September 26, 1991

M E M O R A N D U M

TO: MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill, Executive Director

RE: **FIRST MEETING OF COUNCIL**
Saturday, October 12, 1991, 9:30 a.m.
Oregon State Bar Center, Lake Oswego

The District Court Judges' Association has notified us that Judge Liepe has been reappointed as a Council member. The Circuit Court Judges' Association has notified us that Judges Kelly, Mattison, and McConville have been reappointed.

The State Bar appointments probably will not be completed until after the Bar convention. I am sending this meeting notice to members of the Council whose terms expire this year and to prospective new Bar appointees. I will try to call and confirm the status of those people as soon as we hear from the Bar. I assume Council members remain in office until replacement members are formally appointed.

The first meeting of the 1991-93 Biennium for the Council on Court Procedures will be held Saturday, October 12, 1991, at 9:30 a.m., at the State Bar Center in Lake Oswego, Oregon. An agenda for the meeting is attached.

The first item on the agenda is the election of officers. Ron Marceau has announced that he intends to nominate Henry Kantor as Chair and John Hart as Vice Chair for this biennium. Ron intends his motion to be consistent with the following past practices of the Council: A progression from Vice Chair to Chair, an alternating of primarily plaintiff and defense oriented persons as Chair, and the nomination of persons who have expressed an interest in being officers. Ron will also nominate Lafe Harter for another term as Treasurer. These nominations will not preclude any nominations from the floor.

We have a number of items carried over from last biennium or which came up during the legislative session. The most difficult of these is probably the proposal to use six-person juries in all civil cases. A memorandum briefly describing these matters is enclosed.

FRM:gh
Enc.

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
Marceau, Karnopp, Petersen,
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1201 N.W. Wall Street, Suite 300
Bend, Oregon 97701-1936

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

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

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

Similar Rule in Texas and Florida

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

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

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

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

Safety Issues Suggested

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

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

Continued on Page A13, Column 1

New York Judge Asks Less Secrecy in Civil Cases

Continued From Page 1

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

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

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

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

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

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

Associated Press

Chief Judge Sol Wachtler

A case that is frequently used to illustrate the potential hazards of sealing court records is a 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

GLENN, SITES & REEDER
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Fax: (503) 475-3944

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

* BOYD OVERHULSE
1934-1986 (Deceased)
SUMNER C. RODRIGUEZ
1949-1986 (Retired)

OCT 15 1990

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 S. BOCK DARCY J. SCHULTZ GREGG C. SCHILE 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) 693-1677

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

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

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 6

(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) 222-4429

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
+ LLM in Taxation

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Ronald L. Roome***
Jonathan G. Basham*
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Neil S. Bregenzer

Lyman C. Johnson
(1929-1986)

FAX (503) 388-5410

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

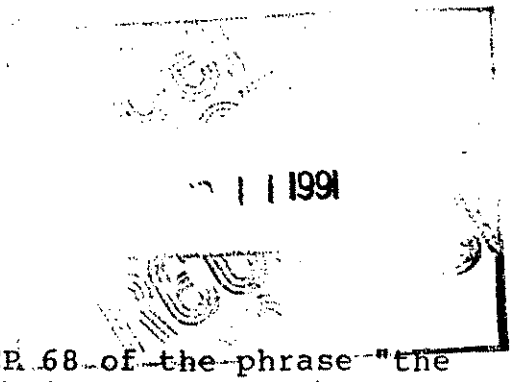
RLM:bdl
200merd.ltr

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.
Egp

cc: CCP

Exhibit 9

LAW OFFICES OF
COONEY, MOSCATO & CREW
A PROFESSIONAL CORPORATION
515 SW FIFTH AVENUE, SUITE 920
PORTLAND, OREGON 97201
FAX (503) 224-6740
TELEPHONE (503) 224-7600

FRANK E. DAY
ALAN R. BECK
BRUCE L. BYERLY
THOMAS E. COONEY
THOMAS M. COONEY
MICHAEL D. CREW
JEFFREY S. EDEN*
CONNIE K. ELKINS

GEORGE J. GREGORES
RAYMOND F. MENSING, JD
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

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

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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

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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.

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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.

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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 [illegible] eliminates the necessity for Rule 6(b).

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 expected 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 16-4

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) is 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 request 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

Ex 16-7

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 16-8

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.

EX 16-9

POZZI WILSON ATCHISON O'LEARY & CONBOY

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DANIEL C. DZIUBA
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(1928-1967)

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 18

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

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1935

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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 contact 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]

FAX: (503) 778-5299 • TELEX 185224
ANCHORAGE, ALASKA • BELLEVUE, WASHINGTON • BOISE, IDAHO • LOS ANGELES, CALIFORNIA
RICHLAND, WASHINGTON • SEATTLE, WASHINGTON • WASHINGTON, D.C.

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) ~~20~~ *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 800-792-8815 (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
TELEPHONE (503) 224-7600

FRANK E. DAY
LAN R. BECK
BRUCE L. BYERLY
THOMAS E. COONEY
THOMAS M. COONEY
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."

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

---

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

December 4, 1991

M E M O R A N D U M

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

FROM: Fred Merrill, Executive Director

RE: Meeting of December 14, 1991

The following are comments relating to matters on the agenda for this meeting:

2. Oaths for depositions by telephone. After consulting with Keith Burns, I suggest that the following be added at the end of subsection 39 C(7);

> "The oath or affirmation may be administered to the deponent, either in person or over the telephone, by a person authorized to administer oaths by the laws of this state, by a person authorized to administer oaths by the laws of the place where the deposition is taken, or by a person specially appointed by the court in which the action is pending. If the witness is not physically in the presence of the officer or person administering the oath, the oath shall have the same force and effect as if the witness were physically present before the officer. For purposes of this rule, subsection 46 A(1), subsection 46 B(1), subsection 55 C(1) and subsection 55 F(2), a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to the deponent."

The first sentence provides flexibility in administering the oath. It may either be done by someone at the questioning end of the telephone call or someone who is in the presence of the deponent. The second sentence is taken from the proposed amendment to Arizona Rule of Civil Procedure 30(c). It makes clear that an oath outside the presence of the person administering the oath is as effective as an oath in the presence of such person. The last sentence is a modified version of FRCP 30 C(7). It actually goes beyond the problem raised by Mr. Burns. There are a number of places in the ORCP where it may be important to determine where a deposition by telephone is being taken. Under the existing rule you could argue that the deposition is taken where the questions are asked or where the deponent is located. The draft follows the federal rule in opting for the location of the deponent.

To define when a deposition has been regularly taken, administration of an oath at either end of the telephone line and by a person authorized to administer oaths by either state or by the court should be adequate. The Oregon court rules can control what formalities must accompany a deposition in order to be valid and usable in Oregon Courts. ORCP 38 A and B identify the same persons as proper oath givers for depositions taken within and without the state.

Whether the provision would subject an out-of-state deponent to prosecution for perjury is less clear. For purposes of defining the crime of perjury in Oregon, Oregon law would control. A definition of a proper form of oath for a deposition in the ORCP would apply in determining whether the deponent had lied under oath. The crime of perjury could be committed by a person outside the state who is testifying by telephone.

One difficulty is that an absent foreign deponent would usually not be subject to arrest and prosecution within the state of Oregon. This difficulty could be addressed in several ways:

1. **Prosecute the deponent in the state where the deponent was located during the deposition**. Most states have a crime of perjury or false swearing that would involve making a false statement under oath. The state where the deponent is located has an interest in controlling any improper conduct committed within its borders. A deponent who intentionally testifies falsely in an Oregon judicial proceeding, after having a standard oath or affirmation administered by a person authorized to do so by Oregon law, is engaging in improper conduct.

2. **Use extradition**. If the perjury was serious enough to warrant prosecution of a foreign defendant, it probably is a crime subject to extradition.

3. **Ignore the problem**. Perjury prosecutions are so rare for depositions that, if there is a problem when oaths are administered to a foreign deponent by a local court reporter, it is more theoretical than actual.

It should be noted that the rules already contain a procedure that presents the same problem. ORCP 38 B provides that, for a deposition taken outside the state in a case pending in Oregon, the oath may be administered by a person appointed by the court. That person probably would not be someone authorized to administer oaths by the laws of the foreign state.

4. **Service of summons at employee's place of business and malpractice insurance for process servers**.

Place of business. The Process Servers Association has asked that we consider an amendment to ORCP 7 D(2) which would allow service of summons upon any employee by service at any

office of his or her employer. They furnished us with copies of summaries of seven states which they said allow employee service by service on the employer. In checking the statutes of those states, I find nothing similar to the type of service suggested. I could not find any office service or employee service at all in a couple of the states. The other five have provisions for service very similar to our office service, that is, referring to service at the defendant's office or usual place of business. For example, California Civil Code sec. 415.20(a) provides for service upon a defendant "... by leaving a copy of the summons and complaint during usual office hours in his or her office with the person who is apparently in charge thereof ...", followed by supplementary mailing.

The question for the Council is whether we wish to create a form of employment service that allows service upon a person by leaving at their place of employment. The language suggested in the Process Servers' bill would allow service at any office maintained by a defendant's employer, whether or not the defendant worked at that office. That seems too broad. For employers with multiple offices, such service would not be reasonably calculated to get notice to the defendant. We could try to limit service to the office or place of business where a defendant actually works by using one of the following alternatives:

> 7 D(2)(c) If the person to be served maintains an office for the conduct of business, **(or is employed in an office)(or has a usual place of business),** office service may be made by leaving a true copy of the summons and complaint at such office **(or usual place of business)** during normal working hours with the person who is apparently in charge. ...

Malpractice insurance. As finally amended, the Process Servers' house bill relating to malpractice insurance (attached) ended up as a statute regulating professional process servers. Whether professional process insurers should have malpractice insurance is not a matter of procedure and is not a concern for the Council. Although the Council asked for an opportunity to review the original bill because it would have applied to all service of process, after the amendment we had nothing to do with the bill failing to pass. We should recommend that Sec 1.(1) of the bill be deleted and ORCP 7 E not be repealed. The general rules for service of summons should remain in the ORCP. If the malpractice insurance requirement did pass, ORCP 7 E could be prefaced by the words: "Except as provided in ORS (malpractice provision)". In fact, ORCP 7 E probably should already say: "Except as provided in ORS 180.260, a summons may be served (etc.)".

5. **Amendment of Rule 17 to cover late filing**. At the last meeting, Council members were furnished with copies of a letter from Thomas Christ suggesting an amendment of ORCP 17 to clearly

provide sanctions for a late filing. Since the sanctions described are those already described in the existing rule, I am submitting the following as an alternative suggested draft that would use the existing sections rather than add a new section:

> **B. Pleadings, motions and other papers not signed or not filed within time limits.** If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. **If a pleading, motion or other paper is not filed within the time period allowed by rule or statute or by court order, or agreed to by stipulation of the parties, it may be stricken by the court.**
>
> **C. Sanctions.** If a pleading, motion or other paper is signed in violation of **section A of** this rule, **or is not filed within the time period allowed by rule or statute or by court order, or agreed to by stipulation of the parties,** the court upon motion or upon its own initiative shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing **or untimely filing** of the pleading, motion or other paper, including a reasonable attorney fee.

In any case, I think it is important that the time periods referred to not be limited to those established by the ORCP. Some time limits for filing may be established by rule or statute outside the ORCP, by a court order, or by stipulation of the parties.

Enclosure: A-Engrossed House Bill 3155

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.

January 27, 1992

M E M O R A N D U M

TO: MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill, Executive Director

RE: Agenda items for February 8, 1992 Council meeting

The following are some tentative drafts and discussion relating to items on the agenda for the February meeting (listed by agenda number):

2. **Oaths for depositions by telephone:**

After discussion with Kathy Augustson from the State Bar Procedure and Practice Committee, the subcommittee on oaths for depositions by telephone suggests the following amendments to ORCP 39 C(7) and G(1):

ORCP 39 C(7) **Depositions by telephone.**

C(7)(a) The parties may agree by stipulation or [T]the court may upon motion order that testimony at a deposition be taken by telephone[,]. [in which event] If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone pursuant to stipulation between the parties, such stipulation shall be made a part of the record by the party taking the deposition. Acceptance of a stipulation as provided in this subsection constitutes a waiver of any objection to the taking of a deposition by telephone.

C(7)(b) The oath or affirmation may be administered by an officer or person authorized to administer oaths as provided in Rules 38 A or 38 B. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition. If the deponent is not physically in the presence of the officer or person administering the oath, the oath shall have the same force and effect as if the deponent were physically present before the officer. For purposes of this rule, for determining the place of examination under Rule 55 F(2), for

securing attendance of a deponent under Rules 38 B and 55 C(1), or relating to motions for sanctions for failure to be sworn or answer questions at a deposition under Rules 46 A(1) and 46 B(1), depositions taken by telephone are taken at the place where the deponent is to answer questions propounded to the deponent. If the place where the deponent is to answer questions is located outside this state, motions to terminate or limit examination under section E of this rule may only be made to the court in the state in which the action is pending and other applications for orders, subpoenas, and sanctions may be made to the court in the state in which the action is pending or a court of general jurisdiction in the county of the state where the deposition is being taken.

ORCP 39 G(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was duly sworn [in the reporter's presence] and that the transcript is a true record of the testimony given by the witness.

This redraft of ORCP 39, approved by the subcommittee, relating to depositions by telephone, attempts to incorporate suggestions from the State Bar Procedure and Practice Committee and made by Council members at the last meeting.

Paragraph 39 C(7)(a) was suggested by the Procedure and Practice Committee and relates to stipulations for depositions by telephone. We changed the language in paragraph C(7)(a) to provide that the party taking the deposition, not the person administering the oath, has the responsibility of getting the stipulation in the record. This is more consistent with the overall approach of Rule 39. We also changed the words "telephonic transmission of testimony" to "taking of a deposition by telephone". The subcommittee also changed the proposed language to make clear that the stipulation in the record need not cover all of the details relating to taking the deposition.

Paragraph 39 C(7)(b) deals with three questions: (1) who can administer the oath for a deposition by telephone? (2) physically how is that accomplished? and, (3) for purposes of compelling attendance and participation of a non-party witness, where is the deposition being taken?

On the first question, the description of who could take the deposition in the first draft did not clearly mesh with ORCP 38. The first sentence of this draft says that, at the option of the person taking the deposition, the oath may be administered either under ORCP 38 A or 38 B. In other words, when the deponent is physically outside this state, for purposes of administering the

oath, the person taking the deposition can treat the deposition as one taken either in this state or outside the state. The second sentence addresses the second question and says that the deponent may or may not be in the physical presence of the deponent. The third sentence of the paragraph makes clear that lack of physical presence does not change the validity of the oath.

The last two sentences of the paragraph deal with the question of location of the deposition in terms of: (a) what limitations are there on travel by the deponent and (b) what court must be used to compel attendance or participation in the deposition?

Relating to travel by the deponent, the draft contains the same limit as any deposition taken outside the state. A non-party foreign deponent can only be forced to appear where he or she is served with a subpoena or where the court orders.

The draft follows the federal rule and, for a foreign non-party witness, says that a court in the state where the deponent is located may issue the subpoena, order participation, and issue sanctions for non-appearance and non-participation. As a practical matter this is the only possible approach. The Oregon Court, where the case is pending, cannot issue a subpoena or an order to a non-party witness that has a binding effect outside the state. Only a court in the state where the deponent is located can effectively order the deponent to testify and punish a deponent for failure to testify. This assumes cooperation of the foreign court either through the Uniform Foreign Deposition Act or comity in response to a commission or a letter rogatory (covered by ORCP 38 B).

For purposes of an order limiting the deposition, however, the rule differs from the federal rule and limits such orders to the Oregon court where the case is pending. This is more convenient for the local party taking the deposition and avoids having a foreign court, unfamiliar with Oregon practice, rule upon the availability of discovery in a case pending in Oregon. It could subject the deponent or other objecting party to the burden of traveling to a foreign court.

The last sentence of the proposed paragraph also deals with the proper foreign court to be used. ORCP 46 and 55 use language more appropriate for depositions being taken in another county in Oregon rather than outside the state. They refer to sanctions and orders by circuit and district courts in the county were the deposition is being taken. Courts in other jurisdictions will have different names and jurisdiction than Oregon Circuit and District Courts. All states have at least one court of general jurisdiction, which would be similar to an Oregon Circuit Court.

The draft does not deal with one problem discussed at the meeting and that is the reliability of an oath administered over the telephone. It could be argued that the person administering the oath should be in the physical presence of the witness to make the witness recognize the importance of the testimony and truthfulness. It could also be argued that, if the person administering the oath cannot observe the demeanor of the witness and secure identification, there is no guarantee that the person testifying is actually the person sought to be deposed. The Council members were, however, adamant that they wanted a procedure that would allow a local court reporter to administer the oath by telephone. As a practical matter, the ceremonial effect of the presence of the person administering the oath is probably overstated. As for identity of the witness, the person taking the deposition, or anyone who might wish to use it for any purpose, would have the burden of suggesting identification procedures that would assure proper identification of the deponent.

3. **Exclusion of witnesses at depositions**

After discussion with Janice Stewart, we suggest the following as a redraft of ORCP 39 D. This draft attempts to control presence of witnesses at depositions in light of the concerns expressed by the Council at the last meeting:

> ORCP 39 D. **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 Oregon Evidence Code. Unless the court orders otherwise, only the following persons may be present during the deposition: (1) attorneys representing the parties, (2) any party who is a natural person, and (3) an officer or employee of a party which is not a natural person designated as its representative by its attorney.

The existing rule says that examination and cross-examination may proceed as at trial. This draft refers to the Oregon Evidence Code. The Oregon Evidence Code is defined in ORS 40.010.

The draft defines who ordinarily may be present at deposition and requires a court order to change the usual rule. ORE 615 allows the court to direct that witnesses be excluded from trial, except for certain categories of witnesses. The deposition categories of normal attenders are generally the categories that cannot be excluded from trial under ORE 615. It is the opposite of ORE 615 because a court order is necessary to change the limitation not to create it.

The categories used differ slightly between this draft and ORE 615. ORE 615 does not specifically mention attorneys. This draft would allow any attorney representing a party to be present, not just an attorney of record for a party. There is no limit upon the number of attorneys that may attend for one party. The rule would, however, allow only one corporate representative without court order. This is consistent with ORE 615.

ORE 615 says that the court cannot exclude persons whose presence is essential to the presentation of a party's cause. This category is not used for depositions because it is too vague to be applied without court discretion. It would provide one basis for arguing that the court should allow an additional person to attend the deposition.

Other than a court order, if a party wants to have additional persons in attendance, the stipulation of all parties to the case would be necessary.

4. **Limiting secrecy in personal injury actions.**

In addition to the material which you have already received on secrecy in personal injury actions, Maury Holland has called our attention to an article in the 1991 Harvard Law Review by Professor Arthur Miller, "Confidentiality, Protective Orders and Public Access to the Courts", 105 Harvard Law Review 427. The article is an excellent and thoughtful review of the area.

His summary of current legislation and rules is somewhat different than that submitted by OTLA. He identified over 30 states where proposals for general and substantial legislative or rule changes have been introduced, but only three where these proposals have been adopted (Virginia, Florida, and Texas; copies of these statutes or rules were furnished to us by OTLA). In Oregon and North Carolina, the changes are limited to cases involving public agencies. The New York rule only codifies existing practice by requiring a showing of due cause before public records can be sealed. He also identifies four of the states listed as pending by OTLA as states rejecting change. In Alaska and Maine, the proposals died in committee and in California and Hawaii, the proposals have been withdrawn by their sponsors.

Miller ends up opposing any elaborate procedural changes or presumption of public access. The entire article is too long to distribute, but his suggestions for modification of existing practice in the area are attached.

6. **Administrative subpoenas and hospital records.**

I recommend that the following changes be made in ORCP 55. The new language would make the subpoena for production of

records without a command to appear at trial or deposition inapplicable to hospital records as defined in ORCP 55 H(1). It would make the procedure described in ORCP 55 H the only procedure applicable to hospital records. This would solve the problems pointed out by Karen Creason and be consistent with the intent of the Council during the last biennium.

55 A. **Defined; form.** A subpoena is a writ or order directed to a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or**, except as provided in paragraph H(4)(a) of this rule,** may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

* * *

55 H.(4) **Limitation of use of subpoena to produce hospital records without command for appearance; [P]personal attendance of custodian of records may be required.**

H.(4)(a) **Hospital records may not be subject to a subpoena commanding production of such records without a command to appear for deposition, hearing, or trial.**

H.(4)(b) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)[(b)]**(c)** If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a)

of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

* * *

7. **Costs - copying of public records**

The following language is intended to limit application of the public records provision in ORCP 68 A(2) to situations where use of certified copies of public records was mandatory. The word "necessary" in the existing rule is redundant.

> ORCP 68 A(2) **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the [necessary] expense of copying of any public record, book or document [used as evidence on trial] admitted into evidence at trial pursuant to ORS 40.570 (Oregon Evidence Code, Rule 1005); ...

8. **ORS sections limiting ORCP 7 E.**

As requested, I did a computer search to see how many ORS sections changed the limits on who may serve summons found in ORCP 7 E. The only ORS section that modifies ORCP 7 E is ORS 180.260 (attached) which allows employees of the Department of Justice to serve summons and process in cases in which the state is interested. The statute was enacted by the 1989 Legislature. We could amend ORCP 7 E as follows:

> ORCP 7 E. **By whom served; compensation.** 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, **except as provided in ORS 180.260,** an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. ...

Attachments

adversary system and hardly is unique to protective orders.[312] The criminal attorney who seeks a not-guilty verdict for a client he knows to be guilty faces the same concerns. Yet that attorney is expected to defend the client without fear of being treated as an accomplice after the fact. The judgment has been made that society is benefitted if clients may rely on their lawyers not to disclose their confidences[313] and are assured that their lawyers' personal judgments regarding the desirability of public disclosure will not prejudice their cases.[314] The rules of professional responsibility on this issue are clear — the attorney's duty is to pursue the client's best interests zealously.[315] If doing so creates a personal conflict of interest, the attorney should refuse to take the case[316] or should secure the client's informed consent to the disclosure of any matter affecting public health or safety before the question of a protective order arises.[317]

VII. Balancing the Competing Interests of Confidentiality and Public Access: A Proposal for the Refinement of Current Practice

No one doubts that a rational civil justice system should have a concern for public health and safety. It is also clear that, because there are benefits from discovery sharing, it should be allowed when sharing truly promotes fairness and efficiency. However, the civil justice system also must promote effective judicial management, efficiency in the resolution of disputes, and the preservation of confidentiality. Further, the system must not lose sight of the primary objec-

[312] *See* Model Code of Professional Responsibility Canon 4 (1986) ("A Lawyer Should Preserve the Confidences and Secrets of a Client."); Model Rules of Professional Conduct Rule 1.6 cmt. [4] (1983) ("A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.").

[313] *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 617 (arguing that to find in lawyers "a moral obligation to refuse to facilitate that which the lawyer believes to be immoral, is to substitute lawyers' beliefs for individual autonomy and diversity. Such a screening submits each to the prior restraint of the judge/facilitator and to rule by an oligarchy of lawyers.").

[314] *See* Model Rules of Professional Conduct Rule 3.6 (1983) (advising that a lawyer should not make extrajudicial statements that may be disseminated to the public if it will materially prejudice the adjudicative process).

[315] *See* Model Code of Professional Responsibility Canon 7 (1986).

[316] *See* Model Rules of Professional Conduct Rule 1.7 (1983) (instructing that a lawyer should not represent a client if representation will be limited by the lawyer's own or another client's interests).

[317] Because, in reality, disclosure will often weaken the plaintiff's bargaining position for securing the defendant's acquiescence in discovery of certain materials and also damage the plaintiff's ability to maximize the settlement value, the client's informed consent is critical.

tives of discovery: "Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."[318] Thus, the national concern for public health and safety or the openness of our courts must be addressed in a way that does not substantially hinder the achievement of these other goals.

These varied and sometimes divergent policies can be served by our civil justice process, but only by trusting trial courts to exercise their traditional discretion guided by a careful analysis of the various competing interests. No one is advocating the automatic or cavalier issuance of protective or sealing orders, let alone that they be granted without regard for substantially deleterious effects on public health and safety. But although disclosure of health and safety information is important, disclosure must be controlled, not indiscriminate. First, a neutral arbiter — the judge and not the litigants — must decide what information is to be revealed in the interest of public health and safety. Second, because a trial court has neither the time nor the expertise to examine carefully every claim of confidentiality that impairs legitimate and important public interests,[319] the process would be facilitated if, after a preliminary judicial determination that information should not be kept wholly confidential, disclosure were usually made to the appropriate governmental agency for further evaluation rather than to the public at large.

The most rational approach, therefore, is to try to accommodate the concerns raised by critics of protective orders without sacrificing the utility of protective orders themselves. Public health and safety can be promoted without resort to uncontrolled and potentially damaging public dissemination of information by the litigants. The benefits and harms of providing confidentiality or permitting disclosure can be balanced to achieve the most appropriate resolution of a particular conflict. The key, however, is retaining judicial discretion. If that discretion is constricted arbitrarily, the trial court's ability to meet the divergent goals of the pretrial process will be diminished.

Because proponents of reform have not demonstrated that significant modification of the present framework is necessary, the existing pragmatic and discretionary balancing technique should be retained. It may be true that substituting a rule that creates a presumption of access for all information, or for enumerated predetermined classes of information, would result in somewhat more predictable outcomes. Unfortunately, the results would correlate only haphazardly to notions of fairness, which are inevitably a function of the particulars of a given case. Too many relevant factors demand consideration to reduce the question of whether to grant a protective order to a simple rule or one with arbitrary criteria for disclosure or nondisclosure.

[318] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984).

[319] *See* Marcus, *supra* note 9, at 472.

Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases.[320] By focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overly broad use of protective and sealing orders and the unnecessary denial of confidentiality for information that deserves it, whether or not the information falls within one of the classes for which confidentiality is traditionally sought.[321]

The existing procedural framework, however, must be applied with a heightened sense of the importance of the issues raised by both sides of the current debate. Judges must guard against any notion that the issuance of protective orders is routine, let alone automatic, even when the application is supported by all the parties.[322] Thus, they must look carefully at each case and tailor appropriate responses, which should take account of a kaleidoscope of factors, including the likely outcome on the merits, the value or importance of commercial or personal data, the identity of the parties and any apparent outside interests, the existence of any threat to health and safety, and the

[320] A court has broad discretion under Federal Rule 26(c), for example, to shape a protective order to the needs of a specific case. *See* Tahoe Ins. Co. v. Morrison-Knudsen Co., 84 F.R.D. 362, 364 (D. Idaho 1979); 8 WRIGHT & MILLER, *supra* note 14, § 2036, at 269; *see also* Lewis R. Pyle Memorial Hosp. v. Superior Court, 717 P.2d 872, 876 (Ariz. 1986) ("The good cause standard gives courts very broad discretion to tailor protective provisions to fit the needs of the case.").

[321] For example, the Texas rule requires public notice of every request to seal court records. *See* TEX. R. CIV. P. ANN. r. 76a(3) (West Supp. 1991). Requests have been made to seal a wide variety of information. In a wrongful death case, the defendant sought confidentiality for an employee handbook that contained a pizza recipe. *See* DePriest v. Pizza Management Inc., No. 483, 464 (Travis County Dist. Ct., 53rd Jud. Dist., Tx. Sept. 17, 1990). In a malpractice action, the plaintiff sought confidentiality for personal bank account statements, personal income tax returns, real estate deeds, certificates of stock ownership, and certificates of title to motor vehicles. *See* McGowen v. Jones, No. 141-126533-90 (Tarrant County Dist. Ct., 141st Jud. Dist., Tx. Sept. 21, 1990). In a personal injury action, defendant sought confidentiality for design and sales information about a popular athletic shoe. *See* White v. Reebok Int'l, Ltd., No. 88-45391 (Harris County Dist. Ct., 125th Jud. Dist., Tx. Nov. 26, 1990). In another case involving a counterclaim for breach of contract and deceptive trade practices, the counter-plaintiff sought a court seal for records concerning the price and intended use of property involved in the contract dispute. *See* Lindsay v. Jacobs, No. 90-06657 (Harris County Dist. Ct., 165th Jud. Dist., Tx. Oct. 24, 1990).

