special treatment?

16. **FILING OF DISCOVERY DOCUMENTS.** The Chief Justice submitted a letter to the Council dated July 29, 1991, with attached memoranda from his clerk and a letter from David Jensen (attached as Exhibit 22). Basically, the issue is the need and desirability of filing requests to disclose, notices of depositions, depositions, requests for production and inspection, and requests for admissions. The Oregon Federal District Court has a special local rule directing that this material not be filed.

The law clerk memo ignores ORCP 9 C and D which govern the question in Oregon. Under ORCP 9, notices of deposition and requests for production and inspection are not filed, but any other document served on an opponent must be filed. Under ORCP 39 G(2)m the transcript or recording of deposition is only filed on request of a party. We might consider adding requests to disclose to those items which should not be filed under 9 D. I think requests for admissions and responses should be in the record. A party also should have the right to demand filing of a deposition so that it can be used for summary judgment purposes.

FRM:gh

Encs.

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August 3, 1990

R. L. Marceau
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1201 N.W. Wall Street, Suite 300
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Dear Ron:

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

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

Yours very truly,

Bernard Jolles

BJ:wh

Enclosure(s)

cc: Fred R. Merrill

Exhibit 1

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

By ELIZABETH KOLBERT
Special to The New York Times

ALBANY, June 18 — New York's highest ranking judge is pressing the court system he heads to give the public greater access to civil court settlements where there is evidence of dangers from consumer products, environmental contamination or other hazards.

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

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

Similar Rule in Texas and Florida

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

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

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

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

Safety Issues Suggested

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

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

Continued on Page A13, Column 1

New York Judge Asks Less Secrecy in Civil Cases

Continued From Page 1

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

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

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

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

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

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

Chief Judge Sol Wachtler

A case that is frequently used to illustrate the potential hazards of sealing court records is a 1968 settlement between the Xerox Corporation and a Rochester family that contended it had been made sick by pollution from the company's plant there. Xerox agreed to a settlement with the family, with the stipulation that the court record be kept secret, a condition that both the family and the judge accepted.

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

Debate Among Lawyers

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

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

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

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

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

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

EX 1-2

Senate Bill 579

Sponsored by Senator KERANS; Senator L. HILL

SUMMARY

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

Allows disclosure of materials or information produced during discovery related to personal injury action or action for wrongful death to another attorney representing client in similar or related matter despite issuance of protective order. Requires notice to parties protected by order and opportunity to be heard. Requires court to allow disclosure except for good cause shown. Applies only to protective orders issued on or after effective date of Act.

A BILL FOR AN ACT

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

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

SECTION 1. ORCP 36 C. is amended to read:

C. Court order limiting extent of disclosure.

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

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

C.(2) A protective order issued under subsection (1) of this section to prevent disclosure of materials or other information related to a personal injury action or action for wrongful death shall not prevent an attorney from voluntarily sharing such materials or information with an attorney representing a client in a similar or related matter. Disclosure may only be made by order of the court, after notice and an opportunity to be heard is afforded to the parties or persons for whose benefit the protective order has been issued. Disclosure shall be allowed by the court except for good cause shown by the parties or persons for whose

NOTE: Matter in bold face in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.

Exhibit 2

benefit the protective order has been issued. No order shall be issued allowing disclosure unless the attorney receiving the material or information agrees in writing to be bound by the terms of the protective order. The provisions of this subsection apply to protective orders in all cases and is not limited to actions for personal injury or wrongful death.

SECTION 2. The amendments to ORCP 36 C. by section 1 of this Act shall apply only to protective orders issued on or after the effective date of this Act.

EX 2-2

HARRANG, LONG, WATKINSON, ARNOLD & LAIRD, P.C.

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September 10, 1990

FRED MERRILL, EXECUTIVE DIRECTOR
COUNCIL ON COURT PROCEDURES
UNIVERSITY OF OREGON
SCHOOL OF LAW
UNIVERSITY OF OREGON
EUGENE OR 97403

Re: ORCP 54A(3)

Dear Mr. Merrill and Committee Members:

I would appreciate the Committee's response to the following queries regarding ORCP 54 A(3):

1. Does the use of the word "may" give the court greater discretion in awarding attorney fees when a case is dismissed pursuant to ORCP 54A(1) than it otherwise would have if judgment were entered after a contested hearing; and

2. What "circumstances" justify a determination that the dismissed party is not a prevailing party, and may the court conduct a mini-trial regarding substantive issues in the case to make a determination concerning a prevailing party.

Your prompt consideration is appreciated.

Sincerely,

B. Kevin Burgess

BKB:sp

Exhibit 3

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OCT 15 1990

AVID C. GLENN
DWARD E. SITES
ONALD V. REEDER

* BOYD OVERHULSE
1934-1988 (Deceased)
SUMNER C. RODRIGUEZ
1949-1988 (Retired)

October 12, 1990

Ron Marceau
Marceau, Karnopp, et al
835 N.W. Bond Street
Bend, OR 97701

Re: Bench Bar Committee Meeting

Dear Mr. Marceau:

In reflecting upon your presentation to the Bench Bar Committee, I wish to express my concern in regards to your committee considering the two judgments in a law suit.

It seems that, in the past, when there have been changes from the court clerk's offices proposed, they are done in order to expedite their handling of the case load or to simplify the procedure. It has been my experience that there has been a continual tinkering with the judgment format which creates more confusion and lost time than if we had kept it in the form prior to the judgment summaries. Nevertheless, my biggest concern is that even if it will expedite the handling of the judgments or simplify it so that the clerks understand the judgments, it appears that there will be yet another piece of paper that will need to be filed with the clerk's office, that is, the second judgment for attorney fees.

Although this is a small matter compared to some of the other concerns regarding changes in the Oregon Rules of Civil Procedure, it still creates additional paperwork and costs to the clients that I represent whenever another piece of paper needs to be filed with the clerk's office. It seems rather ridiculous to bill my client to prepare the attorney fees judgment in order to obtain his attorney fees from a third party. It would seem equally ridiculous to the person upon whom the attorney fees are levied if part of the attorney fees billing would be preparing the attorney fees judgment. My belief is that the less that is necessary to be filed with the clerk's office, the more expeditiously they will handle their paperwork and the less expensive it will be for the litigants to go to court.

Therefore, in general, please consider my request that the reduction in court filings be one of the goals of your committee.

Sincerely,

GLENN, SITES & REEDER

DONALD V. REEDER
DVR:klf

EXHIBIT 4

MOZENA & PERRY, P.C.
ATTORNEYS AT LAW

ADMITTED TO WASHINGTON BAR	ADMITTED TO OREGON BAR	WASHINGTON OFFICE
PETER J. MOZENA PERRY R. BUCK NANCY J. ACHOLTZ CRAIG C. ACHILLE DEAN PONTIUS OF COUNSEL: ALBERT ARMSTRONG III	PETER J. MOZENA RICHARD T. PERRY	2901 MAIN STREET VANCOUVER, WA 98663 FAX (206) 695-9555 PHONE (206) 695-1677

October 9, 1990

Frederic R. Merril
Professor
359 Law Center
University of Oregon
Eugene, Oregon 97403

Dear Mr. Merril:

I have been an Oregon attorney since 1988, and a Washington attorney since 1977. I also served on the Washington State Bar Rules Committee.

After discussing withdrawal with the Oregon Bar Counsel's office and George Riemer, it became clear to me that a rule codifying withdrawal would be appropriate. When I talked to an assistant bar counsel, she was interested in the procedure that I described that existed in Washington, CR 71.

CR 71 provides notice to a client and an opportunity to object. CR 71 provides opposing counsel notice. The rule also provides a filing of record. This rule also provides an automatic withdrawal if no objection occurs, thereby providing clarity to all concerned without a required hearing.

I recommend adoption of a rule similar to CR 71. Thank you for your consideration in this matter.

Sincerely,

PETER J. MOZENA
Attorney at Law

Encl. CR 71

cc. Ed Peterson, Supreme Court Justice
George Riemer, Executive Services Director, Oregon State Bar

PJM1:sw

Exhibit 5

EX 5-1

RULE 69
EXECUTION

(a) **Procedure.** The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the State as authorized in RCW 6.04, 6.08, 6.12, 6.16, 6.20, 6.24, 6.32, 6.36, and any other applicable statutes.

(b) **Supplemental Proceedings.** In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by RCW 6.32.

RULE 70
JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

RULE 71
WITHDRAWAL BY ATTORNEY

(a) **Withdrawal by Attorney.** Service on an attorney who has appeared for a party in a civil proceeding shall be valid to the extent permitted by statute and rule 5(b) only until the attorney has withdrawn in the manner provided in sections (b), (c), and (d). Nothing in this rule defines the circumstances under which a withdrawal might be denied by the court.

(b) **Withdrawal by Order.** A court appointed attorney may not withdraw without an order of the court. The client of the withdrawing

EX 5-2

attorney must be given notice of the motion to withdraw and the date and place the motion will be heard.

(c) **Withdrawal by Notice.** Except as provided in sections (b) and (d), an attorney may withdraw by notice in the manner provided in this section.

(1) *Notice of Intent To Withdraw.* The attorney shall file and serve a Notice of Intent To Withdraw on all other parties in the proceeding. The notice shall specify a date when the attorney intends to withdraw, which date shall be at least 10 days after the service of the Notice of Intent To Withdraw. The notice shall include a statement that the withdrawal shall be effective without order of court unless an objection to the withdrawal is served upon the withdrawing attorney prior to the date set forth in the notice. If notice is given before trial, the notice shall include the date set for trial. The notice shall include the names and last known addresses of the persons represented by the withdrawing attorney, unless disclosure of the address would violate the Rules of Professional Conduct, in which case the address may be omitted. If the address is omitted, the notice must contain a statement that after the attorney withdraws, and so long as the address of the withdrawing attorney's client remains undisclosed and no new attorney is substituted, the client may be served by leaving papers with the clerk of the court pursuant to rule 5(b)(1).

(2) *Service on Client.* Prior to service on other parties, the Notice of Intent To Withdraw shall be served on the persons represented by the withdrawing attorney or sent to them by certified mail, postage prepaid, to their last known mailing addresses. Proof of service or mailing shall be filed, except that the address of the withdrawing attorney's client may be omitted under circumstances defined by subsection (c)(1) of this rule.

(3) *Withdrawal Without Objection.* The withdrawal shall be effective, without order of court and without the service and filing of any additional papers, on the date designated in the Notice of Intent To Withdraw, unless a written objection to the withdrawal is served by a party on the withdrawing attorney prior to the date specified as the day of withdrawal in the Notice of Intent To Withdraw.

