COUNCIL ON COURT PROCEDURES

Minutes of Meeting of December 12, 1992
9:30 a.m.

University of Oregon School of Law, Room 375
1101 Kincaid Street
Eugene, Oregon

Present:

Richard L. Barron
Susan G. Bischoff
William D. Cramer, Sr.
Robert D. Durham
Susan B. Graber
Bruce C. Hamlin
John E. Hart
Lafayette G. Harter
Nely Johnson
Bernard Jolles
Henry Kantor
Richard T. Kropp
David R. Kenagy
Winfrid K.F. Liepe
Ronald L. Marceau
Robert B. McConville
Michael V. Phillips
Charles A. Sams
William C. Snouffer
Janice M. Stewart
Elizabeth Welch

Excused:

Richard Bemis
John V. Kelly

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant. The following were also in attendance: Betsy Bailey, Jeff Foote, Jim Gardner, Bill Gaylord, Phil Goldsmith, Dennis Hubel, Jerry North, Anton Pardini, Chuck Ruttan, Dana Tims, Alan Wight, Douglas Wilkinson, and Charlie Williamson.

Chair Henry Kantor called the meeting to order at 9:38 a.m.

Before beginning with the noticed agenda the Chair announced that the firm of Johnson, Beovich, Kirk, May & Friend, Inc. was furnishing a stenographic reporter for this meeting free of charge, and introduced the reporter, Tammy Aufdermauer. He also announced that this is a public meeting and that, despite the crowded agenda, every effort would be made to give all those who had come to the meeting to present comments a full opportunity to do so.

Agenda Item No. 1: Approval of minutes of meeting held November 14, 1992. John Hart moved, seconded by Bruce Hamlin, that the minutes of the November 14, 1992 meeting as previously circulated be approved. The Chair ruled that, there being no corrections proposed, the minutes are approved.

Agenda Item No. 2: Old business. There was no response when the Chair asked whether anyone wished to raise any item of old business.

Agenda Item No. 3: ORCP 32 and ORCP 69 (tentative passage). The Chair recalled that there was no quorum at the November 14 meeting at which amendments to Rules 32 and 69 were discussed. He therefore invited a motion to tentatively adopt these amendments for the purpose of placing them on the agenda for possible final action at this meeting. Bernie Jolles so moved, seconded by Win Liepe, and the motion carried by unanimous voice vote.

Agenda Item No. 4: ORCP 7. At the Chair's request, Maury Holland summarized the amendments tentatively adopted to Rule 7 along with the proposed Staff Comment[1]. The Chair asked if there were any public comments on the tentative amendments to Rule 7, and none were offered. Richard Barron said he generally agreed with a comment letter received from Robert Van Natta dated 11/23/92, and so moved to delete the portion of the tentative amendment that refers to the Oregon State Bar Lawyer Referral Service and its telephone number. Win Liepe seconded the motion. Ron Marceau wondered whether this information might better be left to a Staff Comment. Susan Graber stated that she continues to think that specific reference to the Lawyer Referral Service, including its telephone number, would be helpful to people apt to be very confused and uncertain upon being served with summons. Several members raised the question of whether inclusion of this specific new language as part of the summons notice might risk invalidation of service in the event some detail was omitted or if the phone number were to change. Liepe expressed worry about possible confusion and unnecessary litigation about the sufficiency of summons forms during the year or so after the amendment takes effect. Bernie Jolles expressed opposition to the motion, in part on the basis of a point made earlier by Bruce Hamlin that Rule 7 G would excuse any minor departures from the prescribed form that might occur. Robert McConville called for the question on the pending motion, and the Chair called the question. On a roll call vote the motion failed by a vote of 7 in favor, 12 opposed and no abstentions.

Susan Graber then moved, seconded by Robert McConville, that debate be terminated and a vote be taken on the question of whether to promulgate the proposed amendments to Rule 7, which motion carried by voice vote, with three members noting that they were voting no. Susan Bischoff then raised a point of order to the effect that it was unclear whether the previous motion was to take a vote up or down on the Rule 7 amendments or merely that

---

[1] All references throughout these minutes to proposed Rules amendments and to Staff Comments are to the packet entitled "TENTATIVELY ADOPTED AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE" and to the Executive Director's "Supplemental Memo" dated 12/7/92, copies of both of which are attached to these minutes.

such a vote be taken. The Chair ruled the point in order and invited a motion on the question of whether to approve or disapprove the proposed amendments to Rule 7. Graber so moved, seconded by McConville, and the motion to promulgate said amendments carried by a vote of 13 in favor, 6 opposed, and no abstentions.