[322] When all the parties support the protective order or seal, as often is the case when the defendant seeks confidentiality and the plaintiff wants to facilitate its own access to discovery materials, the court is faced with an essentially non-adversarial situation and must assume the duty of making an independent inquiry. A useful analogue is the "fiduciary" burden assumed by federal judges in evaluating a proposed class action settlement under Federal Rule 23(e). *See generally* 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1797.1, at 378–416 (2d ed. 1986) (detailing the issues a judge should consider). This seems to have been the approach taken in City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995 (2d Cir. Aug. 14, 1991), which spoke of the court's "larger role" in this context. *See id.* at *15–16.

presence of a governmental agency with primary responsibility for the subject matter of the data. The burden imposed by carefully considering requests for protective orders is justified by the importance of the competing values at stake and is an effective way to conserve judicial resources. Because the current practice has become increasingly well-adapted to controlling discovery abuses, it can be expected to be more efficient in balancing the various interests than other alternatives.

By contrast, a regime that has a public access presumption and removes judicial discretion in shaping protective orders invites exploitation of the discovery process by those primarily seeking to gather information rather than to adjudicate a dispute. Moreover, the proposed public access regime holds out pernicious incentives not only to the parties to the litigation, but also to any curious member of the general public. In addition, retaining judicial discretion only requires judges to undertake a task that is familiar and appropriate to them — balancing the rights of the private parties before them. Shifting to a presumption of public access would require judges to assume the extrajudicial task of factoring in the interests of third parties and the public, which in turn would necessitate that judges become experts in the countless subjects that come before them — a task for which they are not necessarily equipped — and that they reach a decision outside the confines of a fully adversarial dispute.[323]

Trial courts generally should require the parties to the case or third parties to submit specific, written showings of why access should be granted, and they should feel free to review the documents in camera.[324] Based on their careful review, courts should deny disclosure of information worthy of protection unless the party seeking it establishes relevance, demonstrates a true need for the information, and shows that this need outweighs the potential harm to the party opposing discovery.[325]

When the information is subject to discovery, the question then becomes whether terms and conditions should be imposed to minimize the damage public availability of the information might cause. In

[323] *See supra* pp. 487–88.

[324] *See generally* G. I. Fodier, Annotation, *In Camera Trial or Hearing and Other Procedures to Safeguard Trade Secrets or the Like Against Undue Disclosure in Course of Civil Action Involving Such Secret*, 62 A.L.R.2d 509, 516–33 (1958) (discussing a procedure that could be used to protect trade secrets from public or other disclosure). Even the disclosures that occur in the process of adjudicating the protective-order question pose risks that must be guarded against. *See generally* Michael A. Pope, William R. Quinlan & Thomas L. Duston, *Protecting a Client's Secret Data*, NAT'L L.J., July 8, 1991, at 15 (emphasizing the importance of developing sophisticated judicial approaches to discovery that can protect confidential business secrets).

[325] It would be more difficult for third parties to satisfy the first two requirements than it would be for parties to the action. This outcome is both sensible and consonant with current law.

considering terms and conditions, courts should pay attention to the possible existence of any specific nonparty interests or the importance of public disclosure. It would be a mistake, however, to establish an elaborate public notice and intervention procedure — let alone provide for appellate review — each time a protective order is sought.[326] These procedures would delay and distract the litigation, increase the costs to the litigants, dissipate judicial energies, and in themselves would lead to a disclosure of some or all of the information. Instead, the court usually can rely on one of the parties to represent any outside interest or to notify those persons or institutions of the proceeding so that they may seek to intervene. Moreover, the media generally have their own methods for staying abreast of potentially newsworthy cases.[327] When these safeguards might not be effective, the court can use its discretion to require the parties to present any public health and safety concerns to the court or appoint a third person to do so.

When a party requesting protection has made a meritorious showing regarding the need for confidentiality but the judge nonetheless decides that the public interest in some of the information precludes completely sealing the records, the court should limit the information made available to that which is critical to the perceived public interest. Clearly, any confidential information unrelated to the potential harm, such as sensitive marketing or financial data, trade secrets, personal information, and a variety of other items, could and should be protected, even when it is appropriate to make some other portion of the information available to the public.

Even after the information is redacted and limited to that thought relevant to the public interest, the court must consider the proper mode of its disclosure. In most cases, release to an appropriate governmental agency or a limited number of people should suffice.[328] This solution places the information in the hands of those best situated to evaluate it and spares the judge from undertaking a detailed and time-consuming analysis to balance the likelihood of risk to the public against the harm to the disclosing party — an evaluation a judge is often ill-equipped to conduct.[329] If appropriate, further dissemination

[326] One of the least desirable aspects of some of the public access proposals is that they are heavily weighted with procedural requirements such as public notice, waiting periods, intervention proceedings, and rights to appeal. *See, e.g.*, TEX. R. CIV. P. ANN. r. 76a (West Supp. 1991).

[327] *See, e.g.*, City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995, at *4–5 (2d Cir. Aug. 14, 1991).

[328] *See, e.g.*, Anderson v. Cryovac, Inc., 805 F.2d 1, 8 (1st Cir. 1986) ("In a case involving allegations that a city's water supply had been poisoned by toxic chemicals, the public interest required that information bearing on this problem be made available to those charged with protecting the public's health.").

[329] *See supra* pp. 488–90.

by the litigants and the outside recipients of the data must be prohibited.

This technique for limiting access has been used in other contexts, as when the government has a legitimate reason to intrude into the private affairs of its citizens, but the intrusion is limited to the particular persons and the purposes necessary to achieve the government's original objective.[330] Partial disclosure is also common practice in civil litigation when documents contain a mixture of information that falls both within and outside the work product doctrine.[331] Nevertheless, there may be instances when public dissemination is appropriate and no protective order should issue, although these occasions should be rare when the data is truly confidential.[332]

In addition, if confidential information is to be disclosed under a protective order, a court must define the terms of that release with precision.[333] The trial court should consider exactly who should have access to the data other than the discovering party's attorney, and for what purpose. The court must decide whether expert witnesses, support personnel, and other litigants and their attorneys are to have access.[334] Once again, the circumstances of the particular case should control. For example, when the litigation is between business com-

[330] *Cf.* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 4.5(b), at 236–37 (1985) (stating that the government must minimize the scope of intrusion during authorized electronic surveillance). Some information privacy statutes limit access to personal information on a need-to-know basis. *See, e.g.*, Federal Fair Information Practices Act, 5 U.S.C. § 552a (1988); Federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1988).

[331] *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 400 (1981).

[332] *Cf.* Note, *supra* note 205, at 1348–49 (proposing that, although failure to provide a protective order for trade secrets generally would work a taking under the Fifth Amendment, a narrow "nuisance" exception should apply to "allow public disclosure . . . only if limiting access would significantly endanger the public").

[333] Courts have great flexibility to shape protective orders in order to meet the needs of a particular case. *See* 8 WRIGHT & MILLER, *supra* note 14, § 2043, at 305–08. A good example of this flexibility is Maritime Cinema Serv. Corp. v. Movies en Route, Inc., 60 F.R.D. 587 (S.D.N.Y. 1973), which allowed the plaintiff to compel the defendant to answer certain interrogatories only on condition that the answers be seen by plaintiff's counsel but not by the plaintiff itself. *See id.* at 589–90.

[334] A number of courts have limited disclosure to parties' counsel and sometimes their expert witnesses. *See, e.g.*, Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 999 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); General Elec. Co. v. Allinger, No. 91-316-FR, 1991 U.S. Dist. LEXIS 10878, at *4 (D. Or. Aug. 1, 1991); Ohm Resource Recovery Corp. v. Industrial Fuels & Resources, Inc., No. S90-511, 1991 U.S. Dist. LEXIS 10297, at *14 (N.D. Ind. July 24, 1991); Coca-Cola Bottling Co. v. Coca-Cola Co., 107 F.R.D. 288, 300 (D. Del. 1985). Courts have also prevented a governmental agency from using discovery material for purposes outside the litigation, *see* Harris v. Amoco Prod. Co., 768 F.2d 669, 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), and have prevented a state from divulging information to the public and to government employees other than designated workers who signed confidentiality affidavits, *see* New York v. United States Metal Ref. Co., 771 F.2d 796, 805 (3d Cir. 1985).

petitors, the court must take seriously the claim that disclosing research and development information to the opposing party can have serious negative marketplace consequences. It is unrealistic to believe that even well-intentioned scientists and managers can purge their minds of an opponent's commercially valuable information once it is disclosed through discovery. In some cases, it may be necessary to limit distribution to the discovering party's attorneys — perhaps even restricting it to outside counsel — under carefully drawn conditions. In other cases, the discovery objectives can be achieved by using a neutral third party or master to screen the material. In another group of cases, disclosure to the opposing party will not have any special adverse consequences, and these types of precautions will be unnecessary.

As already indicated,[335] disclosure to experts poses special difficulties and risks. If experts are to be granted access, the terms and conditions should be defined with care, and the recipients should be brought under the court's control by having them sign a pledge to adhere to the order's limitations. The court also must consider whether photocopying or computerization is to be permitted and when and on what terms the original material and any copies are to be returned to the owner.[336] Anyone receiving the protected data should be made responsible for maintaining its confidentiality and for impressing that obligation on their employees. The court should be especially careful when materials belonging to nonparties are involved.

In addition to minimizing the risks to the disclosing party, courts must allocate their resources wisely. To avoid increasing the court's workload unnecessarily, a determination regarding the public's interest in discovery materials or settlement terms and any supervision of the release may be obviated if the information can be procured from an alternative source in substantially equivalent form. This requirement is analogous to the practice under Federal Rule 26(b)(3) and under similar rules in most states regarding the discoverability of work product.[337] If the information is otherwise available, grappling with the protective order issue and imposing a supervisory burden on the courts is not justified.[338]

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[335] *See supra* p. 471.

[336] *See, e.g.*, *Allinger*, 1991 U.S. Dist. LEXIS 10878, at *4.

[337] *See* Upjohn v. United States, 449 U.S. 383, 400 (1981).

[338] *See* City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995, at *16 (2d Cir. Aug. 14, 1991) (concluding that a confidentiality order should only be issued after a careful, particularized review); *cf.* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 761 (1989) (arguing that, if federal agencies were required to disseminate information to the public about private individuals merely because the information was contained in public records, the government would be "transformed in one fell swoop into *the* clearinghouse for highly personal information, releasing records on any person, to any requestor, for any purpose").

Discovery sharing is a particularly interesting problem. It can take either of two forms: the discovering party seeks to share the fruits of its efforts with an outsider engaged in similar or related litigation, or an outsider tries to gain access to the fruits of discovery independent of the litigants' desires. Courts have not been consistent in their treatment of these situations;[339] the nature of the problem probably makes that inconsistency inevitable.

It is difficult, and indeed unwise, to have an absolute prohibition on discovery sharing, given the extraordinarily high cost of litigation and the reality that discovery accounts for the largest component of that expense in many cases. Barring sharing smacks too much of requiring each litigant to reinvent the wheel, and not surprisingly it has been rejected on that basis by some courts.[340] As Judge Wisdom has put it, there "is no reason to erect gratuitous roadblocks in the path of a litigant who finds a trail blazed by another."[341] But always permitting sharing would be a mistake as well. Once again, leaving the decision to permit or deny sharing in the judge's discretion seems the best course to follow.

Certainly, discovery sharing should not be left to the whims or private interests of individual parties. In analyzing a discovery sharing request, the court's central inquiry should be whether granting the request will actually promote litigation efficiency and fairness. Thus, the court should be particularly hesitant when the sharing seems motivated by a desire to commercialize the data by selling it to other

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[339] The cases allowing sharing include Wilk v. AMA, 635 F.2d 1295 (7th Cir. 1980); Wauchop v. Domino's Pizza, Inc., No. S90-496(RLM), 1991 U.S. Dist. LEXIS 11694 (N.D. Ind. Aug. 6, 1991); Nestle Foods Corp. v. Aetna Casualty & Sur. Co., No. 89-1701(CSF), 1990 U.S. Dist. LEXIS 12137 (D.N.J. Jan. 25, 1990); United States v. Kentucky Utils. Co., 124 F.R.D. 146 (E.D. Ky. 1989); and Deford v. Schmid Prods. Co., 120 F.R.D. 648 (D. Md. 1987). Cases denying sharing include Scott v. Monsanto Co., 868 F.2d 786 (5th Cir. 1989); Palmieri v. New York, 779 F.2d 861 (2d Cir. 1985); and Mampe v. Ayerst Labs., 548 A.2d 798 (D.C. 1988). *See generally* Gary L. Wilson, Note, Seattle Times: *What Effect on Discovery Sharing?*, 1985 WIS. L. REV. 1055 (arguing that the use of *Seattle Times* as a legal support against discovery sharing is improper); Thomas M. Fleming, Annotation, *Propriety and Extent of State Court Protective Order Restricting Party's Right to Disclose Discovered Information to Others Engaged in Similar Litigation*, 83 A.L.R. 4TH 987 (1991) (analyzing cases that have considered protective orders for the disclosure of discovered material to similarly situated litigants and observing that state courts generally disapprove of categorical prohibitions on disclosure but are willing to impose restrictions to protect trade secrets). The new Virginia statute expressly authorizes the sharing of discovery materials that are under a protective order. *See* VA. CODE ANN. § 8.01-420.01 (Michie Supp. 1991).

[340] *See, e.g.*, Wauchop v. Domino's Pizza, Inc., No. S90-496(RLM), 1991 U.S. Dist. LEXIS 11694, at *13 (N.D. Ind. Aug. 6, 1991); Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982); Patterson v. Ford Motor Co., 85 F.R.D. 152, 153-54 (W.D. Tex. 1980); *see also* Baker v. Liggett Group, Inc., 132 F.R.D. 123, 126 (D. Mass. 1990) (issuing a protective order authorizing disclosure of confidential materials to other tobacco tort litigants, under appropriate restraints).

[341] Wilk v. AMA, 635 F.2d 1295, 1301 (7th Cir. 1980).

attorneys rather than by a desire to promote litigation efficiency[342] or when the action itself was brought to gain access to discovery.[343] The judge should consider whether the benefits of making the material available in other lawsuits and the economies achieved when lawyers collaborate in preparing their cases outweigh the likelihood of increasing discovery disputes in the original lawsuit and the other deleterious consequences of dissemination. For example, when a single event has given rise to complex or multidistrict litigation, the adjudicatory system will often be well-served by allowing the pooling of discovery materials in all the suits, particularly when some have been consolidated for pretrial or all purposes.[344] The same occurs naturally when disputes are aggregated into a class action.

The problem is somewhat more difficult when the cases in which the protected data would be used are not fused with the one in which

[342] In Campbell, *supra* note 11, the author suggests that there are financial rewards in vending discovery materials. *See id.* at 774; *see also* Brad N. Friedman, Note, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protective Order*, 60 N.Y.U. L. REV. 1137, 1155–58 (1985) (discussing the ethical implications of compensation raised by information markets in discovered material). Although the commercialization of discovery material cannot be condoned, particularly when it contains proprietary data, it may be appropriate to allow a plaintiff to recoup the costs incurred in developing the information. *See* Marcus, *supra* note 9, at 498–99; *cf.* Edward F. Sherman & Stephen O. Kinnard, *Federal Court Discovery in the 80's — Making the Rules Work*, 95 F.R.D. 245, 289 (1982) (proposing the imposition of a duty on the plaintiff to make discovery available to others without "undue" profit). Unfortunately, only the court is in a position to make a neutral judgment as to what is reasonable, and requiring courts to make those judgments would divert scarce judicial resources.

[343] *See generally Wilk*, 635 F.2d at 1300–01 (implying that a party bringing suit solely to obtain discovery material would not be entitled to a "day in court"); *Wauchop*, 1991 U.S. Dist. LEXIS 11694, at *15 (recognizing that a different result would be appropriate "if litigation was commenced solely for purposes of engaging in discovery"); *Patterson*, 85 F.R.D. at 154 (allowing the full use of information in other forums absent a showing that the "discovering party is exploiting the instant litigation solely to assist litigation in a foreign forum").

[344] *See, e.g.*, *In re* Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 81 F.R.D. 482, 484 (E.D. Mich. 1979) (vacating a protective order and thereby allowing state court plaintiffs to share discovery information with consolidated federal multidistrict litigation plaintiffs), *aff'd*, 664 F.2d 114 (6th Cir. 1981).

Numerous proposals in recent years suggest that a substantial increase in the aggregation of related lawsuits is likely in the future. *See, e.g.*, 136 CONG. REC. H3116–19 (daily ed. June 5, 1990) (voting to pass the Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess.); AMERICAN BAR ASS'N, REPORT OF THE COMMISSION ON MASS TORTS (1989); JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 91, at 44–45 (proposing an amendment to a multidistrict litigation statute to permit consolidated trials as well as pretrial proceedings); American Law Inst., Complex Litigation Project (Tentative Draft No. 4) §§ 4.01–.02, at 25–92 (Sept. 19, 1991) (providing for the transfer of related cases from federal to state court as well as from state to state); American Law Inst., Complex Litigation Project (Tentative Draft No. 2) §§ 3.01–.10, at 1–26 (Apr. 6, 1990) (proposing federal intrasystem consolidation and transfer, including trial); *id.* §§ 5.01–.05, at 33–129 (discussing a proposed complex litigation statute for federal-state intersystem consolidation); National Conference of Comm'rs of Uniform State Laws, Transfer of Litigation Act (July 1991).

it is originally produced and the relationship is somewhat attenuated or when the cases are dispersed in multiple judicial systems. Still, a collaborative approach in handling related litigation of this type may be best. The court must scrutinize these situations with extreme care, and it should communicate with the judges in the other pending actions when that seems desirable. Of course, if confidential information is to be shared among litigants, they all should be subject to the court's restrictions on further dissemination or any other limitations it might initially have ordered.[345] Again, the participation of the judges handling the related cases would be desirable.

The least sympathetic case for discovery sharing is presented by a request for access on behalf of someone who is merely contemplating the commencement of litigation. The risk of a fishing expedition or some other form of mischief is greatest in this context. The safest course seems to be denial of discovery sharing until the requesting party actually has begun a lawsuit, unless he demonstrates extraordinary need. This requirement will maximize the likelihood that the sharing has a legitimate litigation purpose, that the actions have a relationship to each other so that some discovery economy actually will be achieved, and that the requester is subject to the authority of a court, which might prove valuable for sanctions purposes.

An important and related problem arises when parties seek access to material that was previously disclosed under a protective order.[346] Because that order presumably was issued to prevent harm to the litigants and to promote cooperation during discovery, the court should consider the overall effect of modifying or eliminating that protection.[347] The critical question is to what degree not giving continued effect to earlier protective orders will diminish their efficacy as a discovery management device. To the extent that the parties relied on the protective order when they freely disclosed information without

[345] *See, e.g.*, United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1428 (10th Cir. 1990) (allowing discovery sharing but imposing on the third party "the restrictions on use and disclosure contained in the original protective order"), *cert. denied*, 111 S. Ct. 799 (1991).

[346] Requests for modification of protective orders are relatively common and are subject to varying treatment by courts. *See, e.g.*, Westchester Radiological Ass'n P.C. v. Blue Cross/Blue Shield of Greater New York, Inc., No. 85-CV-2733(KMW), 1991 U.S. Dist. LEXIS 9216 (S.D.N.Y. July 3, 1991); *see also* HARE, GILBERT & REMINE, *supra* note 11, § 6.11, at 144 (discussing cases on order modification); 8 WRIGHT & MILLER, *supra* note 14, § 2042, at 299 n.13 (1970 & Supp. 1991) (same); Robin C. Larner, Annotation, *Modification of Protective Order Entered Pursuant to Rule 26(c), Federal Rules of Civil Procedure*, 85 A.L.R. FED. 538 (1987 & Supp. 1990) (same).

[347] *See* Béchamps, *supra* note 255, at 130 (1990); *see also* Grundberg v. Upjohn Co., No. C-89-2746, 1991 U.S. Dist. LEXIS 14991 (D. Utah Oct. 4, 1991) (considering all relevant factors to determine whether changed circumstances warranted the modification of a protective order); All-Tone Communications, Inc. v. American Info. Technologies, No. 87-C-2186, 1991 U.S. Dist. LEXIS 10096, at *6 (N.D. Ill. July 18, 1991) (adopting the view that a court should consider the circumstances leading up to production prior to releasing judicial records).

further contesting the discovery requests,[348] subsequent dissemination would be unfair.[349] A graphic illustration of this injustice would be a party or witness who chooses to forego a plausible claim of privilege under the assurance that a protective order will shield the communication from subsequent disclosure.[350] Conversely, compulsory disclosure of information to a governmental or public entity under circumstances that make it accessible to the public, a significant passage of time, or a change in other circumstances may undermine the credibility of any claim of reliance. Indeed, some of these events might vitiate the data's sensitivity to the point of assuring that its release will not cause any injury to the original parties. If the information implicates personal privacy, however, in certain circumstances the passage of time may strengthen the privacy interest and militate against modification of the protective order.[351]

Quite understandably, a court's reaction to a modification request should depend in part on the nature of the information and the type of modification that is sought. The protection of sensitive personal or commercial information should be continued. But if the material could improve the efficiency of handling other lawsuits without jeopardizing the rights of the parties to the protective order, modification may be appropriate.

Beyond unfairness to particular parties is the reality that, the more readily protective orders are destabilized, the less confidence litigants will have in them. If protective orders are not reliable, people will be more likely to contest discovery requests when private or commercially valuable data is involved. A protective order can be effective as a management tool and as a mechanism for preventing discovery abuse only if parties believe it is credible. If the parties know that the protective order can be abrogated easily, cooperation in discovery would be compromised and one significant incentive to settle would

[348] *See, e.g.*, H.L. Hayden Co. v. Siemens Medical Sys., 130 F.R.D. 281, 282 (S.D.N.Y. 1989); Tavoulareas v. Washington Post Co., 111 F.R.D. 653, 658–59 (D.D.C. 1986); *In re* Consumers Power Co. Sec. Litig., 109 F.R.D. 45, 55 (E.D. Mich. 1985).

[349] *See, e.g.*, Martindell v. ITT Corp., 594 F.2d 291, 295–96 (2d Cir. 1979); *see also Westchester*, 1991 U.S. Dist. LEXIS 9216, at *17 (modifying a confidentiality order to permit the disclosure of documents and testimony given before an order was in place). One court has suggested that "some element of a breach of faith" is involved. *In re* Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, 18 Fed. R. Serv. 2d (Callaghan) 1251, 1252 (N.D. Cal. 1974).

[350] The unfair consequences are not limited to the parties. Indeed, a nonparty witness who testifies under the aegis of a protective order only to have his guarantee of confidentiality eliminated by a modification of the order quite properly can feel aggrieved.

[351] For example, in United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989), the Court refused to require that the press be given access to ten-year-old criminal records; it found that any public interest in the criminal activity had been vitiated by the passage of time and that the subject of the record now had a protectable privacy interest that did not exist at the time the criminal act originally took place. *See id.* at 762–71.

be reduced. Thus, unless strong evidence exists that a litigant did not rely on the existence of a protective order during discovery (for example, when the party continued to resist reasonable discovery requests) or that no legitimate interest exists in maintaining confidentiality, the balancing of the competing values that led the initial trial court to issue the order should not be undermined in a later proceeding.[352] The reality seems obvious: for protective orders to be effective, litigants must be able to rely on them.[353]

VIII. CONCLUSION

When all of the elements in the confidentiality and public access debate are placed on the scales, the balance clearly favors retaining the essence of the present practice. Courts should continue to use their discretion to protect parties' legitimate litigation, privacy, and property interests, and the parties should retain their rights to negotiate protective and sealing agreements voluntarily, subject to judicial veto in the exceptional case. This practice seems wise, because it leaves our judges free to consider the public interest and to further it when circumstances so require. Moreover, on the whole, judges appear to have exercised this authority appropriately in the past, and there is no reason to believe that their performance will change, especially if they are encouraged to continue their current practices. Because the court is the only neutral participant in the litigation process, it seems appropriate to leave the decisionmaking process with it.

Further, no evidence has been presented that the current practice has created significant risks to public health or safety. At a minimum, therefore, before we rush sheeplike down the path chosen by Texas, Florida, and Virginia and create anything in the nature of a presumption of public access, we must evaluate carefully the public health and safety claims to determine whether a problem exists. Certainly, no evidence has emerged to date that comes close to justifying the fundamental changes in the process sought by those advocating them, especially when the negative effects of these changes would be

[352] *See* Palmieri v. New York, 779 F.2d 861, 862 (2d Cir. 1985) ("[A]bsent an express finding by the district court of improvidence in the magistrate's initial grant of the protective orders or of extraordinary circumstances or compelling need by the State for the information protected thereunder, it was error for the district court to modify the magistrate's orders."); New York v. United States Metals Ref. Co., 771 F.2d 796, 805 (3d Cir. 1985) (concluding that the district court did not abuse its discretion by including a report under a protective order on the basis of irreparable harm to defendant and the absence of public welfare concerns).

[353] *See generally* Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 18 (1983) (questioning whether litigants can still rely on protective orders).

felt in the vast majority of civil cases, which have nothing to do with public health or safety.

Despite protestations to the contrary, the existing system gives the public, including the media, virtually unfettered access to the courts and court records. The presumption advocated by the current public access campaign undermines the greater judicial control necessary for discovery and pretrial reform, and it comes at a time when the need for treating certain types of litigation information confidentially never has been greater. It would be folly to allow undocumented claims to move our complex and integrated procedural systems in the wrong direction.

The current debate has been quite useful, however. It has called the attention of the bench and bar to the importance of the underlying issues[354] and has increased everyone's awareness of the importance of both confidentiality and public access. The controversy should counteract any existing tendencies by judges to issue protective and sealing orders perfunctorily or cavalierly. If that awareness is coupled with a judicial willingness to follow the procedural requirements proposed earlier for resolving clashes between confidentiality and disclosure, the debate will have served a valuable purpose.

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[354] *See, e.g.*, John F. Rooney, *Issue of Sealed Files, Secrecy in the Courts Won't Be Swept Under the Rug*, CHI. DAILY L. BULL., Apr. 20, 1991, at 1 (chronicling the increase in judicial sensitivity toward sealing orders).

SHOULD THE LAW PROHIBIT "MANIPULATION" IN FINANCIAL MARKETS?

*Daniel R. Fischel** *and David J. Ross***

I. INTRODUCTION

Much of the regulation of financial markets seeks to prevent manipulation. The drafters of the Securities Act of 1933[1] and the Securities Exchange Act of 1934,[2] for example, were convinced that there was a direct link between excessive speculation, the stock market crash of 1929, and the Great Depression of the 1930s. Thus, section 2 of the Securities Exchange Act states:

> National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets . . . .[3]

Of particular concern to the drafters, as they repeatedly emphasized in the legislative history, were the well-publicized "pools" dating from the mid-nineteenth century in which perceived combinations of issuers, underwriters, and speculators, by their trading activities, allegedly caused wild fluctuations in security prices.[4]

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The authors would like to thank Frank Easterbrook, William Landes, Louis Loss, Andrew Rosenfield, and seminar participants at the Law and Economics Workshops at Harvard University and the University of Chicago for valuable comments.