(4) *Effect of Objection.* If a timely written objection is served, withdrawal may be obtained only by order of the court.

(d) **Withdrawal and Substitution.** Except as provided in section (b), an attorney may withdraw if a new attorney is substituted by filing and serving a Notice of Withdrawal and Substitution. The notice shall include a statement of the date on which the withdrawal and substitution are effective and shall include the name, address, Washington State Bar Association membership number, and signature of the withdrawing attorney and the substituted attorney. If an attorney changes firms or

EX 5-3

offices, but another attorney in the previous firm or office will become counsel of record, a Notice of Withdrawal and Substitution shall nevertheless be filed.

9. Appeals
(Rules 72–76)

[Reserved]

10. Superior Courts and Clerks
(Rules 77–80)

Rule 77
SUPERIOR COURTS AND JUDICIAL OFFICERS

(a) **Original Jurisdiction.** [Reserved. See RCW 2.08.010.]

(b) **Powers of Superior Courts.**

(1) *Powers of Court in Conduct of Judicial Proceedings.* [Reserved. See RCW 2.28.010.]

(2) *Punishment for Contempt.* [Reserved. See RCW 2.28.020.]

(3) *Implied Powers.* [Reserved. See RCW 2.28.150.]

(c) **Powers of Judicial Officers.**

(1) *Judges Distinguished From Court.* [Reserved. See RCW 2.28-.050.]

(2) *Judicial Officers Defined—When Disqualified.* [Reserved. See RCW 2.28.030.]

(3) *Powers of Judicial Officers.* [Reserved. See RCW 2.28.060.]

(4) *Judicial Officer May Punish for Contempt.* [Reserved. See RCW 2.28.070.]

(5) *Powers of Judges of Supreme and Superior Courts.* [Reserved. See RCW 2.28.080.]

(6) *Powers of Inferior Judicial Officers.* [Reserved. See RCW 2.28-.090.]

(7) *Powers of Judge in Counties of His District.* [Reserved. See RCW 2.08.190.]

(8) *Visiting Judges.*

(A) Assignments.

(i) Visiting judges at direction of Governor. [Reserved. See RCW 2.08.140.]

(ii) Visiting judges at request of judge or judges. [Reserved. See RCW 2.08.140 and 2.08.150.]

(iii) Court administrator—make recommendations. [Reserved. See RCW 2.56.030(3).]

EX 5-4

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for the person, merely for the purpose of harassing or maliciously injuring any other person.
(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

DR 2-110 Withdrawal from Employment.

(A) In general.
(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
(2) In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the lawyer's client, including giving due notice to the lawyer's client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.
(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.
A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:
(1) The lawyer knows or it is obvious that the lawyer's client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for the client, merely for the purpose of harassing or maliciously injuring any other person.
(2) The lawyer knows or it is obvious that the lawyer's continued employment will result in violation of a Disciplinary Rule.
(3) The lawyer's mental or physical condition renders it unreasonably difficult for the lawyer to carry out the employment effectively.
(4) The lawyer is discharged by the lawyer's client.

(C) Permissive withdrawal.
If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:
(1) The lawyer's client:
(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.
(b) Personally seeks to pursue an illegal course of conduct.
(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under these disciplinary rules.

Exhibit

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out the lawyer's employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under these disciplinary rules.

(f) After reasonable notice from the lawyer, fails to keep an agreement or obligation to the lawyer as to expenses or fees.

(2) The lawyer's continued employment is likely to result in a violation of a Disciplinary Rule.

(3) The lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) The lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively.

(5) The lawyer's client knowingly and freely assents to termination of the lawyer's employment.

(6) The lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

EX 6-2

KEITH BURNS
ATTORNEY AT LAW
1100 S.W. SIXTH AVENUE
1105 STANDARD PLAZA
PORTLAND, OREGON 97204
TELEPHONE (503) 222-2411
FAX (503) 222-4428

October 24, 1990

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

Dear Fred:

I represent The Oregon Court Reporters Association. The members of this organization are both the official reporters and the freelance reporters.

A problem that has arisen over the years was the authority of court reporters to administer the oath upon taking depositions. This is usually taken care of by stipulation or the fact that the court reporter was a notary public and had the authority to give oaths under ORS 44.320.

In the 1989 session of the legislature that statute was amended to include "Certified Shorthand Reporters" as those who could take testimony, administer oaths, etc.

A problem arises under telephone depositions provided for in ORCP 39 C.(7) which provides for telephone depositions. While again this is generally taken care of by stipulation and with the new ORS 44.320. When it involves a deposition being taken in Oregon with one of the parties being represented by an out-of-state attorney a questions sometimes arises. There isn't any place in the Certified Court Reporters statute that discusses oaths because they rely upon ORS 44.320.

I believe a very simple way to resolve any problem in the minds of attorneys who are participating in a deposition in this state while they are practicing in another state, would be an amendment to 39 C.(7) by adding the following: "The deposition shall be preceded by an oath or affirmation as provided in Rule 38 A.

Exhibit 7

Perhaps at your convenience you could give me a call on this matter, which I would appreciate.

Sincerely,

KEITH BURNS

KB:db

EX 7-3

Ronald L. Marceau
Dennis C. Karnopp
James E. Petersen
James D. Noteboom
Dennis J. Hubel*
Martin E. Hansen*

* Also admitted in Washington
** Also admitted in Arizona
*** Also admitted in California
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Lyman C. Johnson
(1929-1986)

FAX (503) 388-5710

February 6, 1991

Fred Merrill
University of Oregon
School of Law
Eugene, Oregon 97403

Dear Fred:

Here is a possible future agenda item: One of our local Circuit Court Judges told me he is having a problem with attorneys who insist that the deposition of a witness cannot be confined to the witness, the parties and their attorneys. Evidently, some attorneys believe that other witnesses can be present as well as the parties and their attorneys. This Circuit Court Judge believes this is also a problem in other parts of the state. Evidently, the thought is that the statute which permits exclusion of witnesses from the courtroom during trial is confined to trials, and does not apply to depositions. This Circuit Court Judge points out that ORCP does not deal specifically with the question (I think ORCP provides that parties can be present but probably does not say who cannot be present).

This Circuit Court Judge thought it might be easy to promulgate a rule that would make it clear that non-parties can be excluded from depositions. Any thoughts on this?

Sincerely,

R. L. MARCEAU

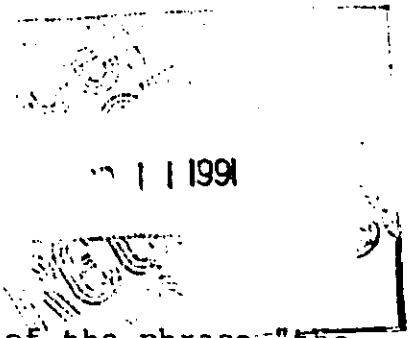
RLM:bdl
200mard.ltr

Exhibit 8

Peter E. Baer, P.C.
Attorney-at-Law
838 N.E. 10th
Gresham, Oregon 97030
(503) 661-7995

March 7, 1991

Re: ORCP - Rule 68



Chief Justice Peterson
Supreme Court Building
1163 State Street
Salem, Oregon 97310

I am requesting a clarification in ORCP 68 of the phrase "the necessary expense of copying of any public record, book or document used as evidence on the trial."

To me, "any public record" would include the pleadings and other documents required by the UTCR's to be submitted during the course of a case. I have just had a Judge rule otherwise and disallow all photocopying charges in the Cost Bill as I could not quickly segregate out exhibits.

Your help clarifying this point will be appreciated.

Very truly yours,

Peter E. Baer

PEB/bjn
PEB-ORCP.LET

3-11-91
Peter:
I have no control over ORCP, but I'm forwarding your letter to the Council on Ct. Procedures.
Ed Jr

cc: CCP ✓

Exhibit 9

LAW OFFICES OF
COONEY, MOSCATO & CREW
A PROFESSIONAL CORPORATION
515 SW FIFTH AVENUE, SUITE 900
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FAX (503) 224-8740
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FRANK E. DAY
ALAN R. BECK
BRUCE L. BYERLY
THOMAS E. COONEY
THOMAS M. COONEY
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JEFFREY S. EDEN*
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GEORGE J. GREGORES
RAYMOND F. MENSING
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ROBERT S. PERKINS*
DEBORAH L. SATHER
OTTO R. SKOPIL, III

OF COUNSEL
JOHN O. McLAUGHLIN
LEONARD D. DUROFF**

*ALSO MEMBER WASHINGTON BAR
**ALSO MEMBER NEW YORK BAR

March 28, 1991

Mr. Ronald L.Marceau
Chair
Council on Civil Procedure
University of Oregon
School of Law
Eugene, Oregon 97403

Re: ORCP 39C(4)

Dear Ron:

I continue to be concerned about ORCP 39C(4) and the unrestricted use of video depositions, with a simple notice request. Subjecting private litigants to the television camera during a deposition is distracting and not necessary, and should only be allowed for good cause. Some lawyers try to utilize the camera as a device to fluster the witness, by having an operator present to be constantly staring through the camera at the witness, making them ever aware of its presence, or they try to position it in such a way so that it's facing right at the witness.

I think video depositions should be limited to certain circumstances and that a showing should be required for the need to take the deposition by video, as it was prior to the present rule. The litigation process is scary enough for litigants without adding to that, except in exceptional circumstance. Imagine a child abuse claim or sexual harassment claim and the impact of a video camera.

Sincerely,

COONEY, MOSCATO & CREW, PC

Thomas E. Cooney

TEC/alw
cc: OADC
Chief Justice Edwin J. Peterson

Exhibit 10

House Bill 3542

Sponsored by JOINT COMMITTEE ON WAYS AND MEANS

SUMMARY

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

Reduces number of jurors in circuit court civil cases from 12 to 6. Reduces number of peremptory challenges in those cases from three to two. Allows court to prescribe rules for exercise of peremptory challenges.

A BILL FOR AN ACT

Relating to circuit court juries; creating new provisions; and amending ORCP 56, 57 D and 59 G.

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

SECTION 1. ORCP 56 is amended to read:

Trial by jury defined. A trial jury in the circuit court is a body of *[12]* six persons drawn as provided in Rule 57. The parties may stipulate that a jury shall consist of any number less than *[12]* six or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

SECTION 2. ORCP 57 D. is amended to read:

D. Challenges.

D.(1) Challenges for cause; grounds. Challenges for cause may be taken on any one or more of the following grounds:

D.(1)(a) The want of any qualifications prescribed by ORS 10.030 for a person eligible to act as a juror.

D.(1)(b) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

D.(1)(c) Consanguinity or affinity within the fourth degree to any party.

D.(1)(d) Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of, the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

D.(1)(e) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, upon substantially the same facts or transaction.