Bruce Hamlin then raised a question as to how the Council as a whole or members of the Council should have input on the final form of Staff Comments. Ron Marceau commented that he had always thought Staff Comments are quite authoritative and that they had been carefully reviewed in some manner by the Council. Win Liepe remarked that, while Staff Comments might shed some light on the Council's purposes and understandings, they could not affect or vary the clear language of the Rules or of amendments thereto. Maury Holland commented that his understanding is that, although as Executive Director he is the preliminary draftsperson, the Staff Comments should reflect the intent and understanding of the full Council to the maximum extent possible. He also stated that in his opinion, the most useful and significant function of Staff Comments is to inform the bench and bar what purpose or purposes the Council had in mind when it adopts a rules amendment, giving as an example the purpose of the proposed amendments to Rule 69 to deal with the problem created by Van Dyke v. Varsity Club, Inc. Another current example he stressed is the statement in the proposed Staff Comment to the proposed new provision of Rule 36 about discovery sharing that the Council's intent is that the provision should have no application to protective orders entered by agreement or stipulation, something not apparent on the face of the proposed new section. Hamlin stated he did not think that Staff Comments should be officially adopted by the Council because, among other reasons, that might lead to greater carelessness or imprecision in drafting the rules amendments themselves.

The Chair recalled a past occasion when the Council discussed the status of Staff Comments with the late Fred Merrill, and there emerged a consensus that the Executive Director would do his best to accurately reflect the thinking of the full Council, not his own personal views, and that while the Council would not officially adopt or approve the Comments, it would exercise a veto power over whatever the Executive Director prepared. Susan Graber stated her opposition to official adoption or voting on Staff Comments largely on the ground that it would unduly prolong the Council's deliberations. Bill Cramer expressed agreement with this point.

Maury Holland said he would welcome suggestions from any member on matters of style and the like. He added, however, that if there were disagreement within the Council on the accuracy of some important substantive Staff Comment regarding what the Council intended, such as whether the proposed addition to Rule

would adversely affect the business climate in Oregon. She added that at least some businesses considering moving to Oregon would be deterred by their perception of a legal climate in Oregon hostile to business. She stated also that adoption of this provision might well be regarded as violating substantive rights in proprietary information. Mr. Jim Gardner, Portland, also spoke in opposition to the proposal. He informed the Council that the previously referred to "Oregon Coalition Against Excessive Litigation" had not yet been funded and thus was not yet in existence. He stated that attracting new businesses is a high priority for Oregon at the present time, and that adoption of this proposal could seriously undercut these efforts. Mr. Chuck Ruttan, Portland, asked for confirmation that Council members had received the recent letter from Mr. Paul Fortino, and was assured that they had.

Mr. Dennis Hubel then spoke on behalf of the OSB Committee on Procedure and Practice. He reported that the committee had considered the pending proposal at two meetings, but had not yet arrived at a consensus in favor or in opposition to it. He further reported that members of his committee see several problems with this specific proposal and are concerned that it might generate more litigation. Among the specific concerns voiced by at least some members of his committee were the possible jeopardy to trade secrets, whether discovery sharing would continue to be possible after cases had been closed and, if so, for how long, and how restrictions remaining in protective orders after their limited modification might be practically enforced in other jurisdictions. Another concern expressed in the committee was the possible vagueness of the term "similar or related claim." In answer to a question from Susan Graber, Mr. Hubel stated that his committee knows this issue is not going to disappear and that it would like to have further opportunity for deliberation before the Council takes any action. Mr. Jerry North, Portland, expressed opposition to the provision that would require a party which had once obtained a protective order to bear a further burden of proof in order to resist its modification.

Dick Kropp, seconded by Bernie Jolles, then moved the adoption of the new subsection 36 C(2) as proposed. Win Liepe then moved to amend the proposal by adding the words: "No order shall be issued modifying a prior stipulation by the parties prohibiting or limiting such disclosure unless the parties consent to the modification" and was seconded by Ron Marceau. Susan Graber noted that the Liepe amendment might be understood in two ways: the first as preserving intact any stipulations entered into before the effective date of this amendment and the second as protecting stipulations entered into prior to an effort to modify but subsequent to the amendment's effective date. She added that perhaps the proposed amendment should have two distinct provisions to address these two distinct issues of