[1] Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a–77aa (1988)).

[2] Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a–78*ll* (1988)).

[3] 15 U.S.C. § 78b(4) (1988).

[4] The legislative history of the securities laws, including the concern about the "pools," is exhaustively analyzed in Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 424–61 (1990) [hereinafter Thel, *Original Conception*]; and Steve Thel, *Regulation of Manipulation Under Section 10(b): Security Prices and the Text of the Securities Exchange Act of 1934*, 1988 COLUM. BUS. L. REV. 359, 362–82 [hereinafter Thel, *Manipulation Under Section 10(b)*]. *See also* TWENTIETH CENTURY FUND, INC., THE SECURITY MARKETS 445 (Alfred L. Bernheim & Margaret G. Schneider eds., 1935) ("[T]he more important [manipulative] market campaigns . . . are the work of groups organized into syndicates, pools or joint accounts."); Norman S. Poser, *Stock Market Manipulation and Corporate Control Transactions*, 40 MIAMI L. REV. 671, 691 (1986) ("Beginning at least as early as the middle of the nineteenth century and continuing until the very time that Congress considered

180.260 Service of process by department employees. (1) Notwithstanding ORCP 7 E. 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. [1989 c.323 §2]

March 12, 1992

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

FROM: **Fred Merrill, Executive Director**

RE: **Agenda Item No. 5 - March 14, 1992 meeting**

I have consulted with Karen Creason and Larry Thorp regarding amendments to ORCP 55 H to solve the problem of the relationship between hospital records and a subpoena duces tecum without a deposition, hearing, or trial. We suggested the following changes to ORCP 55 H would solve the problem and would be consistent with the Council's intent in making the amendments last biennium.

DELETED LANGUAGE IS BRACKETED; NEW LANGUAGE IS UNDERLINED AND IN BOLDFACE.

SUBPOENA
RULE 55

* * * *

H. Hospital records.

* * * *

H.(2) **Mode of compliance.** Hospital records may be obtained by subpoena duces tecum as provided in this section; if disclosure of such records is restricted by law, the requirements of such law must be met.

H.(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i)

if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business[; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena]. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than 14 days prior to service of the subpoena on the hospital.

← NOTE BRACKET

* * * *

H.(4) Limitation of use of subpoena to produce hospital records without command for appearance; **[P]personal attendance of custodian of records may be required.**

H.(4)(a) Hospital records may not be subject to a subpoena commanding production of such records other than in connection with a deposition, hearing, or trial.

H.(4)[(a)](b) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)[(b)](c) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

* * * *

FRM:gh

May 25, 1992

TO: Henry Kantor, Chair, Council on Court Procedures

FROM: Maury Holland, Acting Executive Director

RE: Alternate Civil Trial Jurors in Federal Court

This is in response to your request that, by way of preparation for the June 13 meeting, I brief you on jury size and alternate jurors in civil cases in federal courts. Following is the text of Fed. R. Civ. Pro. 48 promulgated by the Supreme Court April 1, 1991, which Congress permitted to become effective without change on December 1, 1991:

Rule 48. NUMBER OF JURORS-PARTICIPATION IN VERDICT.

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c).* Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

*Rule 47(c). Excuse. The court may for good cause excuse a juror from service during trial or deliberation.

Thus Rule 48, as amended, abolishes alternate jurors, as was explained to the Council by Chief Judge Panner. The following excerpts from the Explanatory Notes of the Rules Advisory Committee might be of interest:

> "The use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation."
>
> * * * *
>
> "Because the institution of the alternate juror has been abolished by the proposed revision of Rule 47, it will ordinarily be prudent and necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors. The use of jurors in excess of six increases the representativeness of the jury and harms no interest of a party. . . . .
>
> If the court takes the precaution of seating a jury larger than six, an illness occurring during the

deliberation period will not result in a mistrial, as it did formerly, because all seated jurors will participate in the verdict and a sufficient number will remain to render a unanimous verdict of six or more.

In exceptional circumstances, as where a jury suffers depletions during trial and deliberation that are greater than can reasonably be expected, the parties may agree to be bound by a verdict rendered by less than six jurors. The court should not, however, rely upon the availability of such agreement, for the use of juries smaller than six is problematic . . . ."

July 8, 1992

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

FROM: Maury Holland, Acting Executive Director

RE: Summary of ORCP amendments tentatively adopted to date

To assist in your preparation for the August 1 meeting and those to follow, I attach a summary of amendments to rules tentatively adopted to date. Henry Kantor has in his hands a proposed agenda for the August 1 meeting which, as approved by him, should be reaching you at least one week prior thereto. The attached summary does not include tentative "Staff Comments" in the manner that Fred used to do. I naturally plan to complete the Staff Comments promptly after the August 1 meeting, so that there is time to circulate a copy of them for your comments and suggestions before submitting them to appear in the Advance Sheets by way of briefly explaining the tentative amendments published there, probably in early September. In lieu of Staff Comments, Gilma has laboriously prepared, for each tentatively adopted rule as amended, a kind of "legislative history," showing their context by including excerpts from background memos, minutes, and so forth.

In addition to this mailing and an agenda to follow, you will also be receiving as much prior to the August 1 meeting as we can possibly manage a report, recommendations, and commentary prepared by your subcommittee on proposed amendments to the class action rule (ORCP 32). In addition to the subcommittee's report et al., that mailing will include the comments of the ad hoc group that submitted the proposed amendments now under consideration, plus two sets of proposed amendments to the federal class action rule (FRCP 23), on which the group's proposals were modeled, each with explanatory commentary. That mailing will impose an unusually heavy reading burden on you, so the subcommittee is making every effort to get it out and in your hands as soon as possible. The class action proposals present issues that we who are members of the subcommittee have found to be extremely complex and challenging. The stakes implicated by them will be seen as very high by the bench, bar and, probably, by the 1983 Legislature. The Council's action, whether it be to adopt all, some or none of the subcommittee's recommendations, is certain to arouse an unusual amount of controversy. I am quite sure that I speak as well for Jan Stewart and Mike Phillips in urging you to give the class action materials you will soon be receiving all the time and thought they require and you can possibly manage.

Enc.

TENTATIVELY ADOPTED ORCP AMENDMENTS

TENTATIVELY ADOPTED ORCP AMENDMENTS

EXCLUSION OF WITNESSES AT DEPOSITION

Excerpts from the late Fred Merrill's 9-26-91 memorandum:

> "EXCLUSION OF WITNESSES AT DEPOSITION. Ron Marceau passed along a question raised by a Bend judge by letter of February 6, 1991 ... The judge felt that the ORCP did not clearly cover the exclusion of witnesses during the deposition. ORCP 39 D provides for oral depositions ... '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."

EXCERPTS FROM MINUTES OF COUNCIL'S 12-14-91 MEETING:

> **Agenda Item No. 3: Exclusion of witnesses at depositions (Janice Stewart) (see attached memorandum from Janice Stewart dated November 4, 1991). Janice Stewart discussed whether ORCP 36 C(5), ORCP 39 D, or ORE 615 give the trial court authority to exclude witnesses from depositions for the same reason that witnesses may be excluded from trial. Her conclusion had been that the rules are unclear and that her recommendation would be to amend ORCP 39 D to clarify the question (see page 4 of her memorandum).**
>
> **The Executive Director asked whether this would be a rule of evidence and beyond the rulemaking power of the Council. Council members pointed out that the rule did not deal with the admission or exclusion of evidence at trial but with the procedure of conducting a deposition. Henry Kantor asked whether the rule would allow the court to control the number of representatives of a corporation that could attend a deposition. Janice Stewart said the intent was to have the same rule for persons attending depositions that applies to trials. Mike Phillips asked if the rule required a court order for exclusion or was mandatory in every case. After further discussion, the Executive Director was asked to confer with Janice Stewart and suggest some language that addressed the concerns expressed by Council members.**

EXCERPT'S FROM THE LATE FRED MERRILL'S 1-27-92 MEMORANDUM:

3. Exclusion of witnesses at depositions

After discussion with Janice Stewart, we suggest the following as a redraft of ORCP 39 D. This draft attempts to control presence of witnesses at depositions in light of the concerns expressed by the Council at the last meeting:

> ORCP 39 D. 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 Oregon Evidence Code. Unless the court orders otherwise, only the following persons may be present during the deposition: (1) attorneys representing the parties, (2) any party who is a natural person, and (3) an officer or employee of a party which is not a natural person designated as its representative by its attorney.

The existing rule says that examination and cross-examination may proceed as at trial. This draft refers to the Oregon Evidence Code. The Oregon Evidence Code is defined in ORS 40.010.

The draft defines who ordinarily may be present at deposition and requires a court order to change the usual rule. ORE 615 allows the court to direct that witnesses be excluded from trial, except for certain categories of witnesses. The deposition categories of normal attenders are generally the categories that cannot be excluded from trial under ORE 615. It is the opposite of ORE 615 because a court order is necessary to change the limitation not to create it.

The categories used differ slightly between this draft and ORE 615. ORE 615 does not specifically mention attorneys. This draft would allow any attorney representing a party to be present, not just an attorney of record for a party. There is no limit upon the number of attorneys that may attend for one party. The rule would, however, allow only one corporate representative without court order. This is consistent with ORE 615.

ORE 615 says that the court cannot exclude persons whose presence is essential to the presentation of a party's cause. This category is not used for depositions because it is too vague to be applied without court discretion. It would provide one basis for arguing that the court should allow an additional person to attend the deposition.

Other than a court order, if a party wants to have additional persons in attendance, the stipulation of all parties to the case would be necessary.

EXCERPTS FROM MINUTES OF COUNCIL'S 2-8-92 MEETING (DISCUSSION OF ABOVE PROPOSAL):

Agenda Item No. 3: Exclusion of witnesses at depositions (Janice Stewart). Janice Stewart said the draft set out on page 4 of the Executive Director's memorandum specified those who could be present at depositions and that unless the court orders otherwise, only those people may be present. She said subsection (1), which states that attorneys can always be present during deposition, was not taken out of ORE 615 but that subsections (2) and (3) were taken out of ORE 615. A discussion followed.

Judge Liepe wondered whether an expert whose deposition was next could listen in on a deposition; Janice Stewart said that a court order would have to be obtained or the parties would have to agree to it. Bernie Jolles wondered whether the witness would be able to have an attorney present. Janice Stewart suggested including language specifying "attorneys of any of the parties or the deponent".

Excerpts from 2-8-92 minutes:

The Chair suggested, to be consistent with the Council's approach in other rules, prefacing the second sentence of the draft with, "Unless the parties stipulate or the court orders otherwise," rather than "Unless the court orders otherwise,". Janice Stewart agreed to make that change also.

The Chair pointed out that ORE 615 has two categories which the proposed amendment to 39 D does not contain: a victim in a criminal case and a person whose presence is shown by the party to be essential to the presentation of the parties' cause, which would include expert witnesses and representatives of non-natural persons. He asked whether the intent was that one cannot bring an expert or a second corporate representative without either the parties' stipulation or a court order. Janice Stewart said the thought was that it was better not to have that specified in the rule and to leave it up to the parties to stipulate or the court to order otherwise. Judge Liepe wondered which would be the better approach: to say a court order is needed to exclude witnesses or that a court order is needed to let them be there. Janice Stewart stated the reason the rule was brought to the Council's attention was the problem currently with the court's authority under the rule that limits depositions. Mike Phillips felt that to have a rule which automatically excluded everyone from a deposition except a limited number of people went far beyond the initial concerns. Bernie Jolles stated that another issue had been raised and that was the intimidation question. Judge Kelly wondered whether or not legal assistants would be allowed to attend a deposition. Further discussion followed.

Attorney Dennis Hubel, speaking on behalf of the OSB Procedure & Practice Committee, stated he thought the amendment to ORCP 39 D as drafted provides a mechanism to limit it to a corporate representative and that would need interpretation if someone wanted to press the issue. He was in favor of leaving it up to the judge to decide how many corporate representatives could attend a deposition.

Judge Barron suggested that the word "exclusion" be added so that the first sentence would be prefaced by: "Examination, cross-examination and exclusion of witnesses may proceed ...".

The Chair asked whether the intent of the draft was to exclude the remainder of existing Rule 39 D. Janice Stewart stated that was not the intent and that perhaps it would be better to break the rule up into subsections.

Judge Barron raised another point: definition of parties. He wondered whether beneficiaries in a wrongful death action would be allowed to be present at a deposition.

The Council discussed whether adding the word "exclusion" would accomplish the intent of the amendment. Janice Stewart said the problem was that ORE 615 is taken directly from the federal rule and that there are federal cases that go both ways as to whether that rule applies to depositions. Bruce Hamlin said that if the concern was that by just adding the word "exclusion" to the first sentence of 39 D does not make it clear that the court has the power, a single sentence after the first sentence of existing 39 D could be added: "At the request of a party or a witness, the court may order persons excluded from the deposition."

The Chair asked for comments on the proposed language, "Examination, cross-examination, and exclusion of witnesses may proceed in the manner as permitted by trial," and adding the existing language in 39 D., with perhaps a reference back to Rule 36 C(5) to take care of the intimidation problem. Janice Stewart stated it would mean that you are only going to be excluding people who are witnesses and then the issue would be who are witnesses; she thought it would be a problem to simply refer to ORE 615 because it is not always clear at deposition who will be a witness at trial.

A motion was made and seconded to add the following language following the first sentence of existing 39 D: "At the request of a party or a witness, the court may order persons excluded from the deposition." A discussion followed regarding whether the sentence should be prefaced with "Upon motion". Maury Holland said he thought that people on all sides of a case want to have stated in the rule the category of people who will be present at deposition. Janice Stewart wanted to make sure that the amendment would not merely incorporate Rule 36 C, i.e. that it should be broader than Rule 36 C.

A vote was taken on Bruce Hamlin's motion to add the following sentence after the first sentence of existing 39 D: "At the request of a party or a witness, the court may order persons excluded from the deposition." The motion passed with 10 in favor and 3 opposed. Judge McConville said he was in favor of establishing categories and that was why he voted against the motion.

After a lengthy discussion of Agenda Item No. 3 (EXCLUSION OF WITNESSES AT DEPOSITION) at its February 8, 1992 meeting at the State Capitol in Salem, the Council voted to add the underlined boldface language to Rule 39 D shown below:

DEPOSITIONS UPON ORAL EXAMINATION
RULE 39

* * * *

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. **At the request of a party or a witness, the court may order persons excluded from the deposition.** The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until the final disposition of the action. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor[e]. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the record. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

* * * *

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Excerpts from the late Fred Merrill's 9-26-91 memorandum:

> "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 provision 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.'"

Excerpt from the late Fred Merrill's 1-27-92 memorandum (page 7):

> "The following language is intended to limit application of the public records provision in ORCP 68 A(2) to situations where use of certified copies of public records was mandatory. The word 'necessary' in the existing rule is redundant.
>
> > **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the [necessary] expense of copying of any public record, book or document [used as evidence on trial] admitted into evidence at trial pursuant to ORS 40.570 (Oregon Evidence Code, Rule 1005); ..."

After discussion under Agenda Item No. 8 at its 2-8-92 meeting, the Council voted to adopt the Executive Director's amendment above, but deleted the language "pursuant to ORS 40.570 (Evidence Code, Rule 1005)". The rule as amended is set forth below:

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS RULE 68

A. **Definitions.** As used in this rule:

* * * *

A.(2) **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the [necessary] expense of copying of any public record, book, or document [used as evidence on the trial] admitted into evidence at trial; recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

* * * * *

Excerpts from the late Fred Merrill's 1-27-92 memorandum:

"**ORS sections limiting ORCP 7 E.**

As requested, I did a computer search to see how many ORS sections changed the limits on who may serve summons found in ORCP 7 E. The only ORS section that modifies ORCP 7 E is ORS 180.260 (attached) which allows employees of the Department of Justice to serve summons and process in cases in which the state is interested. The statute was enacted by the 1989 Legislature. We could amend ORCP 7 E as follows:

> **By whom served; compensation.** 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, except as provided in ORS 180.260, an officer, director, or employee of, nor atttorney for, any party, corporate or otherwise. ..."

At the Council's 2-8-92 meeting, it voted unanimously to adopt the above language. The rule as amended is set forth below:

SUMMONS
RULE 7

* * * *

E. By whom served; compensation. 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, except as provided in ORS 180.260, 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 Rule 68.

* * * *

Excerpt from the late Fred Merrill's 9-26-91 memorandum:

> "**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."

Following is an excerpt from the minutes of the Council's 3-14-92 meeting, after which the tentative amendments to ORCP 7 C(3) are set forth:

Agenda Item No. 3: Summons warning - progress report (Judge Welch). Judge Welch reported that almost a year ago the Bar had received a letter saying that New Jersey had a summons telling people what the telephone number was for the New Jersey State Bar and the New Jersey Law Referral Services, giving telephone numbers on a county-by-county basis, and Judge Welch had taken it upon herself to try to find out the answer to an issue raised by Council members whether that language in the summons wasn't just another opportunity to have something wrong on the form and be the basis for a dismissal or default. Anne Bartsch of the OSB had called and written letters to try to find out whether New Jersey had experienced any problems; Ms. Bartsch learned that there had never been any problem in New Jersey with using that language in the summons.

Judge Welch suggested the following language: "If you need a lawyer and you don't have a lawyer, call the Oregon State Bar Lawyer Referral Service." She pointed out that the Lawyer Referral Service of the Oregon State Bar is a completely integrated referral service.

Judge Graber said she supported the idea of having language in the summons and moved that the following slightly different wording be adopted [which would be an amendment to ORCP 7 C(3)]:

> **"If you have questions, you should see [an attorney] a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636."**

Judge Welch seconded the motion. After discussion, the motion passed unanimously.

SUMMONS
RULE 7

* * * *

C.(1) Contents. The summons shall contain:

* * * *

C.(3) Notice to party served.

C.(3)(a) In general. All summonses, other than a summons referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see [an attorney] a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.

C.(3)(b) **Service for counterclaim.** A summons to join a party to respond to a counterclaim pursuant to Rule 22 D.(1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see [an attorney] **a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

C.(3)(c) **Service on persons liable for attorney fees.** A summons to join a party pursuant to Rule 22 D(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see [an attorney] **a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

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* * * *

Excerpts from the late Fred Merrill's 9-20-91 memorandum:

> **"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 oaths 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."

At the Council's 2-8-92 meeting, the Council discussed extensively the late Fred Merrill's proposal set out below:

> **2. Oaths for depositions by telephone.** After consulting with Keith Burns, I suggest that the following be added at the end of subsection 39 C(7);
>
> > "The oath or affirmation may be administered to the deponent, either in person or over the telephone, by a person authorized to administer oaths by the laws of this state, by a person authorized to administer oaths by the laws of the place where the deposition is taken, or by a person specially appointed by the court in which the action is pending. If the witness is not physically in the presence of the officer or person administering the oath, the oath shall have the same force and effect as if the witness were physically present before the officer. For purposes of this rule, subsection 46 A(1), subsection 46 B(1), subsection 55 C(1) and subsection 55 F(2), a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to the deponent."
>
> The first sentence provides flexibility in administering the oath. It may either be done by someone at the questioning end of the telephone call or someone who is in the presence of the deponent. The second sentence is taken from the proposed amendment to Arizona Rule of Civil Procedure 30(c). It makes clear that an oath outside the presence of the person administering the oath is as effective as an oath in the presence of such person. The last sentence is a modified version of FRCP 30 C(7). It actually goes beyond the problem raised by Mr. Burns. There are a number of places in the ORCP where it may be important to determine where a deposition by telephone is being taken. Under the existing rule you could argue that the deposition is taken where the questions are asked or where the deponent is located. The draft follows the federal rule in opting for the location of the deponent.

To define when a deposition has been regularly taken, administration of an oath at either end of the telephone line and by a person authorized to administer oaths by either state or by the court should be adequate. The Oregon court rules can control what formalities must accompany a deposition in order to be valid and usable in Oregon Courts. ORCP 38 A and B identify the same persons as proper oath givers for depositions taken within and without the state.

Whether the provision would subject an out-of-state deponent to prosecution for perjury is less clear. For purposes of defining the crime of perjury in Oregon, Oregon law would control. A definition of a proper form of oath for a deposition in the ORCP would apply in determining whether the deponent had lied under oath. The crime of perjury could be committed by a person outside the state who is testifying by telephone.

One difficulty is that an absent foreign deponent would usually not be subject to arrest and prosecution within the state of Oregon. This difficulty could be addressed in several ways:

1. Prosecute the deponent in the state where the deponent was located during the deposition. Most states have a crime of perjury or false swearing that would involve making a false statement under oath. The state where the deponent is located has an interest in controlling any improper conduct committed within its borders. A deponent who intentionally testifies falsely in an Oregon judicial proceeding, after having a standard oath or affirmation administered by a person authorized to do so by Oregon law, is engaging in improper conduct.

2. Use extradition. If the perjury was serious enough to warrant prosecution of a foreign defendant, it probably is a crime subject to extradition.

3. Ignore the problem. Perjury prosecutions are so rare for depositions that, if there is a problem when oaths are administered to a foreign deponent by a local court reporter, it is more theoretical than actual.

It should be noted that the rules already contain a procedure that presents the same problem. ORCP 38 B provides that, for a deposition taken outside the state in a case pending in Oregon, the oath may be administered by a person appointed by the court. That person probably would not be someone authorized to administer oaths by the laws of the foreign state.

2-8-92 MEETING

Excerpts from minutes of meeting:

Agenda Item No. 2: Oaths for depositions by telephone (subcommittee report - Mike Phillips and Bruce Hamlin; letters from Kathryn Augustson and Stephen Thompson; see pages 1 and 2 of Executive Director's January 27, 1992 memorandum). Mike Phillips explained that at the last meeting a proposal to amend subsection 39 C(7) had been discussed and concerns had been raised by Council members. The subcommittee, after discussion with Kathryn Augustson of the OSB Procedure and Practice Committee, is now suggesting the amendments to ORCP 39 C(7) and G(1) set out on pages 1 and 2 of the Executive Director's January 27, 1992 memorandum. A motion was made and seconded to adopt those proposed amendments. A lengthy discussion followed.

Bernie Jolles questioned the meaning of the language contained in the last sentence of proposed C(7)(b) which said:

> "If the place where the deponent is to answer questions is located outside this state, motions to terminate or limit examination under section E of this rule may only be made to the court in the state in which the action is pending and other applications for orders, subpoenas, and sanctions may be made to the court in the state in which the action is pending or a court of general jurisdiction in the county of the state where the deposition is being taken."

Excerpts from minutes of meeting (CONTINUED):

Bernie Jolles thought this dealt with a situation where an action is pending in Oregon and a deponent located in a foreign jurisdiction is being deposed. He suggested that, in the second from the last line above, the words "deposition is being taken" be deleted and the words "where the deponent is located" be substituted. Several other suggestions were made by Council members.

The Chair stated that he thought the intent of the last sentence of C(7)(b) should be clarified.

Janice Stewart stated she had a problem with reference to "county" in the last sentence of C(7)(b) since some states do not have counties. A suggestion was made that the wording should be "a court of general jurisdiction of the state where the deposition is being taken". Janice Stewart said it was still unclear where the deposition is being taken and that it could be where you are asking the questions or where the questions are being answered. It was pointed out that in the fourth sentence of C(7)(b) at the bottom of page 1, it states: "For the purposes of this rule ... depositions taken by telephone are taken at the place where the deponent is ...". Judge Liepe suggested that the language prefacing the last sentence of C(7)(b) could read, "If the deponent is located outside this state, ..." Janice Stewart suggested that "where the deponent is located" could be substituted for "where the deposition is being taken" at the end of the last sentence of C(7)(b). The Chair suggested that, to track the preceding sentence, the language "If the place of examination is outside the state" could be substituted for the proposed language in the last sentence of C(7)(b).

Judge Kelly wondered whether there really was an issue regarding out-of-state depositions by telephone. Bruce Hamlin explained that the rule as written requires a court order to conduct one. Bruce said the proposed rule makes it clear that parties can informally take an out-of-state deposition by telephone and tells the court reporters that it is all right to administer an oath over the telephone.

The Chair asked for comments regarding the first three sentences of C(7)(b). Judge Kelly felt that the third sentence of C(7)(b) repeated what is said in the first two sentences of C(7)(b). After further discussion, a motion was made and seconded to delete the third sentence from 39 C(7)(b). The motion passed unanimously.

The Chair asked for comments regarding whether the fourth sentence of C(7)(b) was needed since it is a definitional sentence. A motion was made and seconded to delete the fourth and fifth sentences from C(7)(b). Judge Liepe pointed out that it had been felt necessary to incorporate some language from the federal rule to address matters not addressed by the Oregon rule. Mike Phillips said the subcommittee wanted to try to give directions to the judges as to what they could rule upon, and Janice Stewart agreed that there needed to be some basis for rulings in Oregon. A vote was taken on the motion to delete the fourth and fifth sentences; the motion failed with 4 in favor and 9 opposed.

A motion was made and seconded to delete the words "in the county" from the second to the last line of the fifth sentence in C(7)(b). The motion passed unanimously.

Janice Stewart suggested amending the end of the fourth sentence so that it would say "where the deponent is located" instead of "where the deponent is to answer questions propounded to the deponent" and, at the beginning of the fifth sentence, she suggested saying "If the deponent is located" instead of "If the place where the deponent is to answer questions is located ...". A motion was made and seconded to adopt that language. Further discussion followed. Judge Liepe suggested amending the fourth sentence by saying "... place of the examination under Rule 55 F(2) is deemed to be the place where the deponent is located at the time of the deposition." Bill Cramer suggested deleting the language at the beginning of the fifth sentence, "If the place where the deponent is to answer questions is located outside this state" and begin the sentence with "Motions to terminate ..."

The Chair suggested that the subcommittee take another look at the draft, in particular, the fourth and fifth sentences of C(7)(b), and perhaps find a way of shortening them up. The Chair, referring to the language in C(7)(a), questioned whether a stipulation would be limited to the parties and whether there should be a concern about a witness needing to stipulate. Bruce Hamlin said he thought it was intended to apply to a stipulation of the parties. A discussion followed and it was suggested the last sentence of C(7)(a) was not needed. A motion was made and seconded to delete the last sentence of C(7)(a); the motion passed unanimously.

Excerpts from minutes of 2-8-92 meeting (continued):

The Chair asked if there were further comments regarding the motion as modified to adopt both C(7)(a), except the last sentence, and the first two sentences of C(7)(b). The last two sentences are to be redrafted and submitted for consideration at the next meeting. Attorney Jim Vick expressed concern that someone might forget to put a stipulation on the record, which would present problems at trial; he thought there should be language that would address that issue. The Chair asked the subcommittee to try to come up with some language.

A motion was made, seconded, and unanimously passed to table the motion to adopt 39 C(7)(a) and 39 C(7)(b) until the Council could consider the subcommittee's redraft of the proposed amendments.

At the Council's 5-9-92 meeting, Bruce Hamlin presented the following proposals:

PROPOSALS TO AMEND ORCP 38, 39, AND 46:

RULE 38. PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

A. Within Oregon.

A(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A(2) For purposes of this Rule, a deposition taken pursuant to Rule 39C(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

B. Outside the State. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable

PROPOSALS TO AMEND ORCP 38, 39, AND 46 (CONTINUED):

or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign Depositions.

C(1) Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

C(2) This section shall be so interpreted and construed as to effectuate its general purposes to make uniform the laws of those states which have similar rules or statutes.