D.(1)(f) Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

D.(1)(g) Actual bias, which is the existence of a state of mind on the part of the juror, in reference to the action, or to either party, which satisfies the court, in the exercise of a sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging. A challenge for actual bias may be taken for the cause mentioned in this para-

NOTE: Matter in bold face in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.

Exhibit 11

graph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

D.(2) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude such juror. Either party shall be entitled to *[three]* **two** peremptory challenges, and no more. Where there are multiple parties plaintiff or defendant in the case or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to a total of *[three]* **two** peremptory challenges, except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

D.(3) Conduct of peremptory challenges. After the full number of jurors have been passed for cause, peremptory challenges shall be conducted as follows, **unless otherwise provided by court rule:** the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the order of alternation shall not defeat the adverse party of such adverse party's full number of challenges, and such refusal by a party to exercise a challenge in proper turn shall conclude that party as to the jurors once accepted by that party, and if that party's right of peremptory challenge be not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted, but nothing in this subsection shall be construed to increase the number of peremptory challenges allowed.

SECTION 3. ORCP 59 G. is amended to read:

G. Return of jury verdict.

G.(1) Declaration of verdict. When the jurors have agreed upon their verdict, they shall be conducted into court by the officer having them in charge. The court shall inquire whether they have agreed upon their verdict. If the foreperson answers in the affirmative, it shall be read.

G.(2) Number of jurors concurring. In civil cases three-fourths of the jury may render a verdict. **If the jury consists of six persons, five jurors must agree on the verdict unless the parties have stipulated to some other number under ORCP 56.**

G.(3) Polling the jury. When the verdict is given, and before it is filed, the jury may be polled on the request of a party, for which purpose each juror shall be asked whether it is his or her verdict. If a less number of jurors answer in the affirmative than the number required to render a verdict, the jury shall be sent out for further deliberations.

G.(4) Informal or insufficient verdict. If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be required to deliberate further.

G.(5) Completion of verdict; form and entry. When a verdict is given and is such as the court may receive, the clerk shall file the verdict. Then the jury shall be discharged from the case.

EX 11-2

SECTION 4. The amendments to ORCP 56, ORCP 57 D. and ORCP 59 G. by sections 1, 2 and 3 of this Act apply only to actions commenced on or after the effective date of this Act.

EX 11-3

1991 Regular Legislative Session
FISCAL ANALYSIS OF PROPOSED LEGISLATION
Prepared by the Legislative Fiscal Office

MEASURE NUMBER: HB 3542
STATUS: Original
SUBJECT: Reduces Circuit Court Civil Juries from 12 to 6 Persons and Reduces Circuit Court Peremptory Challenges from 3 to 2
GOVERNMENT UNIT AFFECTED: Judicial Department
PREPARED BY: Robin LaMonte
REVIEWED BY: Sue Acuff
DATE: April 11, 1991

	1991-93	1993-95
EFFECT ON EXPENDITURES:		
Mandated Payments	$(350,000) GF	$(350,000)

GOVERNOR'S BUDGET: This measure is not included in the Governor's recommended budget.

COMMENTS:

This measure may reduce mandated payment (jury fee and mileage expense) to the Judicial Department by reducing the number of jurors in circuit court civil trials, and by reducing the number of peremptory challenges.

The savings (cost avoidance) estimate above assumes:

* 1675 circuit court civil jury trials a biennium, based on 1988 and 1989 statistics.
* An average cost per juror per day of $11.60 (statutorily set at $10 per diem and $.08 per mile).
* The average panel size to select a 12 person jury, with 3 peremptory challenges for the plaintiff and defendant, is 27.
* The average panel size to select a 6 person jury, with 2 peremptory challenges for the plaintiff and defendant, will be 15.
* There are an average of 2 juror days per civil trial.

Based on these assumptions, there will be average savings the first day of trial of $139.20 ($11.60 x 12, which is the difference between 27 and 15 potential jurors). The average savings for the second day and all subsequent days of trial will be $69.60 ($11.60 x 6, which is the difference between a 12 person and a 6 person jury).

There are factors which could affect the savings estimated above. Examples include: Average trial costs are higher in counties where average juror mileage is higher; if the number of civil jury trials in a biennium increases, total costs will increase. This is likely to occur as 8 new judgeships will have been filled by the end of Fiscal Year 1990/91; and some civil trials are more complex and last longer than the average. Also, if the Judicial Department is required to reduce the number of jury trials scheduled in order to reduce other costs, estimated savings will be reduced.

Exhibit 12

House Bill 3156

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

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

Allows service of summons to be made at business office if person to be served is employee of employer who maintains an office for conduct of business.

A BILL FOR AN ACT

Relating to service of summons; amending ORCP 7 D.

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

SECTION 1. ORCP 7 D., as amended by promulgation on December 15, 1990, by the Council on Court Procedures and submitted to the Legislative Assembly at its 1991 Regular Session pursuant to ORS 1.735, is amended to read:

D. Manner of service.

D.(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication.

D.(2) Service methods.

D.(2)(a) Personal service. Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

D.(2)(b) Substituted service. Substituted service may be made by delivering a true copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules, substituted service shall be complete upon such mailing.

D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, **or if the person is an employee of an employer that maintains an office for the conduct of business,** office service may be made by leaving a true copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge. Where office ser-

NOTE: Matter in bold face in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.

Exhibit 13

vice is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules, office service shall be complete upon such mailing.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a true copy of the summons and a true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed or allowed by these rules, service by mail shall be complete three days after such mailing if the address to which it was mailed is within this state and seven days after mailing if the address to which it is mailed is outside this state.

D.(3) Particular defendants. Service may be made upon specified defendants as follows:

D.(3)(a) Individuals.

D.(3)(a)(i) Generally. Upon an individual defendant, by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons.

D.(3)(a)(ii) Minors. Upon a minor under the age of 14 years, by service in the manner specified in subparagraph (i) of this paragraph upon such minor, and also upon such minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any person having the care or control of the minor or with whom such minor resides, or in whose service such minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

D.(3)(a)(iii) Incapacitated persons. Upon an incapacitated person as defined by ORS 126.003 (4), by service in the manner specified in subparagraph (i) of this paragraph upon such person, and also upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

D.(3)(b) Corporations and limited partnerships. Upon a domestic or foreign corporation or limited partnership:

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation or limited partnership, or by personal service upon any clerk on duty in the office of a registered agent.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found in the county where the action is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation or limited partnership who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to the office of the registered agent or to the last registered office of the corporation or limited partnership, if any, as shown by the records on file in the office of the Corporation Commissioner [Secretary of State] or, if the corporation or limited partnership is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation or limited partnership, and

EX 13-2

in any case to any address the use of which the plaintiff knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

D.(3)(c) State. Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant, or clerk.

D.(3)(d) Public bodies. Upon any county, incorporated city, school district, or other public corporation, commission, board or agency, by personal service or office service upon an officer, director, managing agent, or attorney thereof.

D.(3)(e) General Partnerships. Upon any general partnerships by personal service upon a partner or any agent authorized by appointment or law to receive service of summons for the partnership.

D.(3)(f) Other unincorporated association subject to suit under a common name. Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

D.(3)(g) Vessel owners and charterers. Upon any foreign steamship owner or steamship charterer by personal service upon a vessel master in such owner's or charterer's employment or any agent authorized by such owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.

D.(4) Particular actions involving motor vehicles.

D.(4)(a) Actions arising out of use of roads, highways, and streets; service by mail.

D.(4)(a)(i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf who cannot be served with summons by any method specified in subsection 7 D.(3) of this rule may be served with summons by leaving one copy of the summons and complaint with a fee of $12.50 in the hands of the Administrator of the Motor Vehicles Division or in the Administrator's office or at any office the Administrator authorizes to accept summons or by mailing such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicles Division by registered or certified mail, return receipt requested. The plaintiff shall cause to be mailed by registered or certified mail, return receipt requested, a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of the action, and at the most recent address as shown by the Motor Vehicles Division's driver records, and at any other address of the defendant known to the plaintiff, which might result in actual notice to the defendant. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon the date of the first mailing to the defendant.

D.(4)(a)(ii) The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D.(4)(b) Notification of change of address. Every motorist or user of the roads, highways, and 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 liability, shall forthwith notify the Administrator

Ex 13-3

of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D.(4)(c) Default. No default shall be entered against any defendant served under this subsection unless the plaintiff submits an affidavit showing:

(i) That summons was served as provided in subparagraph D.(4)(a)(i) of this rule and all mailings to defendant required by subparagraph D.(4)(a)(i) of this rule have been made; and

(ii) Either, if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicles Division accessible to plaintiff, that the plaintiff not less than 14 days prior to the application for default caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail, return receipt requested, or that the defendant's insurance carrier is unknown; and

(iii) That service of summons could not be had by any method specified in subsection 7 D.(3) of this rule.

D.(5) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases such service shall be reasonably calculated to give actual notice.

D.(6) Court order for service; service by publication.

D.(6)(a) Court order for service by other method. On motion upon a showing by affidavit that service cannot be made by any method otherwise specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

D.(6)(b) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C.(3) shall state: "The 'motion' or 'answer' (or 'reply') must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D.(6)(c) Where published. In order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D.(6)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

Ex 13-4

D.(6)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in sections I. and J. of Rule 20, the action shall proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy, at the time of the commencement of the action, and served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D.(6)(f) Defending before or after judgment. A defendant against whom publication is ordered or such defendant's representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D.(7) Defendant who cannot be served. A defendant cannot be served with summons by any method specified in subsection 7 D.(3) of this rule if the plaintiff attempted service of summons by all of the methods specified in subsection 7 D.(3) and was unable to complete service, or if the plaintiff knew that service by such methods could not be accomplished.

EX 13-5

A-Engrossed
House Bill 3155

Ordered by the House May 28
Including House Amendments dated May 28

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

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

Prohibits service of summons by person other than sheriff, sheriff's deputy or employee of attorney licensed by state unless person files $100,000 certificate of errors and omissions insurance with Secretary of State.

A BILL FOR AN ACT

Relating to service of summons; creating new provisions; amending ORS 180.260; and repealing ORCP 7 E.

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

SECTION 1. (1) A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor an officer, director or employee of, nor attorney for, any party, corporate or otherwise. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in ORCP 68.

(2) Notwithstanding subsection (1) of this section, no person other than the sheriff, a sheriff's deputy or the employee of an attorney licensed to practice law in this state shall serve a summons for a fee unless the person has filed with the Secretary of State a current certificate of errors and omissions insurance with limits of not less than $100,000 per occurrence from a company authorized to do business in this state.

SECTION 2. ORS 180.260 is amended to read:

180.260. (1) Notwithstanding *[ORCP 7 E.]* **section 1 of this 1991 Act** or any other law, employees and officers of the Department of Justice other than attorneys may serve summons, process and other notice, including notices and findings of financial responsibility under ORS 416.415, in litigation and other proceedings in which the state is interested. No employee or officer shall serve process or other notice in any case or proceeding in which the employee or officer has a personal interest or in which it reasonably may be anticipated that the employee or officer will be a material witness.

(2) The authority granted by subsection (1) of this section may be exercised only in, and within reasonable proximity of, the regular business offices of the Department of Justice, or in situations in which the immediate service of process is necessary to protect the legal interests of the state.

SECTION 3. ORCP 7 E. is repealed.

NOTE: Matter in bold face in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.

Exhibit 14

THE SUPREME COURT
Edwin J. Peterson
Chief Justice

1163 State Street
Salem, Oregon 97310
Telephone 378-6026
FAX (503) 373-7516

March 27, 1991

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

Re: Arizona proposed civil rule changes

I was in Arizona earlier this year. A member of the Arizona bar told me about some proposed changes in their civil rules. I asked her to send me some information about it, and she did so. With this letter I enclose portions of a publication entitled "Trial Practice", published by the Trial Practice Section of the State Bar of Arizona and portions of a CLE manual entitled "Proposed Civil Rules Changes; Cure or Bane--You Decide".

I don't know whether any of the proposed rule changes would be of interest to the Council on Court Procedures, but on the assumption that some of the suggestions might be of interest, I am sending them to you.

Very truly yours,

Edwin J. Peterson
Chief Justice

EJP:ksb

Enclosures

cc w/encls: David V. Brewer
Robert H. Fraser

Exhibit 15

Recent Rule Changes

A variety of rule changes of significance to the trial practitioner either have taken effect or will take effect in the near future. They include the following:

Arizona Rules of Civil Procedure

1. Effective September 1, 1990, Rule 8(h) provides that no dollar amount is to be alleged in a complaint, counterclaim, cross-claim or third-party complaint unless the claim is for a sum certain or a sum that can be made certain by computation. The pleading may contain a statement that the minimum jurisdictional amount for filing has been satisfied.

2. Effective January 1, 1991, Rule 14(a) obligates the person initiating a third-party complaint to serve all previous pleadings with the complaint or provide them to the person served "promptly after service."

3. Effective June 1, 1990, Rule 30(b)(1) provides that notice of taking a deposition on oral examination must be given to parties at least ten days prior to the date of the deposition.

4. Effective December 1, 1990, Rule 41(a)(1) provides that a stipulated dismissal, which is necessary to voluntarily dismiss an action after an answer or motion for summary judgment has been served, becomes effective upon entry of an order of the court. This amendment conforms the formal requirements and the effective date of Rule 41(a) stipulated dismissals to those of appealable orders under Rule 58(a).

5. Effective December 1, 1990, Rule 42(f)(1) will make several changes in the current procedure utilized for change of judge. After such date, a "Notice of Change of Judge" must contain an avowal by the party filing the Notice or by the attorney that the party has not previously been granted a change as a matter of right in that case. A copy of the Notice must be served on the noticed judge. A Notice is ineffective if filed within three days of a scheduled proceeding unless the parties have received less than five days' notice of that proceeding. Waiver of the right to change of judge will occur when a party participates "in any scheduled contested matter in the case" or when the party participates in "a scheduled pretrial hearing or conference."

6. Effective October 4, 1990 but with a comment period expiring on December 24, 1990, Rule 55(b)(1) was changed on an emergency basis to modify the default procedure in legal separation, dissolution and annulment cases. Default may be taken on respondent's failure to appear or by agreement of the parties that the matter may proceed as if by default. In default cases, an appropriate decree may be entered upon motion supported by affidavit.

7. The Rule 68 amendment effective May 1, 1990 reported in the Spring 1990 issue has been changed by further amendment effective September 1, 1990. Under the modified rule, double costs will be recoverable if the offeror obtains a judgment "*equal to, or* more favorable to the offeror than, the offer."

Uniform Rules of Procedure for Arbitration

8. Effective December 1, 1990, only a party who actually appears and participates in the arbitration proceeding may take an appeal from the arbitration award.

Rules of the Supreme Court

9. Effective December 1, 1990, Rule 31(a)(4)(E) has been added to the Supreme Court Rules. A corporate employer may be represented by an officer or other duly authorized agent of the corporation who is not charging a fee for the representation in any proceedings under Title 23, Chapter 2, Article 10 of the Arizona Revised Statutes (occupational safety and health proceedings), before any administrative law judge of the Industrial Commission of Arizona or before any review board of the Arizona Division of Occupational Safety and Health.

10. Effective December 1, 1990, new ER 6.1, Rule 42, has been substituted. While not creating a mandatory duty, the Rule

Exhibit 16

Draft of Rule Proposals

PREAMBLE

In March, 1990 the Supreme Court in conjunction with the State Bar of Arizona appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay. The Committee consisted of lawyers, judges, and administrators representing all segments of the Bar, private and public, as well as various practice specialties and various regions of the state.

The Committee was specifically charged "with the task of studying problems pertaining to abuses and delays in civil litigation and the cost of civil litigation." The Committee was directed to consider the recommendations made by the Commission on the Courts. The Committee was initially charged with responding to the court within 90 days.

The Committee concluded, following many hours of study, that while the American jury system continues to be the finest dispute resolution process in the world, it is suffering from some abuses, largely by practitioners, which are causing unconscionable delays and which are contributing to making the system unaffordable to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure would tend to encourage less expensive and more expeditious methods of resolution while preserving for our citizens the ultimate right to trial by jury should they so desire. The Committee further concluded that adjustments in the Rules of Civil Procedure governing the court system of this state could, when properly administered by the judiciary, substantially reduce the cost of the system to the citizens. It is the fervent hope of the Committee that these changes make the judicial system in Arizona more efficient, more expeditious, less expensive, and more available to all of the people.

In addressing concerns regarding the rules which govern proceedings in the courts of this state, it was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid instances of "litigation by ambush." At the same time the Committee recommended to the Supreme Court rules which embody a philosophy requiring, insofar as it is practical, professionalism among counsel with the ultimate goal of increasing voluntary cooperation and exchange of information. The Committee recognized that the American jury system is grounded in the adversary process. The philosophy of the rules recommended to the court proposes to limit the adversarial nature of the proceedings to those areas where there is a true and legitimate dispute between the parties. The philosophy of the rules will no longer tolerate hostile, unprofessional, and unnecessarily adversarial conduct on the part of the counsel.

The Committee had no desire to unduly limit formal discovery in those cases where formal discovery was the only reasonable and necessary means of obtaining the required factual data. In those cases, counsel are encouraged by the philosophy of the rules to agree on reasonable discovery. The courts are encouraged to assist counsel in those areas where they are unable to agree on a reasonable and necessary discovery path. The courts are, however, directed to deal in a strong and forthright fashion with discovery abuse and discovery abusers. These rules provide the vehicle by which such action can be taken.

The ultimate philosophy expressed by these changes in the rules is to encourage counsel to act as the professionals they are and to recognize the professional obligation to the public to continue the American jury system as the world's greatest dispute resolution device.

II.
COMMENCEMENT OF ACTIONS; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

RULE 4. Process

(a - i) [No change.]

(j) ~~Summons; Time Limit for Service.~~ If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (d)(6) of this rule.

Committee Comment

This rule addition is intended to bring the state rules into conformity with the federal rules. It is also consistent with the philosophy of Rule 41(e) eliminates the necessity for Rule 6(f).

RULE 6. Time

(a - e) [No change.]

~~(f) Summons and Service; Abatement of Action. An action shall abate if the summons is not issued and served, or the service by publication commenced within one year from the filing of the complaint.~~

EX 16-2

IV.
PRETRIAL PROCEDURES

RULE 16.
Pretrial Conferences; Scheduling; Management

(a) Pretrial Conferences; Objectives. [No change.]

(b) Scheduling and Planning. ~~Upon its own motion or upon motion of the parties, the court may, after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that sets deadlines for: joining other parties and amending pleadings; serving and hearing motions; and completing discovery.~~

~~The scheduling order may also include the date or dates for conferences before trial, a final pretrial conference, and trial; and any other matters appropriate in the circumstances of the case.~~

~~Should the court determine after consultation that a scheduling order is appropriate, the order shall issue as soon as practicable. A schedule shall not be modified except by leave of court upon a showing of good cause.~~

Upon written request of any party the court shall schedule a Comprehensive Pretrial Conference. The court may upon its own motion schedule a Comprehensive Pretrial Conference.

Committee Comment

The trial court will want to consider the necessity of requiring pretrial memoranda. It is presumed that when the conferences are scheduled, the court by minute entry will prescribe the type of pretrial memoranda, if any, that is required from the parties.

(c) Subject to Be Discussed at Pretrial Conferences. ~~The participants at any conference under this rule may consider and take action with respect to~~

~~(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;~~

~~(2) the necessity or desirability of amendments to the pleadings;~~

~~(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding authenticity of documents, and advance rulings from the court on the admissibility of evidence;~~

~~(4) the avoidance of unnecessary proof and of cumulative evidence;~~

~~(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;~~

~~(6) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;~~

~~(7) the form and substance of the pretrial order;~~

~~(8) the disposition of pending motions;~~

~~(9) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal problems, or unusual proof problems; and~~

~~(10) such other matters as may aid in the disposition of the action.~~

~~At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.~~

The Court may:

(1) Determine the additional discovery to be undertaken and a schedule therefor. The schedule shall include additional depositions to be taken and the time for taking same; requests for additional production of documents; requests for additional non-uniform interrogatories; requests for additional requests for admissions; requests for inspections or physical or mental examinations; other discovery requests pursuant to these rules and any requests for additional expert witnesses. The court shall specify a time schedule for the completion of all further discovery.

(2) Determine a schedule for the disclosure of expert witnesses. Such disclosure shall be within 90 days after the conference except upon good cause shown.

(3) Determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4).

(4) Determine a date for the disclosure of non-expert witnesses and the order of their disclosure; provided, however, that the date for disclosure of all witnesses, expert and non-expert, shall be at least 45 days before the cessation of discovery. Any witnesses not appropriately disclosed shall not be allowed to testify at trial unless there is a showing of good cause.

(5) Resolve any discovery disputes which have been presented to the court by way of motion not less than 10 days before the conference. The moving party shall set forth the question or answer to which objection is made and the basis for the objection. The responding party may file a response not less than 3 days before the conference. No replies shall be filed unless ordered by the court. The court shall assess an appropriate sanction, including those permitted under Rule 16(f), against any party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist discovery.