RULE 39. DEPOSITIONS UPON ORAL EXAMINATION

A. (unchanged)

B. (unchanged)

C. Notice of Examination.

C(1) (unchanged)

C(2) (unchanged)

C(3) (unchanged)

C(4) (unchanged)

C(5) (unchanged)

C(6) (unchanged)

C(7) *Deposition by Telephone.* Parties may agree by stipulation or [T]the court may upon motion order that testimony at a deposition be taken by telephone[,]. If testimony at a deposition is taken by telephone pursuant to court order, [in which event] the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be

PROPOSALS TO AMEND ORCP 38, 39, AND 46 (CONTINUED):

accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.

D. (unchanged)

E. Motion to Terminate or Limit Examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and 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 36C. Those described in Rule 46B(2) shall present the motion to the court in which the action is pending. Other non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order 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 46A(4) apply to the award of expenses incurred in relation to the motion.

F. (unchanged)

G. Certification; Filing; Exhibits; Copies.

G(1) *Certification.* When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was duly sworn [in the reporter's presence] and that the transcript is a true record of the testimony given by the witness. (Remainder unchanged.)

H. (unchanged)

I. (unchanged)

RULE 46. FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, such applications may also be made to a court of general jurisdiction in the political subdivision where the deponent is located. [to a judge of a circuit or district court in the county where the deposition is being taken.]

A(2) (unchanged)

A(3) (unchanged)

A(4) (unchanged)

B. Failure to Comply With Order.

B(1) *Sanctions by Court in the County Where [Deposition Is Taken] the Deposition Is Located.* If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the [deposition is being taken] deponent is located, the failure may be considered a contempt of court.

B(2) (unchanged)

B(2)(a) (unchanged)

B(2)(b) (unchanged)

B(2)(c) (unchanged)

B(2)(d) (unchanged)

B(2)(e) (unchanged)

B(3) (unchanged)

C. (unchanged)

D. (unchanged)

5-9-92 MEETING

Excerpts from minutes of meeting (CONTINUED):

Agenda Item No. 7: Oaths for deposition by telephone (Bruce Hamlin and Mike Phillips). Bruce Hamlin had distributed proposed amendments to Rules 38, 39, and 46 prior to the meeting (they are also attached to these minutes). Bruce Hamlin stated that he and Mike Phillips had tried to incorporate suggestions made by the Council members at the February 8th meeting; they wanted to make it clear that an oath could be given during a telephone deposition over the telephone whether the deponent was located within this state or outside this state (that was designed to clear up any ambiguity with ORS 44.320). Bruce Hamlin explained the proposed amendments to Rules 38, 39, and 46 (see attached).

The Chair asked how the language proposed to be added to Rule 39 C(7) concerning "testimony ... taken by telephone other than pursuant to court order or stipulation made part of the record, ..." would bear upon either an oral stipulation at the deposition or a written stipulation, such as a letter between counsel, not customarily made part of the record. Mike Phillips replied that the language was included because he and Bruce Hamlin thought it was the sense of the Council at its last meeting that there should be two clearly stated ways of taking depositions by telephone -- court order or a written stipulation made part of the record of the deposition, by reading the stipulation into the record or attaching it as an exhibit to the transcript. Inadvertent failure by counsel to comply with this procedure, when there is no court order, should be readily avoided or cured by the proposed language providing that any objections to the taking of a deposition by telephone are waived unless seasonably made at the taking of the deposition.

The Chair questioned the language in 39 (E) on page 4 of the draft: "Those described in Rule 46 B(2) shall present the motion ... in which the action is pending." He wondered to whom the term "Those" made reference. After discussion, a suggestion was made to insert the word "persons" between "Those" and "described". Regarding 39 (C)(7), Judge Liepe suggested deleting the words "upon motion" in the second line of the draft so that the court's discretion would be clear.

The Council then considered the language in 46 A(1) and B(1). After discussion, a suggestion was made that the word "competent" be substituted for "general" in the first sentence of 46 A(1) so that it would read as follows: "... such application may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located." A discussion followed about whether the language in 46 B(1) should be made consistent with the underlined language in 46 A(1).

Judge DeMuniz raised the question about whether the language in 46 B(1) would be utilized by, for example, a Texas judge to find someone in contempt and felt that we would not be able to do anything in Texas.

After further discussion, Mike Phillips made a motion, seconded by Judge Welch, that the Council adopt the amendments as originally written by Bruce Hamlin, with the exception that, in the second line of 39 C(7), the words "upon motion" be stricken. He amended his motion, seconded by Judge Welch, so that in Rule 46 A, in the underlined language, the word "general" would be stricken and the word "competent" would be substituted. Bruce Hamlin pointed out that in B(1), in the heading, the phrase "the Deponent Is located" should be substituted for "the Deposition Is Located." Janice asked whether the amendment to 46 A(1) would also apply to 46 B(1), and Mike Phillips said that it would not apply and that Judge DeMuniz was correct in pointing out that 46 B(1) is designed to address holding someone in contempt in Oregon.

Mike Phillips' motion was further amended by Judge McConville to insert "persons" between "Those" and "described" at the beginning of the underlined language in 39 E. It was also decided after discussion that the word "applications" in the underlined language in 46 A(1) should be changed to "application".

The motion as amended passed with 18 in favor and one opposed.

TENTATIVE AMENDMENTS TO RULES 38, 39, AND 46 AFTER COUNCIL ACTION TAKEN AT MAY 9, 1992 MEETING

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS RULE 38

A. Within Oregon.

A.(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A.(2) For purposes of this rule, a deposition taken pursuant to Rule 39 C(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

* * * * *

DEPOSITIONS UPON ORAL EXAMINATION RULE 39

* * * * *

C. Notice of examination.

* * * * *

C.(7) **Deposition by telephone.** Parties may agree by stipulation or [T]the court may order that testimony at a deposition be taken by telephone[,]. If testimony at a deposition is taken by telephone pursuant to court order, [in which event] the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

* * * * *

E. Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of

the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and 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 36 C. **Those persons described in Rule 46 B(2) shall present the motion to the court in which the action is pending. Other non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination.** If the order terminates the examination, it shall be resumed hereafter 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 46 A(4) apply to the award of expenses incurred in relation to the motion.

* * * * *

G. Certification; filing; exhibits; copies.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was **duly** sworn [in the reporter's presence] and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

* * * * *

FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, [to a judge of a circuit or district court in the county where the deposition is being taken] **such applications may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located**. An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the county where the deposition is being taken.

still to be addressed by Council

* * * * *

B. Failure to comply with order.

B.(1) **Sanctions by court in the county where [deposition is taken] the deponent is located.** If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which [the deposition is being taken] **deponent is located**, the failure may be considered a contempt of court.

* * * * *

August 6, 1992

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

FROM: Maury Holland, Acting Executive Director

RE: **Materials to be submitted for publication in Advance Sheet No. 18**

I enclose a draft of the packet of materials that will be forwarded for publication in Advance Sheet No. 18. That Advance Sheet is scheduled to be mailed to subscribers on September 10, 1992, but the deadline for receipt of materials for inclusion at OJD Publications is **August 21**. Kindly read this draft with care, and provide me with any corrections, suggestions or comments you might have as promptly as possible - by telephone [346-3990 or 346-3834], fax [346-1564], or mail.

With many thanks for your help and anticipated responses.

P.S. Upon further thought I am wondering whether the new sentence proposed to be added to Rule 39 D about exclusion of persons from depositions would not more logically be added to Rule 36 C. This provision now seems to me more in the nature of a protective order than an aspect of deposition procedure, though it is clearly both. An advantage of adding orders excluding persons from depositions to 36 C (even though some Council members, such as Judge Johnson, believed such authority is already subsumed under one or more of the existing 36 C subsections) is that it would automatically pick up the "good cause" standard applicable to all protective orders, together with Rule 46 A(4)'s authorizing cost-shifting when a court finds, in effect, that failure to resolve the matter by agreement between counsel was caused by the unjustified demand or resistance of one of the parties. In any event, the sentence proposed to be added to Rule 39 D is not, as the Council agreed, satisfactory. For one thing, no standard of discretion is included. For another, I think we must avoid a term such as "at the request of" and stick with "on motion" or the like.

PROPOSED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Underscoring (with boldface) denotes new language; bracketing indicates language to be deleted.

Comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent to:

Maurice J. Holland
Acting Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403
Telephone: (503) 346-3834

The Council meetings at which the Council will receive comments from the public relating to the proposals will be held on the following dates at the specified places:

September 26, 1992 9:00 a.m.	Seaside Civic & Convention Center, 415 First Avenue, Seaside
October 17, 1992 9:30 a.m.	Oregon State Bar Center, 5200 Southwest Meadows Road, Lake Oswego
November 14, 1992 9:30 a.m.	Oregon State Bar Center, 5200 Southwest Meadows Road, Lake Oswego
December 12, 1992 9:30 a.m.	University of Oregon School of Law, Room 375, 1101 Kincaid Street, Eugene

The Council will take final action on these proposals at the December 12, 1992 meeting.

In addition to the following proposed amendments, the Council also is currently considering a number of other possible ORCP revisions that have been suggested by members of the bench or bar. These have not yet reached the stage of being tentatively adopted as proposed amendments, and it has not yet been decided which, if any, of them will reach that stage during the current biennium. To facilitate comments upon these possible revisions, which may be sent to the Acting Executive Director,

they are summarized following the proposed amendments set forth in full text below.

PROPOSED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

Contents

SUMMONS
RULE 7

* * * * *

C.(1) Contents. The summons shall contain:

* * * * *

C.(3) **Notice to party served.**

C.(3)(a) **In general.** All summonses, other than a summons referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. **If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

C.(3)(b) **Service for counterclaim.** A summons to join a

party to respond to a counterclaim pursuant to Rule 22 D.(1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. **If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

C.(3)(c) **Service on persons liable for attorney fees.** A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the

agreement to which defendant alleges you are a party.

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. **If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

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* * * * *

E. By whom served; compensation. 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**, except as provided in ORS 180.260,** 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 Rule 68.

* * * * *

COMMENT

7 C.(3)(a), (b) and (c). Some persons served with a summons will not already have an attorney and will be unaware of the Oregon State Bar's Lawyer Referral Service and how it can be contacted. The language added to the "summons warning" prescribed by each of the above subsections would provide that information.

7 E. The language added would remove the inconsistency between this section of the rule and ORS 180.260, which authorizes service of summons by some officers or employees of the Department of Justice in cases in which the State is interested.

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS RULE 38

A. Within Oregon.

A.(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A.(2) For purposes of this rule, a deposition taken pursuant to Rule 39 C.(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

* * * * *

COMMENT

38 A.(2). This subsection is added to provide that when, pursuant to ORCP 39 C.(7), a deposition is taken by telephone it shall be regarded as being taken within Oregon if either the deponent or the individual administering the oath or affirmation is within Oregon at the time the oath or affirmation is administered. This is intended to make clear that, under such circumstances, there need be no compliance with the more cumbersome requirements of ORCP 38 B. If an out-of-state deponent is a non-party, compliance with the Uniform Foreign Deposition Act or other pertinent legislation of the jurisdiction where the deponent is located would of course be necessary in order to secure his or her attendance and compel his or her testimony.

DEPOSITIONS UPON ORAL EXAMINATION
RULE 39

* * * * *

C. Notice of examination.

* * * * *

C.(7) **Deposition by telephone.** **Parties may agree by stipulation or** [T]the court may [upon motion] order that testimony at a deposition be taken by telephone[,]. **If testimony at a deposition is taken by telephone pursuant to court order,** [in which event] the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. **If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.**

* * * * *

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. **At the**

request of a party or a witness, the court may order persons excluded from the deposition. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C.(4) of this rule. If testimony is recorded pursuant to subsection C.(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this rule, until the final disposition of the action. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor[e]. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the record. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

* * * * *

E. Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any

party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and 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 36 C. **Those persons described in Rule 46 B.(2) shall present the motion to the court in which the action is pending. Non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination.** If the order 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 46 A.(4) apply to the award of expenses incurred in relation to the motion.

* * * * *

G. Certification; filing; exhibits; copies.

G.(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was **duly** sworn [in the reporter's presence] and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person

heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

* * * *

COMMENT

39 C.(7). The language added to this subsection is intended to clarify that depositions may be taken by telephone pursuant to a stipulation between or among the parties, as well as by court order. It is not the intent of this subsection as amended to require resort either to a court order or written stipulation made part of the record as the exclusive means by which the ground rules for taking depositions may be established. The next-to-the-last sentence proposed to be added would provide that any of the specified grounds of objection are waived unless timely made at the taking of any deposition conducted pursuant to informal agreement between or among counsel. This added language is not intended to dispense with the requirement of Rule 39 C.(1) that a party desiring to take the deposition of any person provide reasonable written notice thereof to every other party to the action.

The final sentence proposed to be added to this subsection would make clear that, in telephonic depositions, the oath or affirmation may be administered either in the deponent's presence or by a person so authorized speaking to the deponent, and hearing the deponent's response, over the telephone, at the election of the party taking the deposition.

39 D. The purpose of the sentence that would be added to the rule is simply to make clear that trial judges have discretionary authority to order that such persons as might be

specified in the order be excluded from attending a deposition upon request of a party or a witness at such deposition.

39 E. The added language is intended to clarify that motions to terminate or limit examination at deposition must be made before the court in which the action is pending in the case of party-deponents or other parties, whereas non-party deponents have the choice of making such motions either before the court in which the action is pending or the court at the place of examination.

39 G.(1). This amendment is to conform this subsection with the proposed new ORCP 38 A.(2), whereby the deponent's oath or affirmation need not be taken in the presence of the stenographic reporter.

FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) **Appropriate court.**

A.(1)(a) **Parties.** An application for an order to a party may be made to the court in which the action is pending, [or] **and**, on matters relating to a deponent's failure to answer questions at a deposition, [to a judge of a circuit or district court in the county where the deposition is located] **such an application may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located.**

A.(1)(b) **Non-parties.** An application for an order to a deponent who is not a party shall be made to a [judge of a circuit or district court in the county where the deposition is being taken] **court of competent jurisdiction in the political subdivision where the non-party deponent is located.**

* * * * *

B. Failure to comply with order.

B.(1) **Sanctions by court in the county where [deposition is taken] the deponent is located.** If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the [deposition is being taken] **deponent is located**, the failure may be considered a contempt of court.

* * * * *

COMMENT

46 A.(1). This subsection is proposed to be reorganized into two distinct subsections. Proposed subsection 46 A.(1)(a) deals with orders against parties who fail to make discovery in accordance with these rules. Such orders are usually sought from the court before which the action is pending. But in the case of party deponents, the alternative of seeking discovery orders from a court where the deponent is physically located is provided. Although not so limited, this alternative is most likely to be effective with respect to deponents who are outside Oregon. Reference to "a court of competent jurisdiction in the political subdivision where the deponent is located" is substituted for the existing language to avoid possible confusion when another jurisdiction might not have counties or where courts are styled differently from those of Oregon. Proposed subsection A.(1)(b) makes clear that, in the case of non-party deponents, discovery orders can be effectively sought only from a competent court of the political subdivision where the deponent is located, which might or might not be the court where the action is pending.

46 B.(1). The phrase "the deponent is located" is substituted for the existing language to make the wording consistent with proposed new subsections 46 A.(1)(a) and (b). This provision is applicable only to the contempt sanction as imposed by an Oregon court for disobedience of its discovery order. When a recalcitrant non-party deponent disobeys a discovery order of a court of another jurisdiction, the availability of a contempt sanction is of course determined by the law of that jurisdiction. When a recalcitrant deponent is a party who disobeys a discovery order of the court wherein the action is pending, contempt of that court is among the sanctions for such disobedience provided by ORCP 46 B.(2).

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS RULE 68

A. Definitions. As used in this rule:

* * * * *

A.(2) **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the [necessary] expense of copying of any public record, book, or document [used as evidence on the trial] **admitted into evidence at trial**; recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

* * * * *

COMMENT

68 A.(2). The purpose of this proposed amendment is to make clear that the costs of copying public records and the like for use at trial are allowable and taxable only if such records are admitted, as opposed to being merely offered in evidence or

obtained in preparation for trial. Admissibility of public records, documents, and data collections is provided for in Rules 803(8) [ORS 40.460], 902(4) [ORS 40.510], and 1005 [ORS 40.570] of the Oregon Evidence Code.

SUMMARIES OF POSSIBLE ORCP REVISIONS NOT YET IN THE FORM OF PROPOSED AMENDMENTS

1. **ORCP 32 - Class Actions.** The Council has under consideration a set of proposals that would importantly amend this rule. These proposals would substitute a "unitary" class action for the tripartite categorization of the present ORCP 32 B and, in particular, would abolish the mandatory notice and claim form requirements now applicable to class actions certified under ORCP 32 B(3) whereby large numbers of legally independent claims for damages having common questions of law or fact and complying with other requirements of the rules are aggregated in a single litigation. These proposals would make the questions of whether, how and to whom individual notice is provided to class members discretionary with the court in this type of class action as they now are with the other types that involve either injunctive or declaratory relief or a class composed of persons whose joinder would otherwise be needed for just adjudication.

These proposals would also do away with the mandatory claim form provision in ORCP 32 F(2) as applicable solely to aggregated damage class actions, and make this procedure discretionary with the court in all class actions. This would mean that the amount of the judgment in such a class action would no longer be limited by force of this subsection to the total of the amounts of damages claimed by individual class members in forms submitted for that purpose in response to solicitation by the court. In cases where the aggregate amount of damages sustained by the class as a whole could be ascertained without claim forms, that figure could be used as the amount of the judgment even if it exceeded the total of the individual amounts determined to be payable to the class representative and class members.

These proposals would also give judges discretion to give notice of compromise or dismissal of a class action to some, but not necessarily all members of the class, and would authorize shifting of a prevailing defendant's costs and attorney fees against class representatives and class members who have appeared individually only if assessed as a sanction, regardless of other provisions of law.

The Council has received a considerable amount of public testimony and other comments, both in support of, and in opposition, to these proposals. It now has before it the report and recommendations of a subcommittee designated by it to study the proposals. All three members of the subcommittee favor repeal of the mandatory claim form provision (ORCP 32 F(2)), but also favor rejection of the proposed substitute provision that would mandate entry of judgment in the full amount of the aggregate damages sustained by the class whenever that can be

calculated from defendant's records or otherwise. These three members join in the belief that specifying how amounts of judgments must be determined is not appropriately included in rules of procedure. The subcommittee is divided 2 to 1 in support of the proposal that would make individual notice to class members discretionary rather than mandatory in aggregate damage class actions.

2. **ORCP 36 C(2) - Limited Disclosure of Material Covered by a Protective Order**. The Council has under consideration a proposal that would create a new subsection 36 C(2). As presently formulated, this would allow a lawyer in a given case to disclose to any other lawyer representing a client in a similar or related litigation information or material obtained through discovery that has become subject to a protective order obtained under present ORCP 36 C. This modification of a previously granted protective order would be obtainable only upon motion, with notice to, and opportunity to be heard on the part of the party who obtained it. This proposal requires that any attorney receiving material in this manner must agree in writing to be bound by the terms of the protective order. It would make this disclosure mandatory on motion unless the party who had obtained the protective order showed to the court good cause why it should not be allowed.

3. **ORCP 60 - Motion for Directed Verdict**. The Council is considering a suggestion that this rule be amended to give trial judges clear authority to grant directed verdict on motion at any point after the opponent of the motion has been fully heard, rather than no earlier than at the close of the opponent's evidence. This suggestion would also adopt language to make clear that a directed verdict can be granted with respect to one or more claims in a given case, even if no such verdict is sought or granted with respect to other claims of the same or other parties. This suggestion would move practice in Oregon courts in the direction of federal practice pursuant to FRCP 50(a).

4. **ORCP 69 A - Ten-day Notice of Application for Order of Default**. The Council has received, and is considering, a suggestion that ORCP 69 A be amended to remove the present requirement that notice of an application for a default order be given to a party against whom it is sought at least ten days prior to entry thereof in cases where such party fails to attend and defend at a trial as to which he or she has been given notice. This proposal would "overrule" Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990). In appropriate cases of hardship or excusable neglect, relief would remain available to a party against whom judgment had been entered under these circumstances pursuant to ORCP 71 B(1)(a).

SUMMONS
RULE 7

* * * * *

C.(1) Contents. The summons shall contain:

* * * * *

C.(3) **Notice to party served.**

C.(3)(a) **In general.** All summonses, other than a summons referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. **If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

C.(3)(b) **Service for counterclaim.** A summons to join a

party to respond to a counterclaim pursuant to Rule 22 D.(1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. **If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

C.(3)(c) **Service on persons liable for attorney fees.** A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the

agreement to which defendant alleges you are a party.

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. **If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

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* * * * *

E. By whom served; compensation. 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**, except as provided in ORS 180.260,** 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 Rule 68.

* * * * *

COMMENT

7 C.(3)(a), (b) and (c). Some persons served with a summons will not already have an attorney and will be unaware of the Oregon State Bar's Lawyer Referral Service and how it can be contacted. The language added to the "summons warning" prescribed by each of the above subsections would provide that information.

7 E. The language added would remove the inconsistency between this section of the rule and ORS 180.260, which authorizes service of summons by some officers or employees of the Department of Justice in cases in which the State is interested.

PERSONS WHO MAY ADMINISTER OATHS
FOR DEPOSITIONS; FOREIGN DEPOSITIONS
RULE 38

A. Within Oregon.

A.(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A.(2) For purposes of this rule, a deposition taken pursuant to Rule 39 C.(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

* * * * *

COMMENT

38 A.(2). This subsection is added to provide that when, pursuant to ORCP 39 C.(7), a deposition is taken by telephone it shall be regarded as being taken within Oregon if either the deponent or the individual administering the oath or affirmation is within Oregon at the time the oath or affirmation is administered. This is intended to make clear that, under such circumstances, there need be no compliance with the more cumbersome requirements of ORCP 38 B. If an out-of-state deponent is a non-party, compliance with the Uniform Foreign Deposition Act or other pertinent legislation of the jurisdiction where the deponent is located would of course be necessary in order to secure his or her attendance and compel his or her testimony.

DEPOSITIONS UPON ORAL EXAMINATION
RULE 39

* * * * *

C. Notice of examination.

* * * * *

C.(7) **Deposition by telephone.** **Parties may agree by stipulation or** [T]the court may [upon motion] order that testimony at a deposition be taken by telephone[,]. **If testimony at a deposition is taken by telephone pursuant to court order,** [in which event] the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. **If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.**

* * * * *

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. **At the**

request of a party or a witness, the court may order persons excluded from the deposition. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C.(4) of this rule. If testimony is recorded pursuant to subsection C.(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this rule, until the final disposition of the action. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor[e]. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the record. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

* * * * *

E. Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any

party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and 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 36 C. **Those persons described in Rule 46 B.(2) shall present the motion to the court in which the action is pending. Non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination.** If the order 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 46 A.(4) apply to the award of expenses incurred in relation to the motion.

* * * * *

G. Certification; filing; exhibits; copies.

G.(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was **duly** sworn [in the reporter's presence] and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person

heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

* * * *

COMMENT

39 C.(7). The language added to this subsection is intended to clarify that depositions may be taken by telephone pursuant to a stipulation between or among the parties, as well as by court order. It is not the intent of this subsection as amended to require resort either to a court order or written stipulation made part of the record as the exclusive means by which the ground rules for taking depositions may be established. The next-to-the-last sentence proposed to be added would provide that any of the specified grounds of objection are waived unless timely made at the taking of any deposition conducted pursuant to informal agreement between or among counsel. This added language is not intended to dispense with the requirement of Rule 39 C.(1) that a party desiring to take the deposition of any person provide reasonable written notice thereof to every other party to the action.

The final sentence proposed to be added to this subsection would make clear that, in telephonic depositions, the oath or affirmation may be administered either in the deponent's presence or by a person so authorized speaking to the deponent, and hearing the deponent's response, over the telephone, at the election of the party taking the deposition.

39 D. The purpose of the sentence that would be added to the rule is simply to make clear that trial judges have discretionary authority to order that such persons as might be

specified in the order be excluded from attending a deposition upon request of a party or a witness at such deposition.

39 E. The added language is intended to clarify that motions to terminate or limit examination at deposition must be made before the court in which the action is pending in the case of party-deponents or other parties, whereas non-party deponents have the choice of making such motions either before the court in which the action is pending or the court at the place of examination.

39 G.(1). This amendment is to conform this subsection with the proposed new ORCP 38 A.(2), whereby the deponent's oath or affirmation need not be taken in the presence of the stenographic reporter.

FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) **Appropriate court.**

A.(1)(a) **Parties.** An application for an order to a party may be made to the court in which the action is pending, [or] **and**, on matters relating to a deponent's failure to answer questions at a deposition, [to a judge of a circuit or district court in the county where the deposition is located] **such an application may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located.**

A.(1)(b) **Non-parties.** An application for an order to a deponent who is not a party shall be made to a [judge of a circuit or district court in the county where the deposition is being taken] **court of competent jurisdiction in the political subdivision where the non-party deponent is located.**

* * * * *

B. Failure to comply with order.

B.(1) **Sanctions by court in the county where [deposition is taken] the deponent is located.** If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the [deposition is being taken] **deponent is located**, the failure may be considered a contempt of court.

* * * * *

COMMENT

46 A.(1). This subsection is proposed to be reorganized into two distinct subsections. Proposed subsection 46 A.(1)(a) deals with orders against parties who fail to make discovery in accordance with these rules. Such orders are usually sought from the court before which the action is pending. But in the case of party deponents, the alternative of seeking discovery orders from a court where the deponent is physically located is provided. Although not so limited, this alternative is most likely to be effective with respect to deponents who are outside Oregon. Reference to "a court of competent jurisdiction in the political subdivision where the deponent is located" is substituted for the existing language to avoid possible confusion when another jurisdiction might not have counties or where courts are styled differently from those of Oregon. Proposed subsection A.(1)(b) makes clear that, in the case of non-party deponents, discovery orders can be effectively sought only from a competent court of the political subdivision where the deponent is located, which might or might not be the court where the action is pending.

46 B.(1). The phrase "the deponent is located" is substituted for the existing language to make the wording consistent with proposed new subsections 46 A.(1)(a) and (b). This provision is applicable only to the contempt sanction as imposed by an Oregon court for disobedience of its discovery order. When a recalcitrant non-party deponent disobeys a discovery order of a court of another jurisdiction, the availability of a contempt sanction is of course determined by the law of that jurisdiction. When a recalcitrant deponent is a party who disobeys a discovery order of the court wherein the action is pending, contempt of that court is among the sanctions for such disobedience provided by ORCP 46 B.(2).

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS RULE 68

A. Definitions. As used in this rule:

* * * * *

A.(2) **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the [necessary] expense of copying of any public record, book, or document [used as evidence on the trial] **admitted into evidence at trial**; recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

* * * * *

COMMENT

68 A.(2). The purpose of this proposed amendment is to make clear that the costs of copying public records and the like for use at trial are allowable and taxable only if such records are admitted, as opposed to being merely offered in evidence or

obtained in preparation for trial. Admissibility of public records, documents, and data collections is provided for in Rules 803(8) [ORS 40.460], 902(4) [ORS 40.510], and 1005 [ORS 40.570] of the Oregon Evidence Code.

SUMMARIES OF POSSIBLE ORCP REVISIONS NOT YET IN THE FORM OF PROPOSED AMENDMENTS

1. **ORCP 32 - Class Actions**. The Council has under consideration a set of proposals that would importantly amend this rule. These proposals would substitute a "unitary" class action for the tripartite categorization of the present ORCP 32 B and, in particular, would abolish the mandatory notice and claim form requirements now applicable to class actions certified under ORCP 32 B(3) whereby large numbers of legally independent claims for damages having common questions of law or fact and complying with other requirements of the rules are aggregated in a single litigation. These proposals would make the questions of whether, how and to whom individual notice is provided to class members discretionary with the court in this type of class action as they now are with the other types that involve either injunctive or declaratory relief or a class composed of persons whose joinder would otherwise be needed for just adjudication.