(6) Eliminate non-meritorious claims or defenses.

(7) Permit the amendment of the pleadings.

(8) Assist in identifying those matters of fact which are still at issue.

(9) Obtain stipulations as to the foundation or admissibility of evidence.

(10) Determine the desirability of special procedures for management of the case.

(11) Consider alternative dispute resolution.

(12) Determine whether time limits in discovery rules set forth in the Uniform Rules of Practice or Local Rules should be modified or suspended.

(13) Determine whether Rule 26.1 has been appropriately complied with by the parties.

(14) Determine a date for a settlement conference if the court feels a settlement conference is appropriate.

(15) Determine a date for compliance with Rule VI(a), Uniform Rules of Practice.

(16) Determine a trial date.

(17) Make such other orders as the court deems appropriate.

Committee Comment

The subjects to be discussed at the Pretrial Conference are within the dis-

EX 16_3

cretion of the court. All 17 of the items listed may be the subject of discussion or the court may add or delete from those suggested items.

Rule 16(c)(3) should be read in conjunction with Rule 26(b)(4) and the comment appended to that rule. It is not the intent of the Committee to limit parties from designating or calling at trial expert witnesses who are reasonably necessary. The goal of the Committee was to limit the expense of the litigation by eliminating unnecessary or duplicative expert witnesses.

Rule 16(c)(6) is not intended to permit "lightning summary judgments." The intent is to require the court to discuss with the parties in cases where there are multiple parties, multiple theories, multiple causes of action, etc., whether all such claims or defenses were, in fact, necessary and whether they would ultimately be relied on. The court does not have the power over objection of the parties to dismiss any such claim or defense except upon motion as otherwise provided in these rules.

Rule 16(c)(10) is intended to encourage the court and the parties to consider whether or not their particular case requires special procedures for the management of the case. By way of example, discovery masters have proven useful. Judicial time may be preserved if the issues are bifurcated.

Rule 16(c)(11) is intended by the Committee to be a strong suggestion that the court explore the possibility of alternative dispute resolution including binding and non-binding arbitration, mediation and summary jury trials.

(d) Final Pretrial Conference. [No change.]

(e) Pretrial Orders. [No change.]

(f) Sanctions. If a party or attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, ~~may~~ shall, except upon a showing of good cause, make such orders with regard to such conduct as are just, including, among others, any of the orders provided in Rule 37(b)(2)(B), (C), or (D). In lieu of or in addition to any other sanction, the judge shall require the party, or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorneys' fees, or payment of an assessment to the clerk of the court, or both, unless the judge finds that the noncompliance was substantially justified, or that other circumstances make an award of expenses unjust.

Committee Comment

This rule expands the sanctions available to the court for non-compliance with not only the letter of the rule but the spirit of the rule. It makes available to the court any and all of the sanctions available under the rules. The sanctions are mandatory upon the finding by the court that Rule 16 has been breached. The rule also allows the court to enter an order requiring that all or a portion of the sanction be paid to the Clerk of the Court. It is contemplated that where the parties have had expenses and the sanction is intended to reimburse for those expenses or attorneys' fees, that portion of the payment at least will be ordered directly to the party incurring the expense. Where all or a portion of the sanction, however, is not intended to recompense an expense, that can be ordered paid to the clerk of the court. One of the purposes in such an order would be to see that, in fact, the sanction is paid rather than have it waived by opposing counsel.

It should be noted that the court may be required, depending upon the circumstances, to hold an evidentiary hearing to determine the appropriate nature of the sanctions and whether the sanctions should be entered against the party, counsel, or both. See Robinson v. Higuera, 157 Ariz. 622, 760 P.2d 622 (App. 1988).

V.
DEPOSITIONS AND DISCOVERY

RULE 26.
General Provisions Governing Discovery

(a) Discovery Methods. [No change.]

(b) Discovery Scope and Limits. [No change.]

(1) In General. [No change.]

(2) Insurance Agreements. [No change.]

(3) Trial Preparation; Materials. [No change.]

~~(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:~~

(4) Limitations and Discovery Regarding Experts. Each side shall presumptively be entitled to only one independent expert on an issue. Where there are multiple parties on a side and the parties cannot agree as to which independent expert will be called on an issue, the court shall designate an independent expert to be called or, upon the showing of good cause, may allow more than one independent expert to be called.

(4) (A), (B), and (C) [No change.]

Committee Comment

The amendment to Rule 26(b)(4) must be read in conjunction with proposed Rule 43(g). The purpose of these two rules is to avoid unnecessary costs inherent in the retention of multiple independent expert witnesses. The words "independent expert" in this rule refers to a person who will offer opinion evidence who is retained for testimonial purposes and who is not a witness to the facts giving rise to the action. As used in this rule the word "presumptively" is intended to mean that an additional expert on an issue can be used only upon the demonstration of good cause.

Rule 43(g) is intended to reinforce Rule 403 of the Arizona Rules of Evidence which gives the court discretion to exclude relevant evidence which represents "needless presentation of cumulative evidence." By use of the word "shall" in Rule 43(g) it is the intent of the Committee to strongly urge trial judges to exclude testimony from

EX 16

independent experts on both sides which is cumulative except in those circumstances where the cause of justice dictates to the contrary.

There is no intent to preclude witnesses who in addition to their opinion testimony are factual witnesses. Under Rule 43(g), however, the court would exclude an independent expert witness whose opinion would simply duplicate that of the factual expert witness, except for good cause shown.

This amendment to Rule 26(b)(4) in combination with Rule 43(g) and Rule 16(c)(3) as intended to discourage the unnecessary retention of multiple independent expert witnesses and the discovery costs associated with listing multiple cumulative independent experts as witnesses. The committee does not intend any change in the present rule regarding specially retained experts.

(5) **Non-Party at Fault.** [No change.]

(c) **Protective Orders.** [No change.]

(d) **Sequence and Timing of Discovery.** [No change.]

(e) **Supplementation of Responses.** Except as provided in Rule 26.1, a party who has responded to a quest for discovery that was complete when made is under no duty to supplement the response to include information thereafter acquired except as follows:

(1) [No change.]

(2) [No change.]

(3) [No change.]

(f) ~~Signing of~~ **Discovery Requests, Responses, and Objections and Sanctions.** ~~The provisions of Rule 11(a) apply to every request for discovery, or response or objection thereto.~~ The court shall assess an appropriate sanction including any order under Rule 16(f) against any party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct.

Committee Comment

This rule is intended to give the court the authority to sanction any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist conduct. It is intended to allow the court all of the sanctions available under Rule 16(f). The rule is specifically intended to expressly give the court authority to deal with parties and attorneys whose unprofessional and unreasonable conduct has resulted in an abuse of the discovery process.

RULE 26.1
Prompt Disclosure of Information

(a) Duty to Disclose; Scope. Each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based providing, where necessary for a reasonable understanding of the claim or defense, citations of legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a designation of the subject matters about which each witness might be called to testify.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based.

(8) The existence, location, custodian, and general description of any tangible evidence or relevant documents that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or, in the case of voluminous documentary information, a list of the categories of documents, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents will be made, or have been made, available for inspection and copying, unless good cause is stated for not doing so, a copy of each document listed shall be served with the disclosure. If production is not made, indicate the name and address of the custodian of the document.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

Committee Comment

This new addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

The spirit of the rule is perhaps more important than the precise words chosen. It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1, and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) the requirement for the disclosure of all cases in which the expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided

that it would be burdensome to require this information in all cases.

(b) Time for Disclosure; A Continuing Duty.

(1) The parties shall make the disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of an Answer to the Complaint. For good cause, the court may shorten or extend this time. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. Upon each service of a disclosure, a notice of disclosure shall be promptly filed with the court.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be served within fourteen (14) days after the information is revealed to or discovered by the disclosing party, but in no event later than sixty (60) days before trial except by leave of court.

(3) All disclosure shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

Committee Comment

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

(c) Exclusions of Undisclosed Evidence. In addition to any other sanction the court may employ, the court shall exclude at trial any evidence offered by a party that was not timely disclosed as required by this rule, except by leave of court for good cause shown, and no party shall be permitted to examine that party's witness to prove facts other than those identified in the written disclosure to the party's opponents except by leave of court granted upon a showing of good cause.

(d) Signed Disclosure. Each disclosure shall be made in writing under oath, signed by the party making the disclosure.

(e) Misleading Disclosure. A party or attorney who makes a disclosure pursuant to this rule that the party or attorney knew or should have known was inaccurate and thereby misleads an opposing party to engage in substantial unnecessary investigation or discovery shall be ordered by the court to reimburse the opposing party for the cost, including attorneys' fees of such unnecessary investigation or discovery and may be subject to other appropriate sanctions as the court may direct. If a party or attorney fails to comply with the provisions of this rule, the court, upon motion or on the court's own initiative shall make such orders with regard to such conduct as are just, including any of the orders provided in Rule 16(f).

~~Committee Comment~~

~~Rule 26.1(e) is intended specifically to deal with the party and/or attorney who makes intentionally inaccurate or misleading responses to discovery.~~

RULE 30.
Depositions
Upon Oral Examination

(a) When Depositions May Be Taken. ~~After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service which is completed under Rule 4(e), except that leave of court is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

After commencement of the action, the testimony of parties or any expert witnesses expected to be called may be taken by deposition upon oral examination. No other depositions shall be taken except upon: (1) agreement of all parties; (2) an order of the court following a motion demonstrating good cause, or (3) an order of the court following a Comprehensive Pretrial Conference pursuant to Rule 16.2.

If the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service which is completed under Rule 4(e), leave of court granted with or without notice is required except that leave is not required: (1) if a defendant has served a notice of taking deposition or otherwise sought discovery or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

The deposition of a person confined in prison may be taken only by leave of court, on such terms as the court prescribes.

Committee Comment

Rule 30(a) is intended to address the problem of overuse of expensive and unnecessary depositions. The rule, along with Rule 26.1 and Rule 16, is intended to encourage voluntary disclosure of information between the parties and is further intended to require at a minimum consultation between counsel prior to the setting of depositions. Any party may take the deposition of any other party, including depositions taken under Rule 30(b)(6) and the deposition of any disclosed expert, without agreement or leave of court. Any other depositions must be taken either by agreement of the parties, upon motion of the court, or pursuant to an order of the court following a Comprehensive Pretrial Conference under Rule 16. Refusing to agree to the taking of a reasonable and necessary deposition should subject counsel to sanctions under Rule 26(f).

(b) Notice of Examination. [No change.]

(1 - 7) [No change.]