These proposals would also do away with the mandatory claim form provision in ORCP 32 F(2) as applicable solely to aggregated damage class actions, and make this procedure discretionary with the court in all class actions. This would mean that the amount of the judgment in such a class action would no longer be limited by force of this subsection to the total of the amounts of damages claimed by individual class members in forms submitted for that purpose in response to solicitation by the court. In cases where the aggregate amount of damages sustained by the class as a whole could be ascertained without claim forms, that figure could be used as the amount of the judgment even if it exceeded the total of the individual amounts determined to be payable to the class representative and class members.

These proposals would also give judges discretion to give notice of compromise or dismissal of a class action to some, but not necessarily all members of the class, and would authorize shifting of a prevailing defendant's costs and attorney fees against class representatives and class members who have appeared individually only if assessed as a sanction, regardless of other provisions of law.

The Council has received a considerable amount of public testimony and other comments, both in support of, and in opposition, to these proposals. It now has before it the report and recommendations of a subcommittee designated by it to study the proposals. All three members of the subcommittee favor repeal of the mandatory claim form provision (ORCP 32 F(2)), but also favor rejection of the proposed substitute provision that would mandate entry of judgment in the full amount of the aggregate damages sustained by the class whenever that can be

calculated from defendant's records or otherwise. These three members join in the belief that specifying how amounts of judgments must be determined is not appropriately included in rules of procedure. The subcommittee is divided 2 to 1 in support of the proposal that would make individual notice to class members discretionary rather than mandatory in aggregate damage class actions.

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3. **ORCP 60 - Motion for Directed Verdict**. The Council is considering a suggestion that this rule be amended to give trial judges clear authority to grant directed verdict on motion at any point after the opponent of the motion has been fully heard, rather than no earlier than at the close of the opponent's evidence. This suggestion would also adopt language to make clear that a directed verdict can be granted with respect to one or more claims in a given case, even if no such verdict is sought or granted with respect to other claims of the same or other parties. This suggestion would move practice in Oregon courts in the direction of federal practice pursuant to FRCP 50(a).

4. **ORCP 69 A - Ten-day Notice of Application for Order of Default**. The Council has received, and is considering, a suggestion that ORCP 69 A be amended to remove the present requirement that notice of an application for a default order be given to a party against whom it is sought at least ten days prior to entry thereof in cases where such party fails to attend and defend at a trial as to which he or she has been given notice. This proposal would "overrule" Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990). In appropriate cases of hardship or excusable neglect, relief would remain available to a party against whom judgment had been entered under these circumstances pursuant to ORCP 71 B(1)(a).

October 5, 1992

TO: Chair and Members, Council on Court Procedures

FM. Maury Holland, Executive Director

Re: Some Problems with ORCP 69 - Defaults

At our Aug. 1 meeting there was a tentative consensus that the Council should consider the asserted difficulty with ORCP 69 raised by Judge Mattison in his June 26 letter to our Chair (Attachment A), and I was asked to prepare a draft amendment for consideration at our 9/26/92 meeting (Attachment B). The question raised by Judge Mattison was whether it made sense to apply the requirement of R. 69 A that, unless shortened by the court, a defendant must be given written notice of application for a default order at least 10 days prior to entry thereof when the default takes the form of defendant's failure to appear, personally or by counsel, at a trial as to which he had notice. Judge Mattison based his conclusion that, wisely or not, this 10-day notice requirement does apply in this situation on a Court of Appeals decision per Judge De Muniz, Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990) (included with Judge Mattison's letter). This decision reversed the judgment entered by Circuit Court Judge Deiz in a case also involving a failure of a defendant to defend at a trial as to which it had notice. There is no way I can be sure, but it appears that the reason Judge Deiz was led to commit what turned out to be reversible error was because she did not believe that what the non-appearing defendant had done was a "default" within the meaning of R. 69, a position with which many might intuitively agree. Judge De Muniz's opinion, however, reached the contrary conclusion,

largely upon the basis of some unequivocal Staff Comment in Fred Merrill's *ORCP Handbook*, to the effect that failure to attend at trial was intended by the Council to be among the defaults governed by R. 69.[1]

Judge Mattison's letter at least suggests he followed the Van Dyke holding somewhat reluctantly because he could not see what purpose would be served by giving a defendant who failed to show up at trial 10-day notice of entry of a default order (in contrast with a default judgment) His letter asks the Council to reconsider a change made to R. 69 as recently as 1988, that is, the notice requirement now incorporated in R. 69 A as applied to a failure to appear personally or by counsel for trial, etc. I emphasize "now," because the Council has been tinkering with R. 69 during both of the preceding biennia, and, at the risk of being impolitic, appears to have confused things a bit.

At the time of the trial court ruling in Van Dyke, R 69 A contained no notice requirement for entry of a default order. R. 69 B(2), concerning entry of default judgment, apart from the very narrow circumstances prescribed by R. 69 B(1) where such

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[1]This leads me to wonder how authoritative Staff Comments, which appear only in the Handbook published biennially by Butterworths, are generally regarded by Oregon judges. I shall check to see whether there are any explicit statements on point by the Supreme Court or Court of Appeals. Judge De Muniz's treatment of this particular comment in Van Dyke as akin to legislative history brings home to me the necessity that any Staff Comments prepared by me must reflect the intent of the Council majority rather than just my own understanding. This is one important reason why we must continue to have full transcripts of Council meetings. It might clarify matters for others if the designation "Council Notes," similar to the Advisory Committee Notes to the FRCP were adopted in lieu of "Staff Comments." I also wonder if there is a problem, and if so what might be done about it, arising from the fact that some Oregon judges and lawyers presumably rely upon the Butterworths Handbook, which includes Staff Comments, while others rely upon the West Publishing edition, which does not. It is difficult to believe that Judge Deiz would have ruled as she did in Van Dyke had the Staff Comments in the Handbook been brought to her attention. It might be difficult to persuade West to start including Staff Comments or Council Notes, since they do not include Advisory Committee Notes in their trade edition of the FRCP, although they do include them in their educational edition.

judgment may be entered either by the judge or the clerk, provided for 10-days written notice of the hearing on plaintiff's application for default judgment, but only if defendant had appeared in the action and only if evidence was to be taken at the hearing. This feature was added to R. 69 B(2) by the Council in the 1986 biennium. In the 1988 biennium, however, the Council for some reason deleted the notice requirement from R. 69 B(2) and added it to R. 69 A. However, as added to R. 69 A, the notice prescribed was simply of claimant's application for a default order, with no reference to any hearing, since of course there need be no hearing in connection with a mere default order unless the defaulting party subsequently takes the initiative to set it aside pursuant to R. 69 C. This change was effective 1/1/90, and hence controlled the proceedings before Judge Mattison about which he wrote. Since Judge Mattison almost certainly thought he was moving in the direction of entering a default judgment, he might well have been confused by the relocation of the notice requirement to R. 69 A. Had he succumbed to such confusion, he would almost certainly have committed reversible error, since one cannot imagine our appellate courts allowing a judge to move from entry of a default order all the way to entry of a default judgment with no notice and opportunity to be heard, except presumably on the part of a defendant who neglected to enter any appearance, since the summons warning contains an explicit warning of that possibility.

My perusal of the 1988 biennium minutes has not disclosed the reasoning which led the Council to move the notice and hearing provision from R. 69 B(2) to R. 69 A, while dropping any reference to a hearing. The Council appears to have simply acted upon a recommendation the the OSB Practice and Procedure Committee, and I should probably have a look at whatever reasoning was provided in support of this recommendation. Pending that look, my preliminary conclusion is that the 1988 amendment was ill-considered and likely to foster confusion. My revised draft (Attachment C), for consideration at our Oct. 17

meeting or whenever it can be reached, draws upon the current FRCP 55 (Attachment D) and R. 69 B(2) as it existed prior to the 1988 amendment (Attachment E), although it is by no means identical to either of them..

The draft amendment presented at the 8/1/92 meeting (Attachment B) sought to deal with the problem identified by Judge Mattison by simply engrafting onto R. 69 A an exception to its 10-day notice requirement for cases involving failure to show up for trial. But it now seems to me that what is needed is to return essentially to the pre-1988 amendment situation, delete the notice provision from R. 69 A where it does not belong, and restore a substantially modified notice-and-hearing provision to R. 69 B(2).

FRCP 55(a) (Attachment D) seems to me clearly correct in not requiring either notice or any sort of hearing for mere "entry" of default, whether, as is most frequently the case, default is entered by the clerk or, as occasionally happens, by the judge. The reason is, as suggested from the brief excerpt from Friedenthal et al. on *Civil Procedure* (Attachment F), that the usually ministerial notation that defendant (or other opponent of a claim for affirmative relief) is in default is "no big deal," and cannot by itself result in any court action prejudicial to the substantive interests of the defaulting litigant. Entries of default most often happen because claimant's attorney has become exasperated with opponent's neglect to file an answer or file a responsive motion, and finally applies to the clerk for a notation of such neglect. The ORCP do not spell out many consequences of a delinquent litigant being thus placed in this kind of procedural "penalty box." R. 7 D(4)(c) does provide that a defendant served under that subsection may not be placed in default without a special showing by the plaintiff. R. 9 A provides that no papers need be served on a defendant who is in default, but this applies only to one who is in default for failure to appear in the action. R. 23

A provides that amended pleadings need not be served on parties in default unless such pleadings add a new claim against such a party. Default judgments arising out of refusals to make discovery are separately dealt with in R. 46 B(2)(c), although the latter does contain a possibly confusing reference to R. 69..

My impression from practice in Massachusetts many years ago is that there is a kind of "common law" by which clerks will refuse to accept filings from parties while they are in default until they are cured and set aside, but I find no authority for this in either the ORCP or the FRCP. It is also my impression that mere entries of default, or what R. 69 A inadvisedly calls "order[s) of default" (inadvised because nothing is really being ordered) seldom reach the stage of being formally set aside by the judge, because counsel who has applied for entry of default will most often subsequently agree with opposing counsel to filing of a stipulation authorizing the clerk to remove it upon getting assurance that the matter will be rectified The obvious reason for this is that, in cases where the defaulting party is represented by counsel, nearly every attorney would recognize that to persist in failure to cure the default would risk professional discipline and possibly even professional liability. Where defaulting parties are proceeding pro se, it is believed by most trial lawyers that trial judges are understandably reluctant to allow an entry of default to ripen into a default judgment, except as the very last resort and only when it becomes clear that defendant will not do anything to contest the claim. In summary, it strikes me as wholly unnecessary to attach a notice requirement to something as provisional and normally inconsequential as mere entry of default, especially when the notice would not relate to any hearing, but would simply apprise the delinquent party or counsel that his or her delinquency had been noted. If the delinquent party then does nothing, plaintiff's counsel will either proceed under R. 69 B(1) under the very narrow circumstances where that is permitted without involvement of the judge, or make application to the

judge under R. 69 B(2) for default judgment. If, on the other hand, the defaulting party or attorney wants to get back in the game, claimant's counsel will probably stipulate to removal of the entry of default. If not, the delinquent party will have to move pursuant to R. 69 C to have the default set aside, and the judge will be in the familiar posture of having to weigh the interest in enforcing reasonable compliance with procedural requirements against the interest in having cases decided on their merits.

If, as my revised draft proposes, there is to be no notice of mere entry of default, it would seem to me that due process might well require both notice and a hearing upon such notice in any case where claimant goes so far as to apply under R. 69 B(2) for default judgment, and that therefore R. 69 B(2) should expressly require this. The pre-1988 version of R. 69 B(2) seems to me defective in requiring a hearing upon notice only if the judge will hear evidence, especially since judges are given discretion to determine any outstanding issues on the basis of affidavits. In fact, judges are given, and should be given, very wide discretion as to how to proceed at such hearings, ranging from determining outstanding issues, most often concerning damages or other form of relief, upon affidavits, making an order of reference, hearing evidence themselves, or even directing that certain issues be tried to a jury, although, as far as I know, there is no constitutional or other legal right to jury trial in default cases. But whatever else judges do at such hearings, their instinct would probably be to give the delinquent party, by counsel or otherwise, one last chance to persuade them, by motion pursuant to R. 69 C, to excuse and set aside their delinquency and get on with defense against the claim. FRCP 55 provides for a minimum of 3 days notice, but my revised draft retains the 10 days that has been traditional under this rule through all of its many amendments, back to statutory days. One important consideration is that if judges are not prepared at such pre-judgment hearings to consider motions to set aside entries of default, they will more often be confronted under R. 69 C with a post

facto motion to set aside a default judgment, something that would be even more frustrating and disruptive of smooth judicial procedure.

In connection with R. 69 C, and contrary to its federal counterpart, FRCP 55(c), my revised amendment proposes another change that the Council should consider carefully, since if adopted, it would break some new ground. By reference to R. 71 B(1), R. 69 C makes clear that a judge can grant relief from a default judgment unconditionally or only "upon such terms as are just." Members of the Council will know better than I, but my assumption is that the "terms" referred to most often require that the party relieved from a default judgment compensate the claimant for any extra expenses to which the latter has been directly put on account of the moving party's neglects. My draft amendment would modify the present R. 69 C to give judges authority to impose "such terms as are just" as a condition of setting aside an entry of default. This authority would probably be seldom used in the case of "garden variety" defaults that take the form of failure to file an answer or responsive motion. But consider the situation described by Judge Mattison and the similar one confronting Judge Deiz in Van Dyke. A defendant having notice of a trial fails to show up with no apparent excuse, but the plaintiff is in court, prepared to put on witnesses and so forth. The judge would then enter defendant's default under R. 69 A, at least if plaintiff's counsel applies for it. Although it is not clear on the face of ORCP 69 as presently structured, federal cases construing FRCP 55 generally hold that a FRCP 55(a) entry of default, whether by the judge or the clerk, is a prerequisite for a FRCP 55(b)(2) application for a default judgment. So, under the circumstances supposed, the judge would direct the clerk to enter defendant's default simply on the basis of his or her failure to defend at trial. Plaintiff's counsel could then simultaneously apply to the judge for a default judgment, which under my proposed amended R. 69 B(2) would require a hearing upon notice to defendant. If defendant appears at the hearing, personally or by attorney, and persuades the

judge to excuse the rather serious and disruptive default of having failed to show up for a scheduled trial as to which he or she had notice, would it not make as much sense, or at least almost as much sense, to give judges discretionary authority to impose reasonable terms in granting relief from the default entered at the time of the original trial, as it does to grant such authority when defendant fails to show up at the hearing, default judgment is entered, and then defendant later on shows up to file a post-judgment motion under R. 69 C/71 B(1)? Because I am inclined to think the answer to this query is yes, I have drafted amended R. 69 C accordingly. But this matter might well be very sensitive, so the Council will want to consider this proposal carefully.

cc. Mr. Dennis Hubel

Hon. Jack Mattison

ATTACHMENTS TO MEMORANDUM TO COUNCIL

Attachment A

CIRCUIT COURT OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
EUGENE, OREGON 97401

JACK L. MATTISON
JUDGE

687-4257

June 26, 1992

Mr. Henry Kantor
Attorney at Law
900 SW 5th Avenue, Suite 1437
Portland, OR 97204

Re: ORCP 69A

Dear Henry:

The case of Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990), which interprets ORCP 69A, was brought to my attention this morning during our trial call, and it may be that the Counsel should take a hard look at 69A in light of the holding in that case. I should have been aware of it prior to today, but was not, and I would guess that my ignorance has a lot of company among members of both our bench and bar.

My situation this morning was as follows. A domestic relations case involving a decree modification issue was on today's trial docket. The responding party was pro se, but had made an appearance and had received a written trial notice from our calendar clerk. I was told that he had informed the moving party yesterday that he would not be appearing for trial, but that is not of much legal significance except perhaps as an indication that he had, in fact, received the trial setting notice. When I advised the moving party's attorney I would assign the case out to a judge for a prima facie hearing, he allowed as how he would like to do that, but under the Van Dyke ruling, he believed he had to give the respondent ten days notice of his intent to take a default before he could proceed any further. I then read the opinion, and while 69A has been amended since the case was decided, it is pretty clear that he is right.

As a consequence, although the case was set for trial and proper notice was given to all parties, the only effect the trial date has had was to trigger the mailing of a ten day notice of intent to take a default - to a party who voluntarily chose not to appear for trial. So, the case is now in a state of limbo until the plaintiff's attorney jumps through the ORCP 69 hoops.

Attachment A

This section was amended while I was on the Counsel, and I do not recall any discussion about it having this effect in this not uncommon fact situation, but if anything, the changes that were made from the 1988 version strengthen the Van Dyke interpretation.

I would appreciate the Counsel considering amending 69A in a manner that would eliminate any requirement for any notices of any kind in the situation I had this morning, and the situation Judge Deiz had in Van Dyke. When a defendant has been served, has filed an appearance, has received notice of the trial date, and then fails to appear for trial, a court should be able to allow the moving party, who has appeared ready for trial, to proceed to put on a case in support of the allegations of the complaint or petition, and the court should also be able to enter an appropriate judgment. ORCP 71 is always available to the other side.

A copy of the Van Dyke opinion is attached, and thank you for your consideration of this request.

Very truly yours,

Jack Mattison

Jack Mattison
Presiding Judge

JM/rl

cc: Hon. Win Liepe

EDMONDS, J.

Petitioner moves for reconsideration of our opinion in *Mercer Industries v. Rose*, 100 Or App 252, 785 P2d 385 (1990). We held that the Board erred when it refused to award attorney fees to claimant after claimant actively litigated the issue of responsibility. Petitioner argues that claimant is not entitled to an employer-paid attorney fee, because his right to compensation was never in jeopardy.

Claimant's entitlement to receive compensation was resolved before the hearing when an order of responsibility under *former* ORS 656.307,[1] was issued. ORS 656.386(1) provides, in pertinent part:

> "In all cases involving accidental injuries where a claimant finally prevails in an appeal to the Court of Appeals or petition for review to the Supreme Court from an order or decision *denying the claim for compensation*, the court shall allow a reasonable attorney fee to the claimant's attorney. In such rejected cases where the claimant prevails finally in a hearing before the referee or in a review by the board itself, then the referee or board shall allow a reasonable attorney fee." (Emphasis supplied.)

Because claimant did not seek review from an order denying compensation, he is not entitled to attorney fees under ORS 656.386(1). *Shoulders v. SAIF*, 300 Or 606, 611, 716 P2d 751 (1986). To the extent that *SAIF v. Phipps*, 85 Or App 436, 737 P2d 131 (1987), is inconsistent with this opinion, it is overruled.

Motion for reconsideration allowed; former opinion modified to affirm on cross-petition and adhered to as modified.

[1] ORS 656.307 was amended in 1987, after the hearing in this case, to include a provision for award of attorney fees in responsibility hearings. *See* ORS 656.307(5).

Argued and submitted May 25, reversed and remanded for further proceedings August 8, reconsideration denied September 26, 1990, petition for review denied October 23, 1990 (310 Or 476)

Lyle H. VAN DYKE,
Myrtle R. Van Dyke, Frederick G. Witham
and Rest-A-Phone Corporation,
Respondents,

v.

VARSITY CLUB, INC.,
Appellant.

(A8606-03623; CA A60891)

796 P2d 382

Action was brought alleging conversion, trespass and interference with business. When defense counsel did not appear on trial date for which notice had been mailed to counsel for both sides, the Circuit Court, Multnomah County, Mercedes Deiz, J., entered judgment for plaintiffs and defendant appealed. The Court of Appeals, De Muniz, J., held that: (1) evidence including presumption of receipt from correctly mailed notice of trial date supported conclusion that defendant received sufficient notice of scheduled trial that defense counsel's failure to appear was not excusable neglect warranting setting aside of judgment, but (2) trial court did not have authority to proceed with trial in absence of defendant that had engaged in extensive motion practice, but rather, should have proceeded under rule governing default that requires ten days' written notice of intent to apply for judgment when party has appeared in action.

Reversed and remanded.

1. **Evidence—Presumptions—Rebuttal of presumptions of fact**

Evidence permitted conclusion that civil defendant did not defeat presumption of delivery of notice of trial date which arose from showing that court properly mailed notice to defense counsel at his correct address and notice was not returned undelivered to court, although defense counsel claimed that he never received notice, so failure of defense counsel to appear at scheduled trial would not be considered excusable neglect warranting setting aside of judgment for plaintiffs. ORCP 71B.(1)(a); OEC 311(1)(b, m, p, q).

2. **Trial—Course and conduct of trial in general—Presence of parties and counsel—Judgment—By default—Requisites and validity**

Trial court did not have authority to proceed with scheduled trial in absence of defendant, where defendant had engaged in extensive motion practice, but failed to appear and defend at trial; rather, court should have proceeded under rule providing for default, which requires giving ten days' written notice of intent to apply for judgment with respect to party who has appeared in action. ORCP 69.

3. **Judgment—By default—Requisites and validity**

Failure of litigant who has pled to appear and defend at trial is regulated by civil rule providing for default. ORCP 69.

CJS, Evidence § 115.

Appeal from Circuit Court, Multnomah County.

Mercedes Deiz, Judge.

Patrick N. Rothwell, Portland, argued the cause for appellant. With him on the briefs was Hallmark, Keating & Abbott, P.C., Portland.

Craig D. White, Portland, argued the cause and filed the brief for respondents.

Before Riggs, Presiding Judge, and Edmonds and De Muniz, Judges.

DE MUNIZ, J.

Reversed and remanded for further proceedings not inconsistent with this opinion.

DE MUNIZ, J.

Defendant did not appear for trial, and the court entered a judgment for plaintiffs. Defendant contends that the trial court should have granted its motion to set aside the judgment under ORCP 71B. We reverse.

On June 19, 1986, plaintiffs filed a complaint alleging conversion, trespass and interference with plaintiffs' business by defendant. After a series of ORCP 21 motions by defendant and repleadings by plaintiffs, plaintiffs filed a third amended complaint on July 20, 1987. Defendant filed its answer on July 28, 1987.

A trial date was set for March 13, 1989. The circuit court sent computerized trial notices to the correct addresses of the attorneys for both sides. Plaintiffs' counsel received the notice and appeared in court on March 13, 1989. Defendant's counsel did not appear. The trial court telephoned defense counsel's office but did not reach him. After waiting two hours, the trial court proceeded without defense counsel, took plaintiff's testimony and entered a judgment against defendant. Subsequently, defendant moved under ORCP 71[1] for relief from the judgment. The court denied the motion.

1. Defendant maintains that its motion to set aside the judgment should have been granted, because its counsel never received notice of the trial and, therefore, counsel's failure to appear was "excusable neglect." ORCP 71B(1)(a). The record shows that the circuit court properly mailed the notice to defendant's attorney at his correct address. The notice was not returned undelivered to the court, which was shown as the sender address on the notice. When a notice is duly directed and mailed, it is presumed to have been received in the regular course of the mail. OEC 311(1)(q); *see also* OEC 311(1)(b), (m) and (p). The trial court considered that presumption in regard to defendant's counsel's claim that he never received the notice. It concluded that the motion to set aside the judgment should be denied. There were sufficient grounds for the trial

[1] ORCP 71B provides, in pertinent part:

"(1) On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; * * * or (d) the judgment is void[.]"

court to conclude that defendant did not defeat the presumption of delivery of the notice. Therefore, the court acted within its discretion in concluding that defendant received sufficient notice. *Pacheco v. Blatchford*, 91 Or App 390, 392, 754 P2d 1219, *rev den* 306 Or 660 (1988).

Defendant next contends that "[t]he March 13 proceeding resulted in a judgment by default" and that the judgment was void, ORCP 71B(1)(d), because "[p]laintiff failed to comply with the notice requirements of ORCP 69 * * *."[2] Despite the fact that defendant mischaracterizes what happened in the trial court, he is correct. Although the word "default" was used several times at the March 13 proceeding, the trial judge clarified the type of judgment that she intended to enter:

> "An order of default may be entered against Varsity Club—well, actually, strike that. *There's no order of default.* They made an appearance. They've appeared, but they haven't appeared before the trial—for the trial itself." (Emphasis supplied.)

2, 3. The trial court did not intend to act under ORCP 69, but, rather, intended to proceed with the trial in the absence of defendant. However, the trial court had no authority to proceed in that manner. This is not the usual ORCP 69 case where a party fails to plead or to appear properly at any stage

[2] At the time of trial, ORCP 69 provided, in pertinent part:

"A. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that party.

"* * * * *

"B.(2) In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom judgment is sought shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application."

of the proceeding. Rather, defendant engaged in extensive motion practice but failed to appear and defend at trial. Although the phrase "otherwise defend" in ORCP 69 logically could be read not to include a situation when a litigant fails, after pleading, to appear and defend at trial, *see, e.g., 6 Moore's Federal Practice* 55-13, ¶ 55.03(1) (2d ed 1988) the commentary to the rule indicates that, in Oregon, the failure to appear and defend *is* regulated by ORCP 69.

ORCP 69 was meant to be broader than the statute that it replaced, *former* ORS 18.080, which merely addressed default for failure to answer.[3] The commentary to the proposed rule noted that "[t]his rule would apply to anyone required to file a responsive pleading to a claim and to any person who failed to appear and defend at trial." *Council on Court Procedures, Oregon Rules of Civil Procedure and Amendments, Preliminary Drafts and Final Draft,* Commentary to Draft of Proposed Rules 67-74 at page 40 (October 15, 1979). Moreover, the commentary to the final rule provides, in pertinent part:

> "This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69A. *all* defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, *or failure to appear and defend at trial,* or an ordered default under Rule 46, *would be regulated by this rule.*" Commentary to Rule 69, reprinted in Merrill, *Oregon Rules of Civil Procedure: 1990 Handbook* 217. (Emphasis supplied.)

Thus, under the circumstances existing here, where the defendant and counsel, without explanation, failed to appear for trial, the court should have proceeded under ORCP 69. Although an order of default could have been entered, ORCP 69B(2) required that plaintiffs give defendant 10 days written notice of the intent to apply for a judgment. That was

[3] *Former* ORS 18.080(1) provided, in relevant part:

"Judgment may be had upon failure to answer, as prescribed in this section. When it appears that the defendant * * * has been duly served with the summons, and has failed to file an answer with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the plaintiff shall be entitled to have judgment against such defendant * * *."

not done. The trial court erred in not proceeding under ORCP 69.

Reversed and remanded for further proceedings not inconsistent with this opinion.

Argued and submitted May 30, reversed August 8, 1990

STATE OF OREGON,
Respondent,
v.
MATTIE ANN MARTZ,
Appellant.
(10-88-04062; CA A61146)
795 P2d 616

Appeal from Circuit Court, Lane County.

George J. Woodrich, Judge.

Henry M. Silberblatt, Salem, argued the cause for appellant. With him on the brief was Sally L. Avera, Public Defender, Salem.

Michael Livingston, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Joseph, Chief Judge, and Warren and Rossman, Judges.

PER CURIAM

Reversed.

Attachment B

DRAFT FOR 9-26-92 MEETING

RULE 69
DEFAULT ORDERS AND JUDGMENTS

A. Entry of order of default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for [an] **such** order [of default] at least 10 days, unless shortened by the court, prior to entry [of the order of default] **thereof[.], except that no prior notice is required for entry of an order of default against a party who, having proper notice thereof, fails to defend at trial.** These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default

B. Entry of default judgment.

B.(1) **By the court or the clerk.** The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

* * * * *

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to [appear] **plead or otherwise defend**;

* * * * *

REVISED DRAFT AMENDMENT OF ORCP 69 (10-5-92)

RULE 69
[DEFAULT ORDERS AND JUDGMENTS]
DEFAULT

A. [Entry of order of default.] **Default.** When a party against whom a judgment for affirmative relief is sought [has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and] has failed to plead or otherwise defend as provided [in] **by** these rules [the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default] **and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default or the court may order that such entry be made**.

B. Entry of default judgment.

B.(1) **By the court or the clerk.** The court or the clerk **shall** upon written application [of] **by** the party seeking **default** judgment [shall] enter **such** judgment when:

(B.(1)(a) to B.(1)(g) unchanged.)

B.(2) **By the court.** In all other cases, the party seeking a judgment by default shall apply to the court therefor[e], but no judgment by default shall be entered against a minor or an incapacitated person as defined by ORS 126.003(4) unless the minor or incapacitated person has a general guardian or is represented in the action by another representative as provided in Rule 27. [If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.] **Unless waived in a writing filed with the clerk by the party against whom it is sought, no judgment shall be entered under this subsection except at or following a**

hearing on notice served upon said party, unless the court for cause shown shortens the time, not less than 10 days prior to such hearing, but no notice or hearing is required in the case of a party who has neither filed an appearance in the action nor provided the party applying for judgment with written notification of intent to do so. Unless taken under advisement at the hearing required by this subsection the court shall then rule upon whether any motion made under section 69 C. of this rule should be granted and, if not, whether default judgment should be entered. If necessary in order to enter judgment or carry it into effect, to take an account, to determine damages, to establish the truth of any averment, or to investigate any pertinent matter, the court may at such hearing or any adjournment therefrom receive evidence, direct that specified issues be tried by jury, and order such references as it deems necessary, but may also determine the truth of any matter upon affidavits.

B.(3) **Amount of judgment.** [The] Judgment shall be entered for the amount due as shown by affidavit or otherwise; and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

(B.(4). Unchanged.)

C. **Setting aside default.** For good cause shown and upon such terms as are just, the court may set aside an [order] entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B and C

(D. Unchanged.)

(E. Unchanged.)

Attachment D

1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) ***By the Clerk.*** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) ***By the Court.*** In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appear-

Attachment D

ing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES
1937 ADOPTION

This represents the joining of the equity decree *pro confesso* (former Equity Rules 12 (Issue of Subpoena—Time for Answer), 16 (Defendant to Answer—Default—Decree *Pro Confesso*), 17 (Decree *Pro Confesso* to be Followed by Final Decree—Setting Aside Default), 29 (Defenses—How Presented), 31 (Reply—When Required—When Cause at Issue)) and the judgment by default now governed by U.S.C., Title 28, former § 724 (Conformity Act). For dismissal of an action for failure to comply with these rules or any order of the court, see Rule 41(b).

Note to Subdivision (a). The provision for the entry of default comes from the Massachusetts practice, 2 Mass.Gen. Laws (Ter.Ed., 1932) ch. 231, § 57. For affidavit of default, see 2 Minn.Stat. (Mason, 1927) § 9256.

Note to Subdivision (b). The provision in paragraph (1) for the entry of judgment by the clerk when plaintiff claims a sum certain is found in the N.Y.C.P.A. (1937) § 485, in Calif.Code Civ.Proc. (Deering, 1937) § 585(1), and in Conn. Practice Book (1934) § 47. For provisions similar to paragraph (2), compare Calif.Code, *supra*, § 585(2); N.Y.C.P.A. (1937) § 490; 2 Minn.Stat. (Mason, 1927) § 9256(3); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 411(2); U.S.C., Title 28, § 1874, formerly § 785 (Action to recover forfeiture in bond) and similar statutes are preserved by the last clause of paragraph (2).

Note to Subdivision (e). This restates substantially the last clause of U.S.C., Title 28, former § 763 (Action against the United States under the Tucker Act). As this rule governs in all actions against the United States, U.S.C., Title 28, former § 45 (Practice and procedure in certain cases under the interstate commerce laws) and similar statutes are modified in so far as they contain anything inconsistent therewith.

SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING THIS RULE

Note. The operation of Rule 55(b) (Judgment) is directly affected by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C., Appendix, § 501 et seq. Section 200 of the Act [50 U.S.C.A. Appendix, § 520] imposes specific requirements which must be fulfilled before a default judgment can be entered, e.g., *Ledwith* v. *Storkan*, D.Neb.1942, 6 Fed.Rule Serv. 60b.24, Case 2, 2 F.R.D. 539, and also provides for the vacation of a judgment in certain circumstances. See discussion in Commentary, Effect of Conscription Legislation on the Federal Rules, 1940, 3 Fed.Rules Serv. 725; 3 Moore's Federal Practice, 1938, Cum.Supplement § 55.02.

1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Attachment E

RULE 69. DEFAULT ORDERS AND JUDGMENTS

A. Entry of Default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that party.

Attachment E

B. Entry of Default Judgment.

B(1) *By the Court or the Clerk.* The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B(1)(a) The action arises upon contract;

B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B(1)(d) The party against whom judgment is sought is not a minor or an incapacitated person and such fact is shown by affidavit;

B(1)(e) The party seeking judgment submits an affidavit of the amount due;

B(1)(f) An affidavit pursuant to subsection B(3) of this rule has been submitted; and

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7D(3)(a)(i), 7D(3)(b)(i), 7D(3)(e) or 7D(3)(f).

B(2) *By the Court.* In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom the judgment is sought shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application.

B(3) *Amount of Judgment.* The judgment entered shall be for the amount due as shown by the affidavit, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B(4) *Non-military Affidavit Required.* No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and

Attachment E

Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

C. Setting Aside Default. For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71B and C.

D. Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67B.

E. "Clerk" Defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

[Effective January 1, 1982; § B amended by Laws 1981, c. 898, § 8; amended by Council on Court Procedures, effective January 1, 1988.]

Attachment F

WESTLAW REFERENCES
170ak2544 & 170ak2548

B. DEFAULT JUDGMENT

§ 9.4 The Entry of Default and Default Judgment

It is important to keep in mind the difference between the entry of a default and a default judgment.[1] An entry of default does not constitute a judgment; it is merely a notation by the court clerk precluding the defaulting party from making any new defenses regarding liability.[2] The notation of default records the fact that the defending party has failed to plead or otherwise defend against a claim.

Default judgments may be entered in three types of situations. In the first, the defendant never appears or answers in response to the plaintiff's complaint. In the second, defendant makes an appearance, but fails to file a formal answer or appear at trial.[3] In the third, the defendant fails to comply with some procedural requirement, time frame or court order during the pretrial proceedings and the court enters a default judgment as a penalty. As is discussed elsewhere, authority for penalty defaults may be found in most discovery rules[4] and they have been recognized as within the inherent power of the court in order to force compliance or cooperation at the pretrial conference stage.[5] The other two default situations are dealt with in specially designed rules present in each court system and are discussed below.[6]

Default judgments are a drastic action because they confront the judicial preference for disposition of litigation on the merits, especially when the defendant has been otherwise diligent. The actual judgment

support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to such fact • • •.").

§ 9.4

1. The distinction between defaults and default judgments becomes important when relief is sought. As might be expected, relief from the entry of default is more readily granted than from a default judgment. Jackson v. Beech, 636 F.2d 831 (D.C.Cir.1980); Peebles v. Moore, 48 N.C. App. 497, 269 S.E.2d 694 (1980), modified and affirmed 302 N.C. 351, 275 S.E.2d 833 (1981).

2. Citizens Nat. Bank of Grant County v. First Nat. Bank in Marion, Indiana, 165 Ind.App. 116, 331 N.E.2d 471 (1975).

3. A failure to answer or defend should be distinguished from a failure to appear at trial after answering the complaint. In the former situation, the case never has been placed formally at issue and a default judgment may be entered. In the latter, issue has been joined, and the trial proceeds, but without the absent party. See Coulas v. Smith, 96 Ariz. 325, 395 P.2d 527 (1964).

4. See § 7.16, above.

5. See § 8.2, above.

6. A penalty default may not be governed by all the protections set out in the rules governing default judgments. Thus, for example, the damages may not be limited to the amount claimed in the complaint. See text at note 17, below; Aljassim v. S.S. South Star, 323 F.Supp. 918 (S.D.N.Y. 1971); Sarlie v. E.L. Bruce Co., 265 F.Supp. 371 (S.D.N.Y.1967). However, the defending party will be entitled to notice and a right to appear at the default hearing. See Eisler v. Stritzler, 535 F.2d 148 (1st Cir. 1976).

Attachment F

is based on a prior entry of default by the court clerk as provided by rule or statute.[7] The judgment may be entered either by the clerk or by the court, depending on the governing rule or statute and the nature of the underlying claim.

If default has been entered and it is clear from the complaint that a certain sum and only that sum is due to the complainant, most rules provide that the clerk then may enter a default judgment for that amount.[8] This requirement typically is satisfied when the damages claimed are for a liquidated amount and the amount requested is reasonable under the circumstances, conditions commonly fulfilled only in some contract actions.[9]

Aside from these few instances, most rules give the court discretion to decide whether or not to enter a default judgment. In exercising its discretion the court will consider various factors,[10] including whether the default is largely technical and the defendant now is ready to defend,[11] whether the plaintiff has been prejudiced by defendant's delay in responding,[12] and the amounts involved or the significance of the issues at stake.[13] These factors will be evaluated in light of the general preference for decisions rendered after a full adjudication on the merits.[14]

When deciding whether to enter a judgment, the court may hold a hearing.[15] Indeed, Federal Rule 55(b)(2) empowers the district judge to hold hearings or "order such references as it deems necessary and proper." A hearing often is particularly appropriate because defendant's default serves only to concede the factual allegations in the complaint regarding liability.[16] Pursuant to most default rules,[17] once

7. See, e.g., Fed.Civ.Proc.Rule 55(a); West's Ann.Cal.Code Civ.Proc. §§ 585(a) and (b), 586; Md.Civ.Proc.Rule 310; Ohio Rules Civ.Proc., Rule 55(a).

8. Fed.Civ.Proc.Rule 55(b)(1); West's Ann.Cal.Code Civ.Proc. § 585(a); Idaho Rules Civ.Proc., Rule 55(b)(1).

9. Compare Galanti v. Emerald City Records, Inc., 144 Ga.App. 773, 242 S.E.2d 368 (1978) (damages for breach of rental agreement by tenant were liquidated because easily calculable), with Ford v. Superior Ct. for Orange County, 34 Cal.App.3d 338, 109 Cal.Rptr. 844 (1973) (clerk could not enter default judgment on a promissory note secured by a trust deed on real property because complaint alleged that the security had become "worthless" and court must hear that evidence).

10. For a more detailed listing of the factors considered, see 10 C. Wright, A. Miller & M. Kane, Civil 2d § 2685.

11. See McKnight v. Webster, 499 F.Supp. 420 (E.D.Pa.1980); Franzen v. Carmichael, 398 N.E.2d 1379 (Ind.App.1980).

12. See Davis v. Mercier-Freres, 368 F.Supp. 498 (E.D.Wis.1973) (no prejudice); Seanor v. Bair Transport Co. of Delaware, Inc., 54 F.R.D. 35 (E.D.Pa.1971) (prejudice).

13. See Hutton v. Fisher, 359 F.2d 913 (3d Cir.1966); General Motors Corp. v. Blevins, 144 F.Supp. 381 (D.Colo.1956).

14. This preference for a full adversary presentation also influences the decision to allow relief from a default judgment. See § 12.6, below.

15. Ariz.Rules Civ.Proc., Rule 55(b)(2); Fla.—West's F.S.A.Civ.Proc.Rule 1.500(e). See generally 10 C. Wright, A. Miller & M. Kane, Civil 2d § 2688.

16. See Thomson v. Wooster, 114 U.S. 104, 5 S.Ct. 788, 29 L.Ed. 105 (1885); Southern Arizona School for Boys, Inc. v. Chery, 119 Ariz. 277, 580 P.2d 738 (1978).

17. E.g., Fed.Civ.Proc.Rule 54(c); Ariz. Rules Civ.Proc., Rule 54(d); Official Code Ga.Ann. § 9–11–54(c)(1).

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Attachment P

there has been a default the claimant cannot recover more than the amount demanded or the type of relief requested in the complaint. But the default does not concede plaintiff's right to the relief requested; [18] the amount of damages to be awarded must be determined by the court.[19] A default hearing to determine damages then may proceed like any other trial.[20] However, witnesses usually do not appear in person at a default judgment hearing. Rather, evidence is submitted by affidavit.[21]

An important issue is whether the defaulting party is entitled to notice of an impending judgment and hearing.[22] The resolution of this question varies depending on what type of default is involved. The entry of default usually is without notice, as is a default judgment entered by the clerk.[23] However, if the default judgment is to be entered by the court, then most jurisdictions follow the approach of Federal Rule 55(b)(2), which provides for three days' notice of a motion for default judgment if, but only if, the defendant has "appeared" in the case.[24] This distinction between "appearing" and "nonappearing" defendants recognizes that the former have taken some action in the case—shown some interest—so that it is thought appropriate to provide them the opportunity to contest the amount, extent, or type of relief granted at the hearing or, if the pleadings are insufficient, to argue that plaintiff's claims should be dismissed because the pleadings fail to assert a claim upon which relief may be granted.[25]

18. The defendant may claim at the default hearing that the facts, even taken as true, will not support a judgment for plaintiff. Ohio Cent. R. Co. v. Central Trust Co., 133 U.S. 83, 91, 10 S.Ct. 235, 237, 33 L.Ed. 561 (1890); Productora E Importadora De Papel, S.A. v. Fleming, 376 Mass. 826, 383 N.E.2d 1129 (1978). But see Trans World Airlines, Inc. v. Hughes, 449 F.2d 51 (2d Cir.1971), reversed on other grounds 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

19. Pope v. U.S., 323 U.S. 1, 65 S.Ct. 16, 89 L.Ed. 3 (1944); Insurance Co. of N. America v. S/S "Hellenic Challenger," 88 F.R.D. 545 (S.D.N.Y.1980); Kelly Broadcasting Co. v. Sovereign Broadcast, Inc., 96 Nev. 188, 606 P.2d 1089 (1980).

20. Defendant may obtain a jury trial on the question of damages if the court decides it would be appropriate. See Barber v. Turberville, 218 F.2d 34 (D.C.Cir. 1954). But neither side has a right to demand a jury trial on the issue of damages. Eisler v. Stritzler, 535 F.2d 148 (1st Cir.1976). But compare Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., 155 Cal. App.3d 381, 202 Cal.Rptr. 204 (1984) (defendant may not participate in default judgment hearing determining punitive damages).

21. See West's Ann.Cal.Code Civ.Proc. § 585(d).

22. The failure to provide the required notice justifies the reversal or setting aside of a default judgment. See Marshall v. Boyd, 658 F.2d 552 (8th Cir.1981); Wilver v. Fisher, 387 F.2d 66 (10th Cir.1967). The failure does not mean that the judgment is void and subject to collateral attack, however. See Radioear Corp. v. Crouse, 97 Idaho 501, 547 P.2d 546 (1975). See also Winfield Assocs., Inc. v. Stonecipher, 429 F.2d 1087 (10th Cir.1970). But see Bass v. Hoagland, 172 F.2d 205 (5th Cir.1949), certiorari denied 338 U.S. 816 (1949). For a more detailed discussion of notice, see 10 C. Wright, A. Miller & M. Kane, Civil 2d § 2687.

23. Harp v. Loux, 54 Or.App. 840, 636 P.2d 976 (1981), review denied 292 Or. 589, 644 P.2d 1130 (1982); Zettler v. Ehrlich, 384 So.2d 928 (Fla.App.1980).

24. Ala.Rules Civ.Proc., Rule 55(b)(2); Ariz.Rules Civ.Proc., Rule 55(a), (b)(1); Idaho Rules Civ.Proc., Rules 55(a)(1), (b)(1). See also S.C.Code 1962, § 15–9–970; Wis. Stat.Ann. 806.02(1) (notice required to any appearing party).

25. See Lutomski v. Panther Valley Coin Exchange, 653 F.2d 270 (6th Cir.1981);

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Attachment F

Serious questions arise as to what constitutes an appearance sufficient to trigger these notice requirements.[26] One example is when a party has defended solely on a procedural ground such as lack of jurisdiction and, after losing that challenge, fails to defend the merits of the case.[27] But even less formal activity on the part of a defendant may constitute an appearance,[28] such as the exchange of letters between the parties concerning settlement.[29] The liberal approach of many courts in determining what constitutes an appearance reflects, once again, the general distaste for judgments entered without an adversary presentation and the desire to provide notice before a judgment is entered to encourage defaulting parties to appear and defend.

WESTLAW REFERENCES
di default judgment
170ak2411
170ak2417

December 7, 1992

To: Chair and Members, Council on Court Procedures

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

Re: Supplemental Memo for Dec. 12, 1992 Meeting

As voluminous as our Nov. 30 mailing was, there is a bit more material you should have in preparation for the Dec. 12 meeting. This memo contains or covers the following items that were not ready in time for inclusion with the previous mailing:

I. Proposed Staff Comments for pending amendments to Rules 32, 36 and 69. Proposed Staff Comments for the other pending rules amendments, to Rules 7, 38, 39, 46 and 68, are contained in the packet entitled "Tentatively Adopted Amendments to Oregon Rules of Civil Procedure" that was included with the Nov. 30 mailing, immediately following the text of each pending amendment. Our recent experience with Van Dyke and Rule 69 shows how important Staff Comments can be. They should reflect the consensus of the intent and understanding of the full Council to the extent that is possible. So, despite the lateness of this mailing, I earnestly request that you give all the proposed Staff Comments your careful scrutiny.

II. With respect to each pending amendment I supply references to all places in the minutes of this biennium, by meeting date and page number, where they were discussed or voted upon by the Council or where public testimony was received. My thought was this might assist in any referencing back you might wish to do.

III. As attachments to this memo there are some comment letters that have been received too recently for prior distribution to the Council.

These are arranged in numerical order of the rules amendment to which they relate.

P.S: A minor correction to Henry's Nov. 30 memo: We have arranged for enough box lunches for everyone to be catered at the Dec. 12 meeting. You will not have to pay for them and then go to the bother of seeking reimbursement. They will be billed directly to the Council's account in Salem. The UO School of Law is looking forward to hosting the Council at its Dec. 12 meeting.

I. Proposed Staff Comments

ORCP 32

32. This rule is substantially modified by a set of related amendments of specific sections and subsections as set forth below. The general purposes of these amendments are to substitute a unitary class action structure for the tripartite classification scheme of the prior rule, to remove some procedural obstacles to efficient and economical conduct of class action litigation, and to enlarge the discretion of judges to mold such procedures as notice to class members and determining amounts of class damages in response to specific circumstances and practicalities on a case-by-case basis. Some of these amendments were modeled in part upon a "Report and Recommendations of the Special Committee on Class Action Improvements," 110 FRD 195 (1986), which includes helpful commentary.

32 A (5). Language referring specifically to subsection B (3) of the former rule is deleted because, as amended, that subsection no longer defines a distinct category of class action.

32 B. This section is amended to substitute a unitary structure of class actions for the tripartite classification scheme of the former section that assumed sharp and stable distinctions between those defined in terms either of the relief predominantly sought or jural relationships among class members, as opposed to those defined in terms of individual damages claims having common questions of law or fact.. Important procedural consequences were made to turn upon which of the three supposedly mutually inconsistent categories to which a given class action was assigned, particularly regarding required post-certification notice to class members. The Council's understanding is that, although important procedural distinctions do exist among actions for which class certification is sought and that these distinctions often warrant different resolutions of such issues as providing appropriate notice, they are too subtle and variant in character to be satisfactorily formulated in a rule of general application. As amended, therefore, this section changes the defining characteristics used in

the former section to distinguish among types of class actions, to which important procedural consequences attached, into a range of factors all of which are to be applied to any action for which class certification is sought to determine whether it should be maintained as such. Molding of procedures appropriate to any given class action is then, throughout the remainder of this rule, left more largely to the exercise of sound judicial discretion, rather than being mandated by the categorization required at the outset under the former section. The latter section's flat prohibition on the required finding of "predominance" of common questions of law or fact if any claims of individual class members were likely to require adjudication of any separate issues apart from ascertaining damages is abandoned as unduly rigid.

32 C (1). Language is added making clear that the option exists to certify for class treatment only some specified claims or issues presented in a complaint as filed, leaving others to be litigated outside the scope of the class action.

32 D. Language is added making clear that, for purposes of notice to members of a class action being voluntarily dismissed or compromise, this requirement applies to all class actions filed, as well as those certified, as such.

32 E. Amended in the interest of greater clarity with no intent to change existing law. Language added to E (1) making clear the authority of judges to rule upon motions for judgment on the pleadings and for summary judgment in actions filed as class actions prior to, as well as after, ruling on certification, in the same manner as in ordinary litigation.

E (2). Language is added to this subsection, as amended, to make explicit that among the matters about which class members may be given notice is their option to be excluded from the class. Such notice should of course include instructions on how to inform the court of an election to exercise this option, including a reasonable time deadline. Under the terms of this rule, as amended, the decision as to whether to provide an exclusion option, and if so whether it is extended to all or some putative class members, as well as whether this election is unconditional or subject to

some condition apart from giving reasonable notice thereof to the court, are all matters confided to judicial discretion to be exercised on a case-by-case basis. Counsel involved in class action litigation, however, should take care to determine whether, in light of characteristics of a particular litigation, all class members identifiable with reasonable effort must be given individual written notice of a right to be excluded from class membership, subject to no condition apart from giving reasonable notice thereof to the court, might be required by some source of governing law other than these rules, in particular U. S. CONST., amend. XIV, sec. 1. The latter, as currently interpreted, almost certainly confers an unconditional right of exclusion on the part of any class member who, absent consent, is not subject to the jurisdiction of courts of the forum in common questions class actions of the type defined by the former subsection 32 B(3).

32 F. Extensively revised to enlarge judicial discretion to deal with appropriate notice to be given putative class members regarding certification than existed under former section, and to abolish individual claim form procedure and related limitation on amounts of class judgments.

F (1). The former version of this subsection mandated individual post-certification notice to all class members identifiable with reasonable effort, but only in the distinct category of class actions sought to be defined in the former subsection 32 B(3); i.e., those involving individual money damage claims having common questions of law or fact. It also contained detailed prescriptions as to the required content of such notice. This section is amended to function consistently with the unitary class action structure provided by section B of this rule, as amended, which means that notice requirements no longer automatically vary according to which category a given class action would come within under former section B. The only post-certification notice mandated under this subsection, as amended, is that in every class action there be individual written notice to some or all class members. The choice as between notice to all or to some class members, and if the latter, to which and how many class members, is committed to sound judicial discretion, guided by the pertinent considerations specified. Similarly committed to judicial discretion are all

other questions regarding notice to class members, such as its form, content, method and timing. This amendment is not intended to diminish judicial discretion to order more elaborate post-certification notice to class members than is required under this subsection whenever that is deemed appropriate in the interest of fairness to the parties or to putative class members or of efficient conduct of the litigation, and whenever it is concluded that this is required by other sources of governing law apart from these rules, in particular U. S. CONST., amend. XIV, sec. 1. The latter, as currently interpreted, in all probability requires individual written post-certification notice to all class members who can be identified with reasonble effort in class actions involving individual money damage claims and common questions of law or fact; i.e., the type of class action defined by former subsection 32 B(3), and more certainly applies to any members of class actions of this type who, absent consent, are not subject to jurisdiction of courts of the forum, if for no other reason than to notify ~~of~~ them of the right to be excluded from class membership to which they are also constitutionally entitled, and the prescribed method of exercising such right.

F (2) and (3), as designated prior to the current amendments, required that in common questions class actions maintained under former subsection 32 B (3) the court request each class member to complete and file with the court a "claim form" including certain information concerning the injury asserted to have been sustained by him or her, including the amount of damages claimed. They also imposed a limitation on the maximum amount of classwide damages to be adjudged not to exceed the total of the several amounts of damages thus individually claimed by class members. These former subsection are repealed because, under the guise of regulating procedure, they are thought to relate to matters more appropriately governed by the law of evidence and of remedies, in particular the law of restitution, including statutes that might govern the disposition of classwide damages in the form of unjust enrichment in excess of amounts that can feasibly be identifed to, and recovered by, individual class members. In class actions premised upon unjust enrichment or the like, where the full amount of classwide damages can often be reliably ascertained from defendant's records or other comparable sources, the former requirement

of soliciting and return of individual claim forms is thought to impose an often unnecessary cost of prosecuting them. The related limitation of damages is regarded as generally undesirable in class actions premised upon unjust enrichment, since it can result in a defendant held liable therefor retaining a substantial portion of its unlawfully obtained gains. In class actions in which the court concludes that solicitation of claim forms or some equivalent procedure is necessary or desirable in the interest of their fair and efficient conduct, they retain under subsection 32 E (5) full discretionary authority to so order.

F (2), (3) and (4), as amended and renumbered, superceding former subsections F (4), (5) and (6), are intended to clarify existing law to the effect that, pending final allowance and taxation of costs pursuant to rule 68, the ban on imposing upon defendants the cost of notice to class members no longer applies to notice ordered subsequent to a determination of defendant's liability, and that both before and after such determination, courts have discretionary authority to require defendants to bear all or some of the costs associated with notice included with a regular mailing to defendant's customers or employees.

32 G. is amended to make more clear how this rule applies when particular claims or issues, as opposed to all claims and issues tendered by the complaint as filed, are certified for class treatment, as well as when a single class as originally alleged is ordered reorganized into multiple classes or subclasses.

32 H (1) is amended to conform to the concurrent amendment of section 32 B.

32 M is amended to conform to the concurrent amendment of section 32 B, and to make clear that, to the extent possible, judgments in class actions should identify by name, or at least describe with as much specificity as feasible, not only all those whom the court finds to be class members, but also those who have been excluded from a class on condition of agreeing to be bound by the judgment. An illustration of when this infrequently used condition on exclusion might be deemed appropriate is that of one or more

employees for some reason reluctant formally to be included as a member of an employee class action against his or her employer. As suggested in the Staff Comments to subsection E (2) above, however, there are circumstances where conditioning exclusion on anything other than giving the court reasonable notice thereof might well violate currently applicable constitutional due process norms.

ORCP 36

36 C is restructured into two subsections. Subsection C (1), as amended, is identical to former section 36 C, except that in the interest of consistent usage throughout these rules, lower case letters enclosed in parentheses are substituted for the similarly enclosed numerals of the latter.

C (2) is added as a new subsection of this rule to authorize limited sharing of information and materials obtained through discovery and subject to a protective order obtained under subsection 36 C (1). Although application of this subsection is not limited to any area of law, its general purpose is to foster greater efficiency and economy in product liability and comparable litigation where there is a likelihood of sizable numbers of similar or related potential claims both within and beyond this state. Limited sharing of information and materials obtained through discovery, in addition to producing greater efficiency and economy in litigation once instituted, is also thought conducive to fair settlement of related claims both before and after litigation is instituted.

This subsection is loosely modeled upon VA. CODE ANN. Sec. 8,01-420.01 (Michie 1992). By its terms its application is limited to cases where an outstanding protective order has prohibited parties and attorneys in a given litigation from granting access, inter alia, to attorneys representing clients in factually similar or related matters. As this phraseology is intended to convey, the limited discovery sharing authorized by this subsection is not restricted to sharing with attorneys who have actually instituted similar or related litigation on behalf of their clients. All that is contemplated is that such attorneys have formed an attorney-client

relationship focused upon one or more matters factually similar or related to the matters to which the discovery material sought to be shared relates.