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Arizona Rules of Evidence. The examination shall commence at the time and place specified in the notice or within thirty minutes thereafter. And, unless otherwise stipulated or ordered, will be continued on

EX 16-6

successive days, except Saturdays, Sundays and legal holidays, until completed. Any party not present within thirty minutes following the time specified in the notice of taking deposition waives any objection that the deposition was taken without that party's presence. The officer before whom the deposition is to be taken shall put the witness on under oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. If the deposition is taken telephonically and the witness is not physically in the presence of the officer before whom the deposition is to be taken, the officer may nonetheless place the witness under oath with the same force and effect as if the witness were physically present before the officer. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. If the testimony is transcribed, the party noticing the deposition or the party causing the deposition to be taken shall be responsible for the cost of the original transcript.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, or any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. The court shall assess an appropriate sanction, including any order under Rule 26(f), against any party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Length of Deposition; Motion to Terminate or Limit Examination. Depositions shall be of reasonable length. The oral deposition of any party or witness, including expert witnesses, whenever taken, shall not exceed four (4) hours in length, except pursuant to stipulation of the parties, or upon motion and a showing of good cause. The court shall impose sanctions pursuant to Rule 26(f) for unreasonable conduct.

At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to Witness; Changes; Signing. [No change.]

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing; Preservation of Notes and Tapes of Depositions. [No change.]

(g) Failure to Attend or to Serve Subpoena; Expenses. [No change.]

(h) Depositions for Foreign Jurisdiction. [No change.]

Committee Comment

This rule, in conjunction with Rule 30(a) is intended to address the overuse of depositions. Depositions are presumptively limited to four (4) hours. The Committee recognizes, however, that there are depositions which cannot be concluded within these presumptive limits. The presumptive limits can be exceeded upon stipulation of counsel. Counsel who refuse to agree to depositions which reasonably and necessarily require more than four (4) hours may subject themselves to sanctions pursuant to Rule 26(f). The court, upon motion and good cause or as a part of the Comprehensive Pretrial Conference pursuant to Rule 16(c)(1), may prescribe the time limits. The Committee intends that there be professional cooperation between counsel in regulating the necessary length and scope of depositions.

RULE 32.
Use of Depositions in Court Proceedings

(a) Use of Depositions. [No change.]

(b) Objections to Admissibility. [No change.]

(c) [Deleted] [No change.]

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. [No change.]

(2) As to Disqualification of Officer. [No change.]

(3) As to Taking of Deposition.

(A) [No change.]

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(D) Objections to the form of the question or responsiveness of the answer shall be concise and not suggest answers to the witnesses and shall not be general in nature but must specify the defect in the form of the question or answer so that the defect, if any, might be obviated, removed or cured. Argumentative interruptions are not permitted.

Committee Comment

The changes in Rule 32(d)(3) are again intended to reflect the strong recommendation of the Committee that professional conduct on the part of counsel engaged in the deposition process is mandated. The intent of this rule is that absent a stipulation to the contrary, objections at depositions will be limited to those matters involving privilege

against disclosure of information or to the form of the question or answer. If the question or answer are such that a rephrasing of either would make an objection to the form of the question inappropriate at trial, then the opponent of the evidence is required to make that objection at deposition and specify what is inappropriate regarding the form of the question or answer. Rule 32(d)(3)(D) was not intended to be all inclusive of the conduct at depositions which could lead to sanctions under Rule 26(f). By way of example, continuous unwarranted conferences between counsel and the deponent following the propounding of questions and prior to the answer, could also be the kind of conduct proscribed by Rule 32(d)(3)(D) and Rule 26(f).

(4) As to Completion and Return of Deposition. [No change.]

RULE 33.
Interrogatories to Parties.
[No change.]

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 [40] days after service of the interrogatories, except that a defendant may serve answers or objections within 45 [60] days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or failure to answer an interrogatory.

(b) Scope; Use at Trial. [No change.]

(c) Option to Produce Business Records. [No change.]

[RULE 33.1
Non-Uniform Interrogatories; Limitations; Procedure]

(a) Presumptive Limitations. Except as provided in these Rules, a party shall not serve more than fifteen (15) non-uniform interrogatories upon any other party. Any subparts will be considered as separate interrogatories.

(b) Stipulations to Serve Additional Non-Uniform Interrogatories. If a party believes that good cause exists for the service of more than fifteen (15) non-uniform interrogatories upon any other party, that party shall consult with the party upon whom the additional non-uniform interrogatories would be served and attempt to secure a written stipulation as to the number of additional non-uniform interrogatories that may be served.

(c) Leave of Court to Serve Additional Non-Uniform Interrogatories. If a stipulation permitting the service of additional non-uniform interrogatories is not secured, a party desiring to serve additional non-uniform interrogatories may do so only by leave of court. Upon written motion or application showing good cause therefor, the court, in its discretion may grant to a party leave to serve a reasonable number of additional non-uniform interrogatories upon any other party. The party seeking leave to serve additional non-uniform interrogatories shall have the burden of establishing that the issues presented in the action warrant the service of additional non-uniform interrogatories, or that such additional non-uniform interrogatories are a more practical or less burdensome method of obtaining the information sought, or other good cause therefor. No such motion or application may be heard or considered by the court unless accompanied by the proposed additional non-uniform interrogatories to be served, and by the certification of counsel required by Rule IV(g) of the Uniform Rules of Practice of the Superior Court. The proposed additional non-uniform interrogatories shall only be attached to the judge's copy of the motion and the copy served on opposing parties.

[Committee Comment

It is the Committee's belief that with the mandatory disclosure under Rule 26.1 and the addition of the revised uniform interrogatories for personal injury and wrongful death cases, the vast majority of civil cases can be adequately discovered through the use of available uniform interrogatories and the additional 15 non-uniform interrogatories allowed by the rule. As is the case with depositions under Rule 30(a), if there is a reasonable need for additional non-uniform interrogatories, they may be obtained by stipulation of counsel or by motion to the court on a showing of good cause. Refusing to agree to additional non-uniform interrogatories which are reasonable and necessary should subject counsel to sanctions under Rule 26(f).

RULE 34.
Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. [No change.]

(b) Procedure and Limitations. ~~The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.~~

[The request shall set forth the items to be inspected either by individual item or by specific category, and describe each item and specific category with reasonable particularity. The request shall not, without leave of court, include more than five (5) distinct items or specific categories of items. 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

EX 16-B

within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. 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 objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 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. [No change.]

RULE 36.
Requests for Admission

(a) Request for Admission. [No change.]

(b) Procedure. Each request shall contain only one factual matter or request for genuineness of all documents or categories of documents. Each party without leave of court shall be entitled to submit no more than ten (10) requests in any case except upon: (1) agreement of all parties; (2) an order of the court following a motion demonstrating good cause; or (3) an order of the court following a Comprehensive Pretrial Conference pursuant to Rule 16.2. Any interrogatories accompanying requests shall be deemed interrogatories under Rule 33.1.

(c) Effect of Admission. [Renumbered – No change.]

RULE 43.
Witnesses, Evidence

(a) Definition of Witness. [No change.]

(b) Affirmation in Lieu of Oath. [No change.]

(c) Interpreters. [No change.]

(d) Limitation on Examination of Witness; Exception. [No change.]

(e) [Deleted]. [No change.]

(f) Form and Admissibility of Evidence. [No change.]

(g) Multiple Experts. The Court shall not permit opinion evidence on the same issue from more than one independent witness per side, except upon a showing of good cause.

(h) [Deleted]. [No change.]

(i) Evidence on Motions. [No change.]

(j) [Renumbered]. [No change.]

(k) Preservation of Court Reporters' Notes of Court Proceedings. [No change.]

Committee Comment

See the Committee Comment to Rule 16(c)(3) and Rule 26(b)(4).

UNIFORM RULES OF PRACTICE OF SUPERIOR COURT OF ARIZONA

RULE VI.A
Mandatory Settlement Conferences

(a) Mandatory Settlement Conferences; Objectives. Except as to lower court appeals and cases subject to compulsory arbitration under A.R.S. §12-133, in any action in which a motion to set and certificate of readiness is filed, the court, at the request of any party, shall, except for good cause shown, direct the parties, the attorneys for the parties and, if appropriate, representatives of the parties having authority to settle, to participate either in person or, with leave of court, by telephone, in a conference or conferences before trial for the purpose of facilitating settlement. Unless otherwise ordered by the court, all requests for settlement conferences shall be made not later than 60 days prior to trial.

At any time, on motion of a party, or on its own motion, the court may schedule a settlement conference pursuant to Rule 16, Rules of Civil Procedure. The provisions of sub-paragraphs (b) and (c) of this rule shall apply to such pre-trial settlement conferences.

(b) Scheduling and Planning. The court shall enter a scheduling order that sets the date for the conference, a deadline for furnishing memoranda, and other matters appropriate in the circumstances of the case. A schedule shall not be modified except by leave of court upon a showing of good cause.

(c) Settlement Conference Memoranda. Each party shall furnish the court with a separate memorandum. The memorandum shall not be filed with the Clerk of Court. Parties shall furnish the memoranda sealed to the division assigned to the case. Each memoranda shall address the following:

1. a general description of the issues in the lawsuit, and the positions of each party with respect to each issue;
2. a general description of the evidence that will be presented by each side with respect to each issue;
3. a summary of the settlement negotiations that have previously occurred;
4. an assessment by each party of the anticipated result if the matter did proceed to trial; and
5. any other information each party believes will be helpful to the settlement process.

d. Discretion to Transfer. The court, upon its own motion, or upon the motion of a party, may transfer the settlement conference to another division of the court, willing to conduct the settlement conference.

e. Sanctions. The provisions of Rule 16(f) concerning sanctions shall apply to a conference provided for by this rule.

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PHILIP A. LEVIN
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May 6, 1991

Professor Fredric R. Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403-1221

RE: Council on Court Procedures

Dear Fred:

As a new matter to be considered at the next meeting of the Council, whenever that is, we should take a look at Marcoulier v. Umsted, 105 Or. App. 260 (1991), from which a petition for review has been filed but not yet ruled on as far as I know. The court held that ORCP 19B does not require that the defenses of mitigation and avoidable consequences be pleaded affirmatively. Assuming review is denied or the Court of Appeals is affirmed, that seems inconsistent with what I have understood the intent of the Council to be regarding the pleading of affirmative defenses, so I think the Council should consider explicitly overruling Marcoulier. It would be helpful to have your thoughts on this at whatever meeting this matter gets raised.