No effort is made to define the "good cause" necessary successfully to resist a motion under this subsection to modify a previous protective order to allow discovery sharing under the limited conditions and circumstances it prescribes. This is confided to judicial discretion as informed by pertinent case law authority. But it is contemplated that the "good cause" thus required should normally call for a more particularized showing than that entailed in obtaining the previous protective order.

This subsection and the procedure it authorizes is intended to have no application to any effort to modify or relax, by means of court order, any prior written agreements between parties regarding limitations on disclosure of discovery materials, including protective orders entered by stipulation or agreement between the parties as opposed to those obtained pursuant to subsection 32 C (1).

ORCP 69

Former 69 A is reorganized into four subsections and amended to overcome a defect in existing law illustrated by Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990). This decision, in reliance upon a previous Staff Comment to an amendment of this rule, held that failure of a party who had appeared in an action to appear, in person or by counsel, at a scheduled trial at which the opposing party appeared prepared to go forward constitutes a "default" within the purview of this rule. Under the former version of this subsection, written notice to the non-appearing party ten days in advance of application for a default order, a prerequisite for a default judgment, was necessary. The purpose of this amendment is to authorize a more expeditious and economical procedure when default takes the form of failure of a party, in person or by counsel, to appear for a trial as scheduled, in particular, to abolish the need for ten-day advance written or any other form of notice of default to the non-appearing party or his or her attorney.

A (1), as amended,is identical to former section 69 A except for the renumbering and addition to its title of the words: "Default order."

A (2) and (3), as amended, are added to authorize courts in their discretion to, respectively, enter an default order against a party who has appeared in an action but failed to appear, in person or by counsel, for trial, and also to order entry of default judgment against such party without notice of either procedure to the defaulting party or his or her attorney. In both subsections, the word "may," rather than "shall" is used to make clear that under appropriate circumstances, the court may decline either to enter a default order or default judgment, or both. As applied to default orders, such circumstances would normally include instances where the court becomes aware of good and sufficient reasons for the failure to appear at trial. As applied to default judgments, they would also include instances where, on the basis of the complaint and other matters of record, the court is in doubt about whether a party applying for default judgment is legally entitled to judgment against the non-appearing attorney. Similarly as applied to default judgments, the court might decline to enter one immediately and concurrently with entry of a default order if the complaint and other matters of record leave it in doubt concerning the proper amount of damages or other remedial issues, in which event the court is authorized to order further proceedings as provided in subsection B (2) of this rule.

A (4) is added to clarify that the same procedures concerning entry of judgments and giving judgment debtors notice thereof as provided by subsection 70 (B) (1) are fully applicable to default judgment entered pursuant to subsection A (3) above. It is also intended that, in entering default judgments pursuant to the latter subsection, the clerk shall be subject to the direction of the court.

II. References in the minutes of this biennium to discussions, votes and public testimony concerning pending rules amendments. (D=Discussion, V=Vote, T=public testimony):

Rule 7: Minutes of 10/12/91, p. 4 and Exh. I, p. 6 (D); 2/8/92, p. 7(V); 3/14/92, pp. 7-8(V).

Rule 32: Minutes of 11/9/91, p. 6 (D); 2/8/92, pp. 6-7 (D); 5/9/92, pp. 2-3 (D); 6/13/92, p. 2 (D); 8/1/92, pp. 1-3 (D), pp. 3-7 (T); 9/26/92, pp. 6-9 DV); 11-14-92, pp. 2-7 (DV, quorum lacking).

Rule 36: Minutes of 10/12/91, p. 2, Exh. 1, p. 1 (D); 11/9/91, pp. 2-3 (D), pp. 3-5 (T); 3/14/92, pp. 8-9 (D); 8/1/92, pp. 9-10 (T), p. 10 (V); 10/17/92, pp. 3-8 (DTV).

Rule 38: Minutes of10/12/91, p. 3 (D), Exh. 1, p. 2 (D); 11/9/91, p. 5 (D); 12/14/91, pp. 1-2 (D); 5/9/92, pp. 4-6 (DV).

Rule 39: Minutes of 10/12/91, p. 3 (D), Exh. 1, p. 2 (D); 11/9/91, p. 5 (D); 12/14/91, pp. 1-2 (D); 2/8/92, pp. 1-6 (D); 5/9/92, pp. 4-6 (DV), 8/1/92, pp. 8-9 (V).

Rule 46: Minutes of 5/9/92, pp. 4-6 (DV): 8/1/92, p. 8 (D), pp. 12-13 (V).

Rule 68: Minutes of 10/12/91, Exh. 1, pp. 3-4 (D); 2/8/92, pp. 7-8 (V).

Rule 69: Minutes of 8/1/92, pp. 10-11 (D); 9/26/92, pp. 3-6 (DV), 10-17-92, pp. 1-3 (D); 11/14/92, pp. 7-9 (DV).

III. Lately Received Comment Letters, attached.

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November 23, 1992

Mr. Maurice Holland
Council on Court Procedures
University of Oregon Law School
Eugene, Oregon 97403

Re: Proposed revision of ORCP Rule 7

Dear Mr. Holland:

I note that once again, the council on court procedures is seeking to create a malpractice trap for twelve thousand Oregon lawyers by undertaking a well-intentioned, but mis-guided tinkering with the form of summons.

The tendency to "tinker" with such things is the strongest argument that I know for putting Court procedures in the constitution and requiring a two-thirds majority to change them.

The so-called "notice to defendants" was an ill-advised idea in the first instance. In the years of it's existence, it has provided absolutely no demonstrable benefit to anyone. It has mislead and confused people on a number of occasions because the list of things which are suggested as responses is not exclusive, perhaps I should say all inclusive.

Clearly, however, "monkeying" with the language is not a constructive exercise. Everyone seems to honestly believe that they can solve the world's problems by changing a few words, but I believe that they are dreadfully wrong.

Of particular concern to me is the fact that all of this useless verbiage in the "notice to defendants" winds up creating an exorbitant cost.

Most particularly, in the case of published summons' and in order of priority, I would suggest the following three alternatives:

1) My preferred choice would be that you do nothing.

2) My second choice would be that you adopt a "harmless error" subparagraph which declares that the missing or defective "notice to defendants" on a summons does not effect the validity of the summons unless the notice has served as misleading.

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3) My third choice would be to expressly authorize the elimination of the "notice to defendants" section in the case of a published summons.

I do not believe that anyone can demonstrate a cost benefit ratio to support the endless and ongoing verbiage in a summons form which ends up having to be published.

I also believe that as a matter of principal, it is grossly inappropriate to institutionalize the existence of a service which has no statutory existence, namely, the Oregon State Bar Lawyer Referral Service. That service is only the stroke of a budget cut away from abolition, and I don't think that the Council of Court Procedures should institutionalize some Bar Association service in such a way that the entire judicial system in the State of Oregon will be shut down should the Board of Bar Governors decide to abolish, re-name or, otherwise, modify the service.

I am sure that there are well-meaning folks who proposed this revision and have the best of ideals in mind, and who will be deeply offended by my criticism, and for that, I am sorry, but well-intentioned individuals have been "tinkering" with the Court rules on a regular basis, as long as the ORCP has existed, and the sub-total of the results have been substantially as follows:

1) You have greatly increased the amount of paperwork required to accomplish any given task.

2) You have vastly increased the complexity of the very mechanical aspects of practicing law.

3) You have produced no identifiable or quantifiable benefits which can be attributed to this endless tinkering, other than to make a few extra jobs for paper makers grinding out extra reams of paper, simply to appease the mavens who lack the ability to truly distinguish between "better" and "different."

Sincerely,

VANNATTA & PETERSEN

By Robert P. VanNatta

RPV/rfi

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November 20, 1992

Ms. Maurice J. Holland
University of Oregon
School of Law, Rm. 331
1101 Kincaid Street
Eugene, OR 97403

Dear Ms. Holland:

Associated Oregon Industries opposes the proposed amendment to Oregon Rule of Civil Procedure 36, relating to protective orders. Adoption of this amendment will increase the cost of doing business in Oregon. The rule will ultimately diminish our ability to compete with other states, many of whom have already rejected attempts to enact similar anti-business laws.

- Under ORCP 36(c) as it is written now, judges have flexibility to fashion protective orders appropriate for the circumstances of a particular case. There has been no showing that shifting the burden of proof (as in the proposed amendment) would improve on this system; in fact, there is no evidence which would demonstrate show that the system needs to be changed at all. The current rule on protective orders balances all legitimate interests. No one can seriously contend that there are not sufficient remedies for all claims with any merit.

- The character of Oregon's legal system is a key element in improving and maintaining a stable climate for business. This climate is influenced as much by perception as by fact. The proposed amendment appears to increase litigation costs and have a detrimental effect on businesses depending on orders to protect confidential information. Oregon cannot afford to send the message that its legal system is becoming hostile to business interests.

- To be granted a contested protective order, a company must prove good cause. Under the proposed amendment, this company would be required to face that burden countless subsequent times even though the initial ruling is never overturned. This duplication does nothing to decrease congestion in the courts, and drives up the cost of litigation even further.

- The proposed amendment enlarges public access to sensitive information. This creates a chilling effect on research and development, which will be discouraged by companies' legitimate fear of disclosure of confidential information and trade

- The goals underlying the discovery process are to facilitate preparation, avoid surprise at trial, and promote resolution of cases on their merits. Enlarging public access to confidential information is not a goal of the liberal discovery process in Oregon.

- A strong relationship exists between procedural rules and substantive rights -- the former exist to give effect to the latter. The proposed amendment goes beyond a simple rule change by impacting two substantive rights

PRIVACY INTEREST In the discovery context, the privacy interest is "the individual interest in avoiding the disclosure of personal matters." Whalen v. Roe, 429 US 589, 599 (1977); Gary R. Clouse, note, The Constitutional Right to Withhold Private Information, 77 NW U L. Rev. 536, 537 (1982). A rule (such as the proposed amendment) restricting a court's discretion or ability to protect a business' confidential information could violate the constitutional rights of the companies or individuals involved.

PROPERTY RIGHTS Commercial information, especially research and development and financial information, is considered to be property. In Carpenter v. United States, 484 US 19, 25-26 (1987), the Supreme Court stated that "confidential information . . . is a species of property to which the corporation has the exclusive right and benefit." See also Ruckelshaus v. Monsanto, 465 US 986, 1000-04 (1984). Given the extent to which the economy depends on production and sale of information, businesses should be encouraged to invest time and money in research and development. The proposed rule amendment, by increasing access to confidential information, threatens these activities as well as companies' property rights in resulting information.

Associated Oregon Industries respectfully requests that you vote against the proposed amendment to ORCP 36(c) when it comes before the Council on Court Procedures December 12, 1992.

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November 20, 1992

Maurice J. Holland
Acting Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Re: Comments on Proposed Amendment to ORCP 36C(2)

Dear Mr. Holland:

I represent CIBA-GEIGY Corporation. CIBA-GEIGY stands in opposition to the proposed amendment of ORCP 36C(2) and appreciates the opportunity to register this opposition with the Oregon Council on Court Procedures.

The amendment would weaken the effect of protective orders, thus eroding one of the basic court procedures used to protect the property and privacy rights of American businesses.

Under the proposed amendment to ORCP 36C(2), CIBA-GEIGY would be subjected to increased legal defense costs and potentially lost market advantages. The corporation's valuable proprietary information would be exposed to unfettered disclosure and misuse by others who simply allege wrongdoing.

Justice is well served under the current system of allowing judges to carefully review each case on its merits in the issuing of protective orders. Regulatory oversight by agencies such as the Food and Drug Administration and the Environmental Protection Agency protect the public interest in product safety. In extraordinary cases, if the public safety outweighs the need of a company for confidentiality, a judge has the right to deny protective orders.

CIBA-GEIGY, headquartered in Ardsley, New York, is a leading developer and manufacturer of healthcare, agricultural, and industrial products.

We urge your rejection of the proposed amendment to ORCP 36C(2).

Very truly yours,

KENNEDY, KING & ZIMMER

Garr M. King

GMK:pw:1112

BIOJECT

KANTOR AND SACKS

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November 17, 1992

Henry Kantor
Kantor & Sacks
1100 Standard Plaza
1100 S.w. Sisxth Avenue
Portland, OR 97204

Re: Amendment to ORCP 36C(2)

Dear Mr. Kantor:

Bioject, a public company traded on NASDAQ, located in Portland, Oregon is opposed to the proposed amendment to Rule 36C(2) of the Oregon Rules of Civil Procedure. This amendment proposes procedures overturning protective orders.

As Founder, General Counsel, President and CEO of Bioject, a company of 36 employees that was founded in 1985, this proposed rule change could have significant ramifications for our business. Protective orders are important to small, high-tech growth companies in Oregon, especially those that are publicly traded, in that they assist in preventing the unwarranted dissemination of confidential information. This rule change will have a detrimental effect on our operations by increasing the cost of an already expensive process. For example, this rule change could discourage clinical investigators from recruiting patients into clinical trials of health care products in Oregon medical institutions. It also introduces new economic uncertainty into the litigation process.

Our primary concerns about the proposed amendment to ORCP 36C(2) are as follows:

1. Protective orders are normally sought by a defendant business or company in the course of settling one of the inevitable plaintiff suits, many times for an amount less than the defense costs, as a means of achieving final settlement of a case.

2. Although meritorious cases do occur occasionally, unfortunately, a public company is also a perfect target for frivolous and meritless litigation. Such companies are highly motivated to conclude litigation quickly since their auditors must always treat

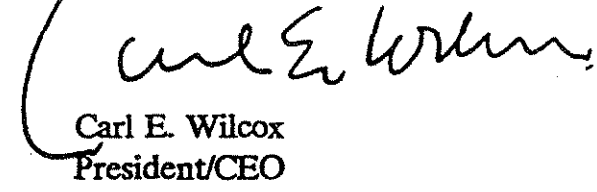
November 17, 1992

"reopen" that portion of the settled case, by producing witnesses and evidence, proving, once again, that the protective order should stand.

Bioject is committed to remaining in Oregon as a fast-growing, high-technology, medical device company. We hope that you will be similarly committed to protecting the rights of individuals and the opportunity for business to add to the prosperity of our state.

I strongly urge you to oppose this amendment to Rule 36C(2). Please feel free to contact me regarding this letter. Thank you for your consideration.

Sincerely,



Carl E. Wilcox
President/CEO

CEW/fkm

wp51\corporat\orcp.ltr

November 20, 1992

Mr. Maurice J. Holland
Executive Director
Council on Court Procedures
University of Oregon School of Law, Room 331
1101 Kincaid Street
Eugene, OR 97403

RE: Proposed Amendment to Rule 36(c)

Dear Mr. Holland:

At its December 12 meeting the Council on Court Procedures will consider an amendment to Rule 36(c), promoted by the Oregon Trial Lawyers Association (OTLA), that would make it easier for plaintiffs to free themselves from court orders that prevent them from disseminating information produced in discovery by defendants. The proposed rule would promote frivolous lawsuits and increase the cost of litigation. It should be rejected.

Description of the Proposed Amendment

Under existing law, parties seeking information from each other in discovery often agree to produce confidential information freely and without dispute, on the condition that the information thus produced shall not be used for any purpose outside of the immediate lawsuit. These agreements between the parties are formalized in "protective orders" issued by the trial court at the request of the parties pursuant to Rule 36(c). A party who wishes to disclose confidential information obtained in discovery bears the burden of convincing the court that the protective order should be modified.

The proposed amendment to Rule 36(c) would lift this burden of justification from the party seeking modification, and place on the party who produced the information the burden of convincing the court that the protective order should not be modified. The amendment would give the party to whom confidential information has been produced an absolute right to share the information with another party in "a similar or related matter" if the party who produced the information cannot convince the court to keep the information confidential.

What constitutes "a similar or related matter" is not defined in the proposed amendment.

In functional terms, the proposed amendment would make protective orders presumptively invalid as to parties in "similar or related" matters. The party who produced the information would be forced to overcome that presumption of invalidity if confidentiality is to be preserved.

Objections to the Proposed Rule Change

OTLA claims that the proposed amendment, by making it easier for plaintiffs in "similar or related" cases to share information obtained from a common defendant in discovery, would reduce litigation costs and make litigation more "efficient." The proposed amendment, however, would have the opposite effect.

Oregon courts already have the power to modify protective orders to permit the sharing of information produced in discovery. The issue is whether the "plaintiff" should be required to justify a request to share confidential information obtained through discovery with plaintiffs in other cases, as Rule 36(c) currently provides, or the defendant should be required to justify keeping the information produced in discovery confidential, as the proposed amendment would provide.

The proposed rule would facilitate the dissemination to third parties of information produced in discovery before any determination of liability on the part of the defendant. The allegation of wrongful conduct set forth in the plaintiff's complaint enables the plaintiff to seek confidential information from the defendant through discovery, and that in turn sets the stage for the release of the information to plaintiffs in other cases under the proposed rule.

No matter that the trial has not yet been held and liability has not been established. Under the proposed amendment, being named as a defendant in Oregon would mean opening your files to potentially an unlimited group unless you can persuade the court that the protective order pursuant to which you produced the information to your adversary should be enforced!

Oregon courts should not be burdened with discovery concerns from cases in other jurisdictions. Oregon should not be adopting procedures which will affect cases in those

jurisdictions. Oregon courts have no reason to allow a plaintiff in Florida access to information confidentially produced in Oregon. A defendant should not be required to incur the expense of retaining a lawyer in Oregon to litigate, and bear the burden of proof, in a proceeding in Oregon to establish that a Florida plaintiff's case is not "a similar and related matter." The simple cost effective, and prudent procedure is to require the Florida plaintiff and defendant to resolve discovery concerns in Florida courts.

The proposed rule presents significant additional problems for Oregon's public companies. Federal securities laws and Securities and Exchange Commission regulations prohibit the selective distribution of material nonpublic information. Under the current rules, the public company that is required to produce such information in the course of litigation is able through the protective order to keep close track of who has access to the nonpublic information. If the proposed rule were adopted, however, the potential is high that the nonpublic information will be dispersed to a wider group of people unknown to the corporate defendant, such as the clients of the attorneys with whom the material has been shared. It is not infrequent that the SEC requires public companies to account in detail for all people who have had access to material nonpublic information prior to its public announcement, including the identity of people who have had access to the information and the exact time that the information was made available to them. The adoption of the proposed rule would make it impossible to comply fully with SEC requests for this type of information once discovery materials are disseminated to counsel not involved in the pending litigation in which the information was produced.

If the proposed amendment is adopted, protective orders will offer substantially less assurance that confidential information produced in discovery by corporate defendants will remain confidential. That is why OTLA wants the rule change. But the result will be that corporate defendants who now freely and without dispute comply with discovery requests will resist such requests tenaciously. Every discovery request will become a battleground because complying with the request will likely mean producing the information for use beyond the immediate case by other attorneys contemplating future litigation. This will make litigating the immediate case more costly and time-consuming for the parties and increase the workload of the courts.

At the same time, the proposed rule will give plaintiffs greater leverage to force settlements by defendants prior to discovery. Regardless of liability, many defendants will be eager to avoid the risk that confidential information will be disseminated beyond the immediate case -- and the costs of litigating to prevent that from happening. Ironically,

if more defendants settle prior to discovery as a result of the proposed rule, other plaintiffs will not get the benefit of the information that is in the hands of the defendant.

By helping the first plaintiff obtain discovery for all subsequent undisclosed potential plaintiffs, the proposed rule may well make it less costly for subsequent plaintiffs to sue. That, however, would mean more litigation, more frivolous lawsuits and more insubstantial claims. Thus, a reform that could make litigation less costly for some individual plaintiffs also would increase the burden of litigation on the judicial system -- and on Oregon -- as a whole. Perhaps individual cases will be more "efficient" to pursue, but increased litigation will undermine, not promote, the efficiency of the civil justice system as a whole. An additional adverse result will be to make Oregon a less hospitable environment for business, without producing any corresponding benefit.

The existing system "ain't broke." It certainly does not require the dubious "fix" that the proposed amendment to Rule 36(c) offers. For all of these reasons, the Council should reject the proposed amendment.

Very truly yours,

Charles D. Ruttan
Dunn, Carney, Allen, Higgins & Tongue

Very truly yours,

Paul R. Duden
Tooze, Shenker, Holloway & Duden

Very truly yours,

Lois O. Rosenbaum
Stoel Rives Boley Jones & Grey

[CDR\COV6-2.044]

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** RESIDENT, BEND OFFICE

November 19, 1992

Henry Kantor
KANTOR AND SACKS
Member of Council on Court Procedures
1100 Standard Plaza
1100 S.W. Sixth Avenue
Portland, OR 97204

RE: Proposed Amendment to ORCP 36(c)

Dear Henry:

At your December 12 meeting of the Council on Court Procedures, you will have before you a proposed amendment to Rule 36(c). After review of the proposed amendment, I have come to the conclusion that the amendment should be rejected.

Our firm represents plaintiffs and defendants. We represent out-of-state corporations that are sued in this state and Oregon corporations that are sued in various states. The present Rule 36(c) is for all practical purposes identical to the Federal Rule of Civil Procedure 26(c). That rule is well understood across the country and has been the subject of a number of court decisions that provide guidance to trial courts faced with interpreting the rule. The Federal Rules have recently been reviewed and proposed changes are being experimented with in various Districts. The rule change under consideration here is not a part of the proposed Federal Rule changes.

The proposed amendment to my knowledge has not been adopted in any state. There is no body of existing law as to the effect of the proposed amendment. If the proposed change were to be adopted, the result almost certainly would be an increase in Oregon's litigation to determine the confidentiality of key business information. If the amendment were to be passed, I would expect cases filed in Oregon in an attempt to obtain information to be used in litigation in other states without the same rule. I would further expect cases to be filed in the state court rather than in federal court. While the numbers of such additional cases may not be large, they are certainly going to be particularly time-consuming cases and burden our already overburdened judicial system. In my judgment, Oregon should defer considering this amendment until other states have had decisions interpreting the effect of changes and we know what we are getting ourselves into.

Oregon has longstanding practice of not adopting discovery rules which are considered experimental, burdensome or expensive. For example, Oregon delayed adopting many of the federal rules and still has not adopted rules permitting interrogatories. It would certainly be out of character for Oregon to be an experimenter with a new rule.

Trial lawyers presently exchange information without reservation based on protective orders. If this proposed amendment were to be adopted, I would expect defendants to be much more reluctant to release information to plaintiffs in Oregon resulting in delays and expense to Oregon plaintiffs in obtaining information that otherwise would have been available to them. I would expect state trial court judges would have to hear many more motions on the form of protective orders. The focus of these orders are presently worked out between counsel. The only potential benefit of the rule change would be to facilitate transfer of information obtained in one case to somebody who has a similar case. If Oregon was one of only a very few states having a rule permitting that sort of exchange, I would expect increased numbers of suits to be filed in Oregon for the purpose of obtaining information that would then be distributed about the country. I do not know that we want Oregon courts to be known as facilitating persons in dealing in confidential business information.

The proposed rule as drafted is highly indefinite as to what standards should be applied. It is further uncertain as to what the standard of review would be. This is the sort of uncertainty that will slow down progress of cases and add to litigation costs. The only potential benefits would be to litigants in other states who might receive information from Oregon cases. In my judgment, the proposed rule is not in the best interests of the state and should be rejected.

Very truly yours,

Thomas H. Tongue

THT:jjb

[THT\COV6-1.001]

January 26, 1993

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

FROM: Maury Holland, Executive Director

Re: **LEGISLATIVE SESSION, FUTURE COUNCIL MEETINGS, ETC.**
{NOTE: THERE WILL BE NO COUNCIL MEETING ON FEBRUARY 6}

1. As I have reported to Henry, there is as yet very little accumulated material from the legislative session that is germane to the Council. He has therefore authorized me to make the decision that the previously noticed February 6, 1993 meeting is postponed indefinitely. Henry has asked me to monitor legislative output pertinent to the Council and to consult with him about when our next meeting might usefully be held. It now seems that Saturday, February 27, 1993, at the Bar Center, is the most likely date, so you might tentatively reserve it. Whatever develops, with Henry's approval, I shall give you a notice of a firm new date with as much lead time as possible.

2. To this point only two bills relating to the Council or its work have reached our law library, both of which are attached. We should all be flattered to learn from Sec. 2 of H.B. 5045 that, unless the Council is funded for 1993-95, there is danger of plague sweeping the state and at least scattered outbreaks of rioting. (Few, if any, of you will be unaware that this is legislative boilerplate used in appropriation bills.) The total biennial appropriation of $99,709, up from the current $80,039, seems rather pricey in this Measure 5 environment, and it might well be cut. The requested increase is for the purposes of higher mileage reimbursement and other travel expense, the cost of stenographically transcribing meetings (I will strongly recommend to the Chair that this be continued - having a stenographic transcript was of enormous help in producing accurate and full minutes of the 12/12/92 meeting), and offsetting some audit and other charges by state agencies. When this appropriation bill comes on for hearings, the Judicial Department staffer who prepared it will attend prepared to carry the ball if necessary, but my assumption is that Henry will attend if his schedule permits, or delegate some Council member to do so if it does not. In any event I shall attend whatever hearings are scheduled, to assist Henry or whoever else presents the budget.

3. Regarding HB 2360, which would reduce the Council's role to that of an advisory body, all of us will want to be giving some thought as to how, if at all, the Council should respond. I am trying to get some indication about how serious this proposal

is. Some of you are probably in a much better position than I to obtain a reliable sense about this. Previous contacts with Rep. Mannix left me with the sense that he is a serious and thoughtful legislator. It certainly would be useful to learn whether there was anything in particular that prompted this bill. On the face of it, it does not appear to be a cost-cutting effort.

In addition to learning whatever I can, I plan to do some research concerning how many states adhere to the present Oregon model regarding civil rules amendments, as opposed to the model that is proposed, the federal model or others. On the assumption that the present Council will probably oppose this bill, we will have to go beyond simply arguing that we don't like the proposed loss of authority or even that there is no demonstrated need to "fix something that ain't broke." I believe there has been some academic work done on various structures for updating rules of practice and procedure, and will see if I can come up with something worthwhile. Depending on how serious this turns out to be, our most effective tactic might be to ask some of the people involved in the original decision to establish the Council in its present form to testify as to the reasons for structuring the process in that manner. Laird Kirkpatrick, for one, has already told me that the decision to give the Council the power to promulgate amendments having the force of law, subject to legislative revision, as opposed to constituting it as merely advisory either to the Legislative Assembly or the Supreme Court, was very carefully thought out at the time. Laird has mentioned that Hardy Meyers, whose name ought to ring a bell with several current legislators, was especially emphatic in believing that, to be effective, the Council had to be given limited law-making, rather than merely advisory, authority. If and when we learn that this bill has been set for hearings and therefore must be taken seriously, my assumption is that Henry as Chair will want to move promptly to have the Council determine its present position, and to develop strategies accordingly. It goes without saying that if any of you have some early thoughts or reactions you would like to share with the Council, you have merely to mail or fax them here and we will make prompt circulation to all members.

Enclosures: HB 5045 and HB 2360

House Bill 5045

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession filed (at the request of Budget and Management Division, Executive Department)

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.

Appropriates money from General Fund to Council on Court Procedures for biennial expenses. Declares emergency, effective July 1, 1993.

A BILL FOR AN ACT

Relating to the financial administration of the Council on Court Procedures; appropriating money; and declaring an emergency.

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

SECTION 1. There is appropriated to the Council on Court Procedures, for the biennium beginning July 1, 1993, out of the General Fund, the amount of $99,709.

SECTION 2. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect July 1, 1993.