Very truly yours,

Henry

Henry Kantor

HK:lb
cc: Mr. Ronald L. Marceau

Exhibit 17

JUN 2 7 1991

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June 25, 1991

Mr. Ronald L. Marceau
Chair, Council on Court Procedures
1201 N. W. Wall St., Suite 300
Bend, Oregon 97701

Re: Mitigation of Damages as Affirmative Defense
Marcoulier v. Umsted, 105 Or.App. 260 (1991)

Dear Ron:

In my opinion, the Council on Court Procedures should consider a rule that would require the pleading of a mitigation of damage claim. In Marcoulier v. Umsted, 105 Or.App. 260 (1991), the Court holds that although the Defendant has the burden of proof regarding mitigation of damages, it need not be pleaded as an affirmative defense. I do not believe this is a step in the right direction for "notice pleading."

I learned of this ruling while doing some research in a case where the Defendant had pleaded that the Plaintiff was at fault for a bike/truck collision in not wearing a bike helmet. I moved to strike the defense on the grounds that if such evidence was admissible at all, it would only be admissible on the issue of mitigation of damages. Quite frankly, I do not believe it should be admissible at all. In any event, the Court ruled that the Motion to strike the defense would be allowed, but indicated that the Defendant could prove that Plaintiff failed to wear a bike helmet in mitigation of damages if they had evidence to support such a claim. However, the Court specifically ruled on the basis of Marcoulier that the Defendant would not be required to plead the defense in mitigation of damages.

Think of the consequences of such a ruling. In my case, the Defendant could have filed a general denial and at the time of trial showed up with a biomedical/engineer expert to prove that if the Plaintiff would have been wearing a bike helmet, his damages would have been lessened, etc. According to Marcoulier v. Umsted, such a claim could have been made without any notice having been given to the Plaintiff about the Defendant's intention to put on such evidence.

Exhibit 13

There are many other examples I could cite where such an "ambush" could occur. It seems to me that the better rule would require the Defendant to plead affirmatively a mitigation of damages defense.

Very truly yours,

Garry L. Kahn

GLK:de

cc: Mr. Henry Kantor
Vice-Chair, Council on
Court Procedures

EX 18-2

On the merits, the trial court concluded that, under ORCP 19B, the defenses of mitigation and avoidable consequences must be pleaded affirmatively. Appellants rely on *Zimmerman v. Ausland*, 266 Or 427, 513 P2d 1167 (1973), and *Blair v. United Finance Co.*, 235 Or 89, 383 P2d 72 (1963), for the opposite conclusion.[2] Appellants are correct. The court said in *Zimmerman*:

> "In considering whether plaintiff is required to mitigate her damages by submitting to surgery we must bear in mind that while plaintiff has the burden of proof that her injury is a permanent injury, defendant has the burden of proving that plaintiff unreasonably failed to mitigate her damages by submission to surgery. • • • However, evidence that plaintiff could reasonably have avoided all or part of the damages is admissible under a general denial." 266 Or at 432. (Citations omitted.)

It said in *Blair*:

> "The defense [of avoidable consequences] need not be affirmatively alleged. • • • Evidence that a plaintiff reasonably could have avoided all or part of the damages is admissible under the general issue." 235 Or at 91. (Citations omitted.)

See also Nelson v. EBI Companies, 296 Or 246, 252, 674 P2d 596 (1984).

ORCP 19B was adopted after *Zimmerman* and *Blair* were decided. It provides, as material:

> "In pleading to a preceding pleading, a party shall set forth affirmatively [several enumerated defenses, not including mitigation or avoidable consequences] and any other matters constituting an avoidance or affirmative defense."

The Council on Court Procedures staff comment notes that:

of the record setting out the specific ruling." If the point of that statement is that the assignment of error is deficient, we agree, and it is not unique among appellants' assignments in that respect. *See* 102 Or App at 66. However, on this remand from the Supreme Court, we are not at liberty to refuse to consider an assignment of error that we did address in our earlier disposition of the appeal, notwithstanding the inadequacy of the assignment.

[2] Appellants and the trial court appear to treat the doctrines of avoidable consequences and mitigation of damages interchangeably. Although we question the analytical accuracy of that treatment, it appears to find support in *Zimmerman v. Ausland*, *supra*. In any event, whether the doctrines are or are not correctly viewed as synonymous or as overlapping, no reason occurs to us why the pleading and proof requirements that apply to them should differ.

> "Section 19B does not change the existing burden of pleading," although some "specific affirmative defenses which do not appear in the federal rule but which are the subject of Oregon cases are included." Merrill, *Oregon Rules of Civil Procedure: 1990 Handbook* 57. ORCP 19B does not affect the holdings in *Zimmerman* and *Blair*, and the trial judge erred by excluding the evidence on the ground that he did.[3]

As part of their second assignment, appellants also contend that the court erred by denying their motion for a directed verdict, made on the ground that Umsted's proof of damages failed because there was no evidence of mitigation. As the cases on which appellants rely make clear, Umsted had no burden of proof on mitigation. Hence, no directed verdict should have been allowed against him on the ground that he did not prove mitigation.

In the same assignment, appellants also attempt to challenge the court's refusal to give an instruction on avoidance of damages. Any such error in the jury instructions is intertwined with the error in excluding the evidence and will be curable on remand in the trial court. The Supreme Court's instructions in its remand to us do not affect the portions of our earlier opinion relating to the other assignments of error, and we adhere to them.

Appellants argue that, because the error on the mitigation question goes to all of Umsted's compensatory damages, a remand on all issues is necessary. They are not correct. In the first place, we have affirmed the judgment for Umsted in the partnership dissolution proceeding, and it is not affected by our present disposition of the third-party claim. On that claim, Umsted was awarded $100,000 damages for lost future income and profits and $25,000 in punitive damages. The mitigation/avoidable consequences defense can relate directly only to the compensatory damages. Appellants argue that the punitive damages award cannot stand in the absence of an award of compensatory damages. Umsted takes the opposite view, relying on *Goodale v. Lachowski*, 97 Or App 158, 775 P2d 888 (1989). We held there that proof of actual harm, even in the absence of an award of actual damages, is

[3] No substantive legal questions concerning the defenses are before us, and we imply no answers to any that might arise on remand.

Exhibit 19

Exhibit 19

OREGON STATE BAR
1935

5200 S.W. Meadows Road, P.O. Box 1689, Lake Oswego, Oregon 97035-0889
(503) 620-0222 or WATS 1-800-452-8260, FAX: (503) 684-1366

May 21, 1991

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

Dear Prof. Merrill:

Bob Oleson of the OSB's Public Affairs program has asked me to forward a copy of the enclosed material. The Bar's Lawyer Referral Committee is proposing, as suggested in the attached letter, that ORCP 7C(3) be amended to read as follows:

> If you have questions, you should see an attorney immediately. <u>If you need assistance in finding an attorney, you may contaot the Oregon State Bar's Referral and Information Service at (503) 684-3763 or (800) 452-7636.</u>

Addition of the underlined language would provide individuals served with process with timely and practical information. The OSB's Referral and Information Service provides referrals not only to panel members of the Lawyer Referral Service, but also to appropriate sources of free legal help (legal aid and pro bono programs) in the caller's geographic area.

I would appreciate any comments you or the Council may have on this proposal. Please feel free to contact me at extension 323 at the Oregon State Bar Center.

Sincerely,

Ann Bartsch

Ann Bartsch
Director of Member Services

AB:ab
cc: Bob Oleson
Lawyer Referral Committee

Exhibit 20

DAVIS WRIGHT TREMAINE
LAW OFFICES

2300 FIRST INTERSTATE TOWER • 1300 SW FIFTH AVENUE • PORTLAND, OR 97201-5682
(503) 241-2300

DUANE A. BOSWORTH

April 10, 1991

Ms. Ann Bartsch
Oregon State Bar
P.O. Box 1689
Lake Oswego, OR 97035

Dear Ann:

I recently came across this very interesting language in a New Jersey summons. This would be an excellent project, in my opinion, for both the Pro Bono Committee and the Lawyer Referral Committee. I think ORCP 7C(3) should be changed from its inadequate "If you have questions, you should see an attorney immediately." I am sure there are many poor or unsophisticated defendants who simply throw up their hands at that great bit of advice, and who could really use, at that very point, some telephone numbers. What do you think?

Very truly yours,

Duane A. Bosworth

DAB:lla
Enc.
cc: Pro Bono Committee Members
[n:\dab\probono\Bartsch1.ltr]

EX 20-2

Attorney(s): JOHN M. MAKOWSKI, ESQUIRE
Office Address & Tel. No.: 407 White Horse Pike, Oaklyn, New Jersey 08107
Attorney(s) for Plaintiff(s) (609) 858-0355

Plaintiff(s)

ACE PALLET CORPORATION

vs.

Defendant(s)

DIAL-A-TRUCK INC., et al

SUPERIOR COURT OF NEW JERSEY

LAW *DIVISION*

GLOUCESTER *COUNTY*

Docket No. L-001630-90

CIVIL ACTION

Summons

The State of New Jersey, to the Above Named Defendant(s): Dial-A-Truck, Inc. and DAT Services, Inc.

YOU ARE HEREBY SUMMONED in a Civil Action in the Superior Court of New Jersey, instituted by the above named plaintiff(s), and required to serve upon the attorney(s) for the plaintiff(s), whose name and office address appears above, an answer to the annexed complaint within (35) ~~28~~ *days after the service of the summons and complaint upon you, exclusive of the day of service. If you fail to answer, judgment by default may be rendered against you for the relief demanded in the complaint. You shall promptly file your answer and proof of service thereof in duplicate with the Clerk of the Superior Court, CN-971, Trenton, New Jersey 08625, in accordance with the rules of civil practice and procedure.*

An individual who is unable to obtain an attorney may communicate with the New Jersey State Bar Association by calling toll free 800-792-8315 (within New Jersey) or 609-394-1101 (from out of state). You may also communicate with a Lawyer Referral Service or, if you cannot afford to pay an attorney, call a Legal Services Office. The phone numbers for the county in which this action is pending are: Lawyer Referral Service , Legal Services Office . Persons who reside in New Jersey may also call their county Lawyer Referral Service or Legal Services Office

Dated: June 29, *19* 90

JOHN M. MAYSON *Clerk of the Superior Court*

Name of defendant to be served: Dial-A-Truck, Inc. and DAT Services, Inc.
Address for service: 33 N.E. Middlefield Road, Portland, Oregon

EX 20 - 3

LAW OFFICES OF
COONEY, MOSCATO & CREW
A PROFESSIONAL CORPORATION
1515 SW FIFTH AVENUE, SUITE 920
PORTLAND, OREGON 97201
FAX (503) 224-6740
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FRANK E. DAY
ALAN R. BECK
BRUCE L. BYERLY
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MICHAEL D. CREW
JEFFREY S. EDEN*
CONNIE K. ELKINS

GEORGE J. GREGORES
RAYMOND F. MENSING, JR.
FRANK A. MOSCATO
ROBERT S. PERKINS*
DEBORAH L. SATHER
OTTO R. SKOPIL, III

OF COUNSEL
JOHN G. McLAUGHLIN
LEONARD D. DUBOFF**

*ALSO MEMBER WASHINGTON BAR
**ALSO MEMBER NEW YORK BAR

May 22, 1991

Mr. Ronald Marceau, Chair
Council on Court Procedure
University of Oregon
School of Law
Eugene, Oregon 97403

RE: Bifurcation

Dear Ron:

ORCP 53 B. allows for bifurcation of trials. It has been apparent to me that in legal malpractice cases where the doctrine of a case within a case is involved, bifurcation would be the ideal way of fairly determining whether or not there was any underlying liability in the primary case, and also of shortening the trials and cutting down some of the expense. I would therefore propose in legal malpractice cases involving the case within a case doctrine, that upon application of the defendant, the issues in the underlying case shall be bifurcated from the issues involving the legal malpractice.