Note: For budget, see 1993-95 Biennial Budget, Page K-3

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

LC 9045

House Bill 2360

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession filed (at the request of Representative Kevin Mannix)

SUMMARY

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

Requires that Oregon Rules of Civil Procedure may only be enacted, amended, repealed or supplemented by law enacted by Legislative Assembly. Deletes provisions that allow rule promulgated by Council on Court Procedures to become effective unless Legislative Assembly repeals or modifies promulgated rule. Specifies that rules submitted to Sixty-seventh Legislative Assembly by Council on Court Procedures are not effective unless enacted by law.

A BILL FOR AN ACT

Relating to Oregon Rules of Civil Procedure; creating new provisions; amending ORS 1.730, 1.735, 1.750, 174.580 and 174.590 and ORCP 1 D.; and repealing ORS 1.745.

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

SECTION 1. The Oregon Rules of Civil Procedure may only be enacted, amended, repealed or supplemented by law enacted by the Legislative Assembly.

SECTION 2. ORS 1.730 is amended to read:

1.730. (1) There is created a Council on Court Procedures consisting of:

(a) One judge of the Supreme Court, chosen by the Supreme Court;

(b) One judge of the Court of Appeals, chosen by the Court of Appeals;

(c) Six judges of the circuit court, chosen by the Executive Committee of the Circuit Judges Association;

(d) Two judges of the district court, chosen by the Executive Committee of the District Judges Association;

(e) Twelve members of the Oregon State Bar, at least two of whom shall be from each of the congressional districts of the state, appointed by the Board of Governors of the Oregon State Bar. The Board of Governors, in making the appointments referred to in this section, shall include but not be limited to appointments from members of the bar active in civil trial practice, to the end that the lawyer members of the council shall be broadly representative of the trial bar. The Board of Governors shall include at least one person who by profession is involved in legal teaching or research; and

(f) One public member, chosen by the Supreme Court.

(2)(a) A quorum of the council shall be constituted by a majority of the members of the council. An affirmative vote of a majority of the council shall be required to [*promulgate*] **propose** rules [*pursuant to ORS 1.735*].

(b) The council shall [*adopt*] **propose** rules of procedure and shall choose, from among its membership, annually, a chairman to preside over the meetings of the council.

(3)(a) All meetings of the council shall be held in compliance with the provisions of ORS 192.610 to 192.690.

(b) In addition to the requirements imposed by paragraph (a) of this subsection, with respect to

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

the public hearings required by ORS 1.740 and with respect to any meeting at which final action will be taken on the [*promulgation,*] **proposal for enactment,** modification or repeal of a rule [*under ORS 1.735*], the council shall cause to be published or distributed to all members of the bar, at least two weeks before such hearing or meeting, a notice which shall include the time and place and a description of the substance of the agenda of the hearing or meeting.

(c) The council shall make available upon request a copy of any rule which it proposes [*to promulgate, modify or repeal*] **for enactment, modification or repeal.**

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

(5) Members of the Council on Court Procedures shall not receive compensation for their services but may receive actual and necessary travel or other expenses incurred in the performance of their official duties as members of the council, as provided in ORS 292.210 to 292.288.

SECTION 3. ORS 1.735 is amended to read:

1.735. The Council on Court Procedures shall [*promulgate*] **propose** rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The [*rules thus adopted*] **proposed rules** and any amendments which may be [*adopted*] **proposed** from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each regular session [*and shall go into effect on January 1 following the close of that session unless the Legislative Assembly shall provide an earlier effective date*]. [*The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.*]

SECTION 4. ORS 1.750 is amended to read:

1.750. The Legislative Counsel shall cause the rules which [*have become effective under ORS 1.735, as they may be*] **are enacted,** amended, repealed or supplemented by the Legislative Assembly, to be arranged, indexed, printed, published and annotated in the Oregon Revised Statutes.

SECTION 5. ORS 174.580 is amended to read:

174.580. (1) [*As used in the statute laws of this state, including provisions of law deemed to be rules of court as provided in ORS 1.745, "Oregon Rules of Civil Procedure" means the rules adopted, amended or supplemented as provided in ORS 1.735.*] **As used in the statute laws of this state, "Oregon Rules of Civil Procedure" means those enactments of the legislature that are arranged, indexed, printed, published and annotated by the Legislative Counsel under the provisions of ORS 1.750.**

(2) In citing a specific rule of the Oregon Rules of Civil Procedure, the designation "ORCP (number of rule)" may be used. For example, Rule 7, section D., subsection (3), paragraph (a), subparagraph (i), may be cited as ORCP 7 D.(3)(a)(i).

SECTION 6. ORS 174.590 is amended to read:

174.590. References in the statute laws of this state[, *including provisions of law deemed to be rules of court as provided in ORS 1.745,*], **including references in the Oregon Rules of Civil Procedure,** in effect on or after January 1, 1980, to actions, actions at law, proceedings at law, suits, suits in equity, proceedings in equity, judgments or decrees are not intended and shall not be

construed to retain procedural distinctions between actions at law and suits in equity abolished by ORCP 2.

SECTION 7. ORCP 1 D. is amended to read:

D. "Rule" defined and local rules. References to "these rules" shall include Oregon Rules of Civil Procedure numbered 1 through 85. General references to "rule" or "rules" shall mean only rule or rules of pleading, practice and procedure [*established by ORS 1.745,*] **enacted by the Legislative Assembly and arranged, indexed, printed, published and annotated by the Legislative Counsel under the provisions of ORS 1.750** or promulgated under ORS 1.006, [*1.735,*] 2.130 and 305.425, **unless otherwise defined or limited. These rules do not preclude a court in which they apply from** regulating pleading, practice and procedure in any manner not inconsistent with these rules.

SECTION 8. (1) The Oregon Rules of Civil Procedure in effect on the effective date of this Act are not affected by this Act.

(2) Any rules or amendments submitted to the Sixty-seventh Legislative Assembly by the Council on Court Procedures under the provisions of ORS 1.735 (1991 Edition) do not become effective unless those rules or amendments are enacted by the Sixty-seventh Legislative Assembly.

SECTION 9. ORS 1.745 is repealed.

February 18, 1993

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

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

RE: **2/27/93 Meeting; Bills Pending in Legislature**

Attached are texts of bills currently pending in the Legislative Assembly that have some pertinence to the Council. Together with this memo, these are intended to flesh out item 3 of the agenda for our February 27 meeting previously circulated with the notice of said meeting. Following are my brief comments about each of the attached bills, summarizing the limited information I have concerning them:

1. **SB 215** would amend ORCP 39 C.(7) in a manner that differs substantially from the amendment to this subsection promulgated by the Council 12/12/92. The most important difference is that SB 215 would authorize telephonic depositions only by court order or pursuant to written stipulation entered of record. The Council's amendment, by contrast, would authorize telephonic depositions pursuant to informal agreement among counsel. My recollection is that, in the Council's discussion of this amendment, many thought it important not to disallow telephonic depositions by informal agreement. The latest information I have on the status of this bill is that it has been referred to the Senate Judiciary Committee, but no hearings have yet been scheduled.

2. **SB 253** would amend the language of the "summons warning" contained in ORCP 7 C. in a manner very slightly different from the version promulgated 12/12/92 by the Council. This bill would add the words: "If you do not have an attorney," in lieu of the Council's: "If you need help in finding an attorney, ..." The Council received a letter urging adoption of the language of this bill. This bill has been referred to Senate Judiciary, but no hearings have been scheduled.

3. **SB 340** would essentially adopt, as new subsections ORCP 36 C.(2) and (3), the provision for "discovery sharing" considered but not adopted by the Council last year. The bill deals with the issue that especially concerned the Council in proposed C.(3) to the effect that protective orders entered upon written stipulation would not be subject to modification under C.(2) if such stipulation expressly so provides. This bill has been referred to Senate Judiciary, but no hearings have been scheduled to date.

4. **HB 2360.** This is obviously the most important bill introduced thus far from the Council's perspective. It would leave the Council intact, but would change its function from promulgating rules amendments having the force of law unless affirmatively overridden by the Legislature to that of merely recommending rules amendments to the Legislature. The bill would also nullify the amendments promulgated 12/12/92, which means they would not become law unless, and only to the extent, they are enacted by the current Legislative Assembly. Henry Kantor has been in touch with Rep. Del Parks, Chair of House Judiciary, to which this bill has been referred. Our present best information is that the initial hearing on this bill will be on March 17 at 1:00 p.m., but that is not yet official. At a minimum, Henry and I will appear prepared to testify as to the Council's official position on this bill, and Henry might well enlist others.

Some of you might have a firm indication of what has prompted this proposal at this particular time. My surmise, and it is no more than that, is that this bill is seriously intended, not just some shot across the bow inspired by some disgruntled judge or lawyer. My further surmise is that the rationale behind this bill is something to the effect that, as time goes on, an increasing number of ORCP provisions are of legislative derivation. The current biennium has furnished some examples of the Council holding back in exercising its best procedural judgment out of deference to that fact. For instance, during the course of the Council's debate about whether to abolish the claim form procedure, one experienced member argued that, even were the Council to conclude that this represents bad procedure from a purely procedural point of view, it should not even communicate that conclusion to the legislature unless it was also prepared to overcome its scruples about affecting substantive rights by promulgating a repealing amendment. Assuming this bill reflects the considered view of Rep. Mannix, and knowing him to be a very bright lawyer, my guess is that the argument Henry will have to rebut, assuming the Council decides officially to oppose this bill, is that given the likelihood of ever-increasing legislative intervention into the ORCP over time, making the Council advisory to the legislature would make it a more useful body by freeing it from its current self-imposed reticence about touching any provision having a legislative origin. In other words, at this juncture, I think we should consider whether this bill might well be intended as a friendly proposal, intended to enhance the Council's usefulness, and not at all hostile. It would be impolitic for me to try to contact Rep. Mannix to simply ask him what his thinking is, but that would not apply to you as Council members.

5. **HB 2497** would amend ORCP 56 and 59 to provide for six-person juries in civil cases and to prescribe majorities required to agree to verdicts. The Council decided not to take an official position on this issue, which was anticipated would arise during the current session. John Hart has sent a letter to

all legislators expressing the Council's unofficial consensus opinion that twelve-person juries should be retained. I am not aware that anything further needs to be done by the Council.

6. **HB 2562** would not amend ORCP 7 E or other rule provision, but would enact a statute requiring that anyone serving a summons for a fee would have to have a $100,000 certificate of errors and omissions insurance on file with the Secretary of State. This would not apply to sheriffs, sheriffs' deputies of "employees of an attorney." Early in this biennium the Council declined a proposal that it impose this requirement by rule amendment. This bill has been referred to the House Judiciary Committee, but no hearings have been scheduled.

7. **HB 5045** would appropriate the Council's 1993-95 budget. This has been referred to Ways & Means, but no hearing has yet been scheduled

There are some other bills pending that relate to civil practice generally, but not in ways pertinent to the Council or the ORCP. My favorite to this point is one that would require parties to all civil actions to be present at any hearing or proceeding, in person or by authorized representative other than legal counsel. No doubt further bills will be filed between now and the February 27 meeting, and I will bring copies thereof with me for distribution in case the Council wishes to discuss any of them.

Another item of new business is a February 1 letter to Henry from Helle Rode regarding ORCP 55 and having to do with subpoenas of hospital and other similar records, a copy of which is attached. As you know, John Hart is chairer of a task force that will be considering possible recommended rules changes regarding hospital records, a project which could not be completed during this biennium.

As much as I dislike having to conclude on a somewhat disagreeable note, I must warn you the Council has somewhat overspent its current biennial budget for reasons I shall explain at the February 27 meeting should anyone wish to know. It is therefore possible that there will be insufficient funds with which to reimburse you for travel expenses in connection with that meeting. Needless to say, Gilma and I will do whatever we can to patch up some arrangement whereby you can receive the expense reimbursement to which you are surely entitled.

Enc.

Senate Bill 215

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Interim Judiciary Committee for Procedure and Practice Committee of Oregon State Bar)

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 parties in civil proceedings to stipulate to deposition by telephone.

A BILL FOR AN ACT

Relating to depositions; amending ORCP 39 C.

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

SECTION 1. ORCP 39 C. is amended to read:

C. Notice of examination.

C.(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

C.(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

C.(3) Shorter or longer time. The court may for cause shown enlarge or shorten the time for taking the deposition.

C.(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

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C.(6) Deposition of organization. A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

C.(7) Deposition by telephone. **Parties may agree by stipulation, or** the court may upon motion order that testimony at a deposition be taken by telephone, in which event the **stipulation or** order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. **A stipulation between the parties must be made part of the record by the person authorized to administer oaths for the purpose of the deposition under the provisions of ORCP 38. A party who enters into a stipulation under this subsection waives any objection that the party may have to telephonic transmission of the testimony.**

Senate Bill 253

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Interim Judiciary Committee for Lawyer Referral Committee of Oregon State Bar)

SUMMARY

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

Requires that notice to defendant in summons contain phone number for Oregon State Bar Lawyer Referral and Information Service.

A BILL FOR AN ACT

Relating to summonses; creating new provisions; and amending ORCP 7 C.

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

SECTION 1. ORCP 7C. is amended to read:

C.(1) Contents. The summons shall contain:

C.(1)(a) Title. The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(1)(b) Direction to defendant. A direction to the defendant requiring defendant to appear and defend within the time required by subsection (2) of this section and a notification to defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(1)(c) Subscription; post office address. A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(2) Time for response. If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D.(6) of this rule, the defendant shall appear and defend within 30 days from the date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C.(3) Notice to party served.

C.(3)(a) In general. All summonses, other than a summons referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:
READ THESE PAPERS
CAREFULLY

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not

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have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. **If you do not have an attorney, you may wish to call the Oregon State Bar Lawyer Referral and Information Service at 684-3763 (Portland Area) or 1-800-452-7635 (Outside Portland Area).**

C.(3)(b) Service for counterclaim. A summons to join a party to respond to a counterclaim pursuant to Rule 22 D. (1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:
READ THESE PAPERS
CAREFULLY

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. **If you do not have an attorney, you may wish to call the Oregon State Bar Lawyer Referral and Information Service at 684-3763 (Portland Area) or 1-800-452-7635 (Outside Portland Area).**

C.(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:
READ THESE PAPERS
CAREFULLY

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. **If you do not have an attorney, you may wish to call the Oregon State Bar Lawyer Referral and Information Service at 684-3763 (Portland Area) or 1-800-452-7635 (Outside Portland Area).**

SECTION 2. The amendments to ORCP 7C. by section 1 of this Act apply only to summonses served on or after the effective date of this Act.

Senate Bill 340

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Trial Lawyers Association)

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 even though protective order has been entered if disclosure is to another attorney representing client in similar or related matter. Requires notice to parties protected by order and opportunity to be heard. Requires court to allow disclosure except for good cause shown. Allows parties to stipulated protective order to agree that disclosure not be made. 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 materials or information subject to the order with an attorney representing a party to a proceeding involving 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

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by the parties or persons for whose benefit the protective order has been issued. No order may 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 and the court makes a written determination that there is good cause to believe that the protective order will be obeyed. The provisions of this subsection apply to protective orders in all cases, and are not limited to protective orders in actions for personal injury or wrongful death.

C.(3) If the parties to a proceeding stipulate in writing to a protective order under subsection (1) of this section, the parties may by the terms of the stipulation agree that disclosure of the materials or other information may not be made under the provisions of subsection (2) of this section. If the parties so agree, the court shall not enter an order allowing disclosure under the provisions of subsection (2) of this section.

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.

House Bill 2360

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession filed (at the request of Representative Kevin Mannix)

SUMMARY

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

Requires that Oregon Rules of Civil Procedure may only be enacted, amended, repealed or supplemented by law enacted by Legislative Assembly. Deletes provisions that allow rule promulgated by Council on Court Procedures to become effective unless Legislative Assembly repeals or modifies promulgated rule. Specifies that rules submitted to Sixty-seventh Legislative Assembly by Council on Court Procedures are not effective unless enacted by law.

A BILL FOR AN ACT

Relating to Oregon Rules of Civil Procedure; creating new provisions; amending ORS 1.730, 1.735, 1.750, 174.580 and 174.590 and ORCP 1 D.; and repealing ORS 1.745.

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

SECTION 1. The Oregon Rules of Civil Procedure may only be enacted, amended, repealed or supplemented by law enacted by the Legislative Assembly.

SECTION 2. ORS 1.730 is amended to read:

1.730. (1) There is created a Council on Court Procedures consisting of:

(a) One judge of the Supreme Court, chosen by the Supreme Court;

(b) One judge of the Court of Appeals, chosen by the Court of Appeals;

(c) Six judges of the circuit court, chosen by the Executive Committee of the Circuit Judges Association;

(d) Two judges of the district court, chosen by the Executive Committee of the District Judges Association;

(e) Twelve members of the Oregon State Bar, at least two of whom shall be from each of the congressional districts of the state, appointed by the Board of Governors of the Oregon State Bar. The Board of Governors, in making the appointments referred to in this section, shall include but not be limited to appointments from members of the bar active in civil trial practice, to the end that the lawyer members of the council shall be broadly representative of the trial bar. The Board of Governors shall include at least one person who by profession is involved in legal teaching or research; and

(f) One public member, chosen by the Supreme Court.

(2)(a) A quorum of the council shall be constituted by a majority of the members of the council. An affirmative vote of a majority of the council shall be required to [*promulgate*] **propose** rules [*pursuant to ORS 1.735*].

(b) The council shall [*adopt*] **propose** rules of procedure and shall choose, from among its membership, annually, a chairman to preside over the meetings of the council.

(3)(a) All meetings of the council shall be held in compliance with the provisions of ORS 192.610 to 192.690.

(b) In addition to the requirements imposed by paragraph (a) of this subsection, with respect to

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

the public hearings required by ORS 1.740 and with respect to any meeting at which final action will be taken on the [*promulgation,*] **proposal for enactment,** modification or repeal of a rule [*under ORS 1.735*], the council shall cause to be published or distributed to all members of the bar, at least two weeks before such hearing or meeting, a notice which shall include the time and place and a description of the substance of the agenda of the hearing or meeting.

(c) The council shall make available upon request a copy of any rule which it proposes [*to promulgate, modify or repeal*] **for enactment, modification or repeal.**

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

(5) Members of the Council on Court Procedures shall not receive compensation for their services but may receive actual and necessary travel or other expenses incurred in the performance of their official duties as members of the council, as provided in ORS 292.210 to 292.288.

SECTION 3. ORS 1.735 is amended to read:

1.735. The Council on Court Procedures shall [*promulgate*] **propose** rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The [*rules thus adopted*] **proposed rules** and any amendments which may be [*adopted*] **proposed** from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each regular session [*and shall go into effect on January 1 following the close of that session unless the Legislative Assembly shall provide an earlier effective date*]. [*The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.*]

SECTION 4. ORS 1.750 is amended to read:

1.750. The Legislative Counsel shall cause the rules which [*have become effective under ORS 1.735, as they may be*] **are enacted,** amended, repealed or supplemented by the Legislative Assembly, to be arranged, indexed, printed, published and annotated in the Oregon Revised Statutes.

SECTION 5. ORS 174.580 is amended to read:

174.580. (1) [*As used in the statute laws of this state, including provisions of law deemed to be rules of court as provided in ORS 1.745, "Oregon Rules of Civil Procedure" means the rules adopted, amended or supplemented as provided in ORS 1.735.*] **As used in the statute laws of this state, "Oregon Rules of Civil Procedure" means those enactments of the legislature that are arranged, indexed, printed, published and annotated by the Legislative Counsel under the provisions of ORS 1.750.**

(2) In citing a specific rule of the Oregon Rules of Civil Procedure, the designation "ORCP (number of rule)" may be used. For example, Rule 7, section D., subsection (3), paragraph (a), subparagraph (i), may be cited as ORCP 7 D.(3)(a)(i).

SECTION 6. ORS 174.590 is amended to read:

174.590. References in the statute laws of this state[, *including provisions of law deemed to be rules of court as provided in ORS 1.745,*], **including references in the Oregon Rules of Civil Procedure,** in effect on or after January 1, 1980, to actions, actions at law, proceedings at law, suits, suits in equity, proceedings in equity, judgments or decrees are not intended and shall not be

construed to retain procedural distinctions between actions at law and suits in equity abolished by ORCP 2.

SECTION 7. ORCP 1 D. is amended to read:

D. "Rule" defined and local rules. References to "these rules" shall include Oregon Rules of Civil Procedure numbered 1 through 85. General references to "rule" or "rules" shall mean only rule or rules of pleading, practice and procedure [*established by ORS 1.745,*] **enacted by the Legislative Assembly and arranged, indexed, printed, published and annotated by the Legislative Counsel under the provisions of ORS 1.750** or promulgated under ORS 1.006, [*1.735,*] 2.130 and 305.425, unless otherwise defined or limited. These rules do not preclude a court in which they apply from regulating pleading, practice and procedure in any manner not inconsistent with these rules.

SECTION 8. **(1) The Oregon Rules of Civil Procedure in effect on the effective date of this Act are not affected by this Act.**

(2) Any rules or amendments submitted to the Sixty-seventh Legislative Assembly by the Council on Court Procedures under the provisions of ORS 1.735 (1991 Edition) do not become effective unless those rules or amendments are enacted by the Sixty-seventh Legislative Assembly.

SECTION 9. **ORS 1.745 is repealed.**

YES

House Bill 2497

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession filed (at the request of Interim Committee on Agency Reorganization and Reform)

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 six.

A BILL FOR AN ACT

Relating to circuit court juries; creating new provisions; and amending ORCP 56 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 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.*]

G.(2)(a) If the jury consists of six persons, five jurors must agree on a verdict, unless the parties have stipulated to some other number under ORCP 56;

G.(2)(b) If the jury consists of five persons, four jurors must agree on a verdict;

G.(2)(c) If the jury consists of four persons, three jurors must agree on a verdict;

G.(2)(d) If the jury consists of three persons, two persons must agree on a verdict; and

G.(2)(e) If the jury consists of two or less persons, the verdict must be unanimous.

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.

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

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

67th OREGON LEGISLATIVE ASSEMBLY--1993 Regular Session

House Bill 2562

Introduced and printed pursuant to House Rule 13.01 (at the request of Oregon Association of Process Servers, Oregon State Sheriffs Association)

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.

Prohibits service of summons by person other than sheriff, sheriff's deputy or employee of attorney licensed to practice law unless person has on file with Secretary of State $100,000 certificate of errors and omissions insurance.

A BILL FOR AN ACT

Relating to service of summons.

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

SECTION 1. (1) Notwithstanding ORCP 7 E., a person may not serve a summons for a fee unless the person has on file 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.

(2) Failure of a person to comply with subsection (1) of this section does not affect the validity of a service of summons made by the person that is otherwise in compliance with the law.

(3) Subsection (1) of this section does not apply to a sheriff, a sheriff's deputy or the employee of an attorney who has been admitted to the practice of law in this state.

SECTION 2. Section 1 of this Act applies only to a service of summons made on or after the effective date of this Act.

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

LC 1661

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February 1, 1993

Mr. Henry Kantor
KANTOR & SACKS
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1100 S.W. Sixth Avenue
Portland, OR 97204

Re: Council on Court Procedures: Revisions to ORCP 55

Dear Mr. Kantor:

I am writing with regard to ORCP 55 which relates to subpoenas for records. I have three changes to suggest. First, that subpoenas for books, papers, or documents, not accompanied by a demand to appear at trial or hearing, or at deposition, be allowed to be served by regular mail (i.e., revise ORCP 55D(3)(d)). Realistically, most such subpoenas are served by regular mail because this is the most efficient process. Otherwise, in a case requiring several subpoenas, the service fees can become astronomical. This is especially true if the person with the documents is out of town. It is also consistent with ORCP 55H(2)(d), which allows the service of subpoenas to hospitals by first-class mail.

Second, the time periods for giving notice to the injured party of the subpoena and for actually requiring production of the documents, should be the same for non-hospital records as for hospital records. I suggest 10 days' notice to the parties and 10 days for the responding party to produce the documents (unless the responding party is subpoenaed to court with the documents, in which case the subpoena should simply be served before the person is required to appear). Please compare the last two sentences of Section D(1), with the last sentence of Section H (2)(b) and the second to the last sentence in Section H (2)(a).

I think ten days' notice to the other party is sufficient because if the notice is mailed, it must be mailed 13 days before the subpoena is served. Thus, unless the mail is particularly slow, the other party will generally have 11 to 12 days' notice of the subpoena in any case. This should be plenty of time to file an objection.

Third, it should be made clear that certain sections of ORCP 55 do not apply to Section H, which deals with hospital records. For example, Section D does not apply. This would at least eliminate some confusion.

If you have any questions in this regard, please feel free to call me.

Very truly yours,

Helle Rode

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and disbursements against plaintiff in the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

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

[Amended effective January 1, 1982; January 1, 1984; January 1, 1986.]

RULE 55. SUBPOENA S

A. Defined; Form. A subpoena is a writ or order directed to a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For Production of Books, Papers, Documents, or Tangible Things and to Permit Inspection. A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody or control of that person at the time and place specified therein. A command to produce books, papers, documents or

tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things but not commanded to also appear for deposition, hearing or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents or tangible things the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance.

C(1) *By Whom Issued.* A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance of a person, to produce books, papers, documents or tangible things and to permit inspection thereof: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38C, or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

C(2) *By Clerk in Blank.* Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

D. Service; Service on Law Enforcement Agency; Service by Mail; Proof of Service.

D(1) *Service.* Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39C(6), shall be served in the same manner as provided for service of summons in Rule 7D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

D(2) *Service on Law Enforcement Agency.*

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

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D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

D(3) *Service by Mail.* Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a) The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D(3)(b) The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)(c) The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

D(3)(d) Service of subpoena by mail may not be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

D(4) *Proof of Service.* Proof of service of a subpoena is made in the same manner as proof of service of a summons.

E. Subpoena for Hearing or Trial; Prisoners. If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F. Subpoena for Taking Depositions or Requiring Production of Books, Papers, Documents, or Tangible Things; Place of Production and Examination.

F(1) *Subpoena for Taking Deposition.* Proof of service of a notice to take a deposition as provided in Rules 39C and 40A, or of notice of subpoena to command production of books, papers, documents, or tangible things before trial as provided in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein.

F(2) *Place of Examination.* A resident of this state who is not a party to the action may be required by subpoena to attend an examina-

tion or to produce books, papers, documents, or tangible things only in the county wherein such person resides, is employed or transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend or to produce books, papers, documents or tangible things only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

G. Disobedience of Subpoena; Refusal to Be Sworn or Answer as a Witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, such party's complaint, answer, or reply may be stricken.

H. Hospital Records.

H(1) *Hospital.* As used in this section, unless the context requires otherwise, "hospital" means a health care facility defined in ORS 442.015(13)(a) through (d) and licensed under ORS 441.015 through 441.097 and community health programs established under ORS 430.610 through 430.700.

H(2) *Mode of Compliance.* Hospital records may be obtained by subpoena duces tecum as provided in this section; if disclosure of such records is restricted by law, the requirements of such law must be met.

H(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the

subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than 14 days prior to service of the subpoena on the hospital.

H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D of this rule.

H(3) *Affidavit of Custodian of Records.*

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(4) *Personal Attendance of Custodian of Records May Be Required.*

H(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) *Tender and Payment of Fees.* Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

[Amended effective January 1, 1982; January 1, 1984; January 1, 1988; October 3, 1989; January 1, 1990; January 1, 1992.]

RULE 56. TRIAL BY JURY

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

RULE 57. JURORS

A. Challenging Compliance With Selection Procedures.

A(1) *Motion.* Within 7 days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief, on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury.

A(2) *Stay of Proceedings.* Upon motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury, the moving party is entitled to present in support of the motion: the testimony of the clerk or court administrator, any relevant records and papers not public or otherwise available used by the clerk or court administrator, and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply with the applicable