Sincerely,

COONEY, MOSCATO & CREW, P.C.

Thomas E. Cooney

TEC/alw

Exhibit 21

THE SUPREME COURT
Edwin J. Peterson
Chief Justice

1163 State Street
Salem, Oregon 97310
Telephone 378-6026
FAX (503) 373-7536

July 29, 1991

Fredric R. Merrill
School of Law
University of Oregon
Eugene OR 97403

William A. Gaylord, Chair
Uniform Trial Court Rules Committee
Gaylord & Eyerman
1400 SW Montgomery Street
Portland OR 97201

Re: Filing in court requests to disclose, notices of deposition, depositions, requests for admissions

I enclose two memoranda prepared by my clerk. I asked my clerk to do this research following receipt of a letter from David L. Jensen of Eugene. A copy of his letter also is enclosed.

When I was practicing law, I came to the conclusion that it was not necessary to file most depositions, interrogatories, requests for production, requests for documents, and requests for admissions. Perhaps we should have such a rule in Oregon.

I submit these materials to you for whatever action you wish to take.

Very truly yours,

Edwin J. Peterson
Chief Justice

EJP:ksb

Enclosures
cc w/encls: David L. Jensen
cc: Colleen O'Brien

Exhibit 22

MEMORANDUM

TO: JUDGE PETERSON
FROM: COLLEEN
DATE: 3/11/91

RE: BUDGET SUGGESTIONS; Trial Court Record

You inquired whether documents, such as notice of depositions, request to produce, or request to admit, must be filed. A review of the ORS, ORCP and UTCR leads to the conclusion of yes and no.

The Trial Court File - ORS 18.335

A copy of ORS 18.335 is attached. The list of documents that must be kept by the clerk is not comprehensive. Included in the list of documents are "original documents" filed with the court. "Original documents" are defined as (1) summons and proof of service, (2) pleadings, (3) motions, (4) affidavits, (5) depositions, (6) stipulations, and (7) orders. This list is not inclusive.

To determine what documents are "original documents" that must be filed, the individual statutes must be consulted. My examination of the statutes was fairly thorough and resulted in the following.

Summons - ORCP 7

ORCP 7 F(1) requires the return of the summons to the

EX 22-2

clerk along with proof of service or mailing. Although subsection (1) uses the word "return" rather than "file," the two appear to be synonymous given ORCP 7 F(4) ("If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service").

Request to Disclose - ORCP 36 B(2)(b)

Interestingly, with regard to disclosure of insurance agreements or policies, the rules provide that such disclosure "shall be performed as soon as practicable following the filing of the complaint and the request to disclose." (Emphasis added.) It is unclear whether "filing" modifies both "the complaint" and "the request to disclose."

Because nowhere else in the ORCPs is it mentioned that the request to disclose must be filed with the court, I read this language as requiring disclosure soon after two events occur -- (a) the filing of the complaint and (b) a request for disclosure is made. Thus, the record need not contain requests for disclosures.

Depositions

Notice of deposition - ORCP 39 C(5):

Notice to the party deponent must be accomplished in the same manner as are requests for documents (ORCP 43). Neither ORCP 43 or ORCP 39 expressly requires that the notices be filed with the court clerk. Thus, the record

EX 22-3

need not contain notices of deposition.

Notice of deposition upon written questions - ORCP 40 B

A copy of the notice and all questions served shall be delivered to the designated officer. The officer shall be responsible for filing the notice and questions "in the manner provided by Rule 39 D, F, and G. ORCP 39 G requires filing only upon request of a party. Thus, the record must contain the notice of deposition upon written questions only if a party so requests.

Transcript of deposition - ORCP 39 G

The transcript or recording of the deposition shall be filed with the court where the action is pending on request of any party. Thus, the record must contain the deposition if a party so requests.

Perpetuate testimony - ORCP 37 A(1) and 37 D

A person may file a petition with the court if they desire to perpetuate testimony or to obtain discovery to perpetuate evidence. (ORCP 37 A(1)). If such petition is filed, any deposition taken under the rule shall be filed with the court where the petition is filed or the motion is made. Thus, the record must contain depositions taken to "perpetuate testimony."

EX 22-4

Request for Admission - ORCP 45

There is no express requirement that requests for admissions be filed with the court. However, ORCP 45 F, pertaining to the number of requests for admissions that a party may serve on an adverse party, states that the maximum number of 30 may not be exceeded "unless the court otherwise orders for good cause shown after the proposed additional requests have been filed." Thus, the record need not contain the first 30 requests for admission. If the number of requests exceeds the maximum, however all previous requests should be filed so the judge can determine whether there is good cause to order the additional requests.

The federal courts have dealt with unnecessary filings in the Local Rules of Civil Practice for the United States District Court. Rule 120-4 provides:

> "(a) Depositions, Interrogatories, Requests for Production or Inspection, Requests for Documents, Requests for Admission, and answers and responses thereto shall not be filed with the court. This rule shall not preclude their use as exhibits or as evidence on a motion or at trial.
>
> "(b) During the pendency of any civil proceeding, any person may, with leave of court obtained after notice served on all parties to the action, obtain a copy of any deposition or discovery documents not on file with the court upon payment of the expense of the copy."

If you wish to model a proposed rule after Rule 120-4,

EX 22-5

it will be necessary to amend several ORCPs. I suggest the UTCR Committee first discuss and prepare language for a new rule, and then draft proposed amendments to the relevant statutes.

If you wish to see possible draft language at this time, please advise.

EX 22 - 6

MEMORANDUM

TO: JUDGE PETERSON
FROM: COLLEEN
DATE: 4/8/91

RE: BUDGET SUGGESTIONS; Trial Court Record; Necessary UTCR Amendments

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In my last memo to you regarding "budget cuts and the trial court record" (attached) I explained that the statutes do not require the filing of the following documents except in limited circumstances: (1) request to disclose; (2) notice of deposition (except notice of deposition by written questions); (3) transcript of deposition (except if party requests such filing or depositions taken to "perpetuate testimony"); and (4) request for admission (unless the requests exceed thirty). You requested that I look at the UTCRs and draft any changes that may be necessary to permit the "non-filing" of the above documents.

I see no obstacles in the current UTCRs (Oregon Advance Sheets, Volume 11, 1990) to the adoption of a rule relieving the parties from filing these documents with the court (and relieving the court from placing and keeping these documents in the trial court record). At first, I thought UTCR 2.090, Filings for Consolidated Cases, may cause a problem. UTCR 2.090 requires that "[a]ll pleadings, memoranda, and other documents applicable to more than one file * * * be filed in each case." The key term, however, is "applicable." If "applicable" is intended in

its broad sense, the documents listed above are obviously germane and thus, must be filed. Considering the numerous documents that are relevant to a case, it is doubtful that "applicable" carries this meaning. "Applicable" likely means "required." If so, the documents listed above are, in most cases, not "applicable."

You should also be alerted to UTCR 5.010, which requires attorneys in arbitration proceedings to confer on motions made under ORCP 21, 23 and 36 - 46. Although ORCP 36 through 46 address our list of documents, the motions those ORCPs refer to are those items that comprise the exceptions to the "no-filing presumption." Therefore, a new UTCR will have no effect on UTCR 5.010 if the new UTCR discusses only the documents currently not required to be filed by any rule or statute.

Below is my attempt at a proposed UTCR based on the US Local Rule 120-4 (see 3/11/91 memo, attached, page 4-5). I strongly advise that you take a close look at the proposal. Remember, since I have never practiced I'm flying blind to what really goes on in the trenches. At this point, however, I see no reason to reinvent the rule and the following is basically Rule 120-4 with a few additions.

> "(1) The following documents shall not be filed with the court unless the statutes or UTCRs require otherwise or the court directs that such documents be filed:
>
> (a) Request to disclose;
> (b) Notice of deposition;
> (c) Transcript of deposition; and
> (d) Request for admission.
>
> This rule shall not preclude the use of such documents

EX 22-8

as exhibits or as evidence on a motion or at trial.

"(2) During the pendency of any civil proceeding, any person may, with leave of the court, obtain a copy of any deposition or discovery documents not on file with the court upon payment of the expense of the copy. The person requesting the copy(ies) must serve notice on all the parties to the action before obtaining the leave of the court."

EX 22-9

JENSEN, FADELEY & ELMORE

ATTORNEYS AT LAW

DAVID JENSEN
CHARLES N. FADELEY
KENNETH ELMORE

EUGENE OFFICE
1399 FRANKLIN BLVD., SUITE 220
EUGENE, OREGON 97403
(503) 342-1141

SISTERS OFFICE
P.O. BOX 1408
SISTERS, OREGON 97759-1408
(503) 549-1617

March 4, 1991

Honorable Edwin J. Peterson
Chief Justice
Supreme Court of Oregon
1163 State Street
Salem, OR 97310

Dear Chief Justice Peterson:

In response to your memorandum requesting great ideas, and cost cutting, I submit the following. Trial court files ought not to be cluttered with every request to produce, notice of deposition or request to admit in every case. In my experience, only rarely is it necessary for the trial court file to contain these documents. Further, these documents, together with the responses thereto (especially when they append lengthy medical bills and medical reports) are voluminous.

We should borrow from the federal experience. There, the discovery materials are not made part of the trial court file. If there is any need for the trial court to refer to these documents such as a motion to compel, then the relevant portions of the basic documents are appended to the motion to compel or response to the motion to compel.

Very truly yours,

JENSEN, FADELEY & ELMORE

David Jensen

DJ:ljw

3-6-91
David:
Thanks for
your suggestion.
EJP

EX 22-10