retroactivity. Bruce Hamlin commented that the problem of retroactive application of the proposed amendment is already addressed by Rule 1 C. Ron Marceau stated that he had seconded the pending Liepe motion to amend on his understanding that it meant that judges would not have authority by virtue of this proposal to undo or modify protective orders entered into by agreement or stipulation. He added that while he agreed with the proposed Staff Comment in this regard, he would prefer that this point be incorporated into the language of the rule as amended so there would be no doubt about its authoritativeness. Liepe confirmed that this was the precise issue he intended to address in his motion to amend, and added that the other retroactivity issue raised by Graber seemed important to him. Jan Stewart expressed concern that if the pending proposal were to be adopted as amended by the Liepe motion, that would mean nearly the end of stipulated or agreed upon protective orders, and Bernie Jolles said he agreed that it would at the least discourage stipulations. Mike Phillips stated that he thought there might be an important difference between agreements and stipulated orders as far as the authority of the rules and of the Council is concerned. Jolles stated he agreed that the proposed new subsection should not in fairness be applied to stipulations entered into before the new rule takes effect, but thinks this is a very different question from whether judges should be able to modify stipulated protective orders entered after everyone has notice of the new rule. Robert Durham stated that he remained very concerned about the issue of the effective date of the proposed rule amendment, and had in mind to offer a distinct amendment addressed to that matter. Jolles wondered why a stipulation could not contain a provision whereby plaintiff's attorney reserves the right to seek modification to permit discovery sharing.

With the consent of Ron Marceau as seconder of the motion to amend, Win Liepe then amended the motion to amend the pending proposal to read as follows: "No order shall be issued modifying an order upon stipulation by the parties prohibiting or limiting such disclosure unless the parties consent to the modification." Mr. Foote was then heard briefly in opposition to this amendment. The Chair then called the question on the Liepe motion to amend, which carried by a roll call vote of 12 in favor, 8 opposed and 1 abstention.

Following a luncheon recess, the Chair announced that the proponents of the original new subsection 36 C(2) wished to have it withdrawn from the Council's current agenda, and the Chair so moved. This was treated as a non-debatable motion to table the basic proposal, it was seconded by Bruce Hamlin, and the motion carried by unanimous voice vote.

Agenda Item Nos. 7, 8 and 9: ORCP 38, 39 and 46. It was agreed that consideration of these agenda items and the proposed

amendments to which they relate should be consolidated since they are integrally related. Dick Kropp, seconded by John Hart, moved that the foregoing proposed amendments be adopted, and the motion carried by unanimous voice vote.

Agenda Item No. 10: ORCP 68. Jan Stewart, seconded by Dick Kropp, moved the adoption of the proposed amendment to Rule 68, which motion carried by unanimous voice vote.

Agenda Item No. 11: ORCP 69. Win Liepe, seconded by Bill Stouffer, moved adoption of the proposed amendment to Rule 69. There followed some inconclusive discussion on how courts should rule with respect to the continued vitality of Van Dyke if this amendment is adopted, prior to its effective date.

The Chair then recognized Mr. Douglas R. Wilkinson, on behalf of the OSB Committee on Practice and Procedure, for some comments on this proposed amendment. He stated that he was satisfied that the proposed amendment as currently worded would not force the hands of judges. He suggested that the proposal should be amended to place on the party seeking the default judgment the burden of serving upon the non-appearing party the form of the judgment that would be entered.

Robert Durham stated that he seriously questions the correctness of treating a failure to appear for trial as a "default," which has opprobrious connotations and suggests punishments or sanctions to follow. There followed a lengthy discussion as to how, if a failure to show up for trial were to be regarded as a default, that would affect the tenability of various legal defenses, such as the statute of ultimate repose. Susan Graber stated she thought the most important thing was to fix Van Dyke in the simplest and most straightforward manner, and moved adoption of a newly numbered rule to read as follows: "Failure to Appear for Trial. When a party who has filed an appearance fails to appear for trial, the court may in its discretion proceed to trial and judgment without further notice to the non-appearing party." This motion was seconded by Robert McConville. It was suggested that this might be added to Rule 58, but Maury Holland pointed out that neither public notice of Council action included any reference to Rule 58. Bernie Jolles moved that the language formulated by Graber be incorporated into existing Rule 69 as 69 C, with existing section 69 C and following being redesignated accordingly. The Chair called the question on the Jolles motion, which carried by unanimous voice vote.

Jan Stewart made a clarification to the effect that the materials setting forth proposed adoptions show a second sentence of Rule 39 D reading: "At the request of a party or a witness, the court may order persons excluded from the deposition" as being struck through and thereby deleted, whereas it should have

been shown as a sentence to be added. The addition of the sentence had been tentatively approved by the Council at its May meeting, although she had not approved its addition because it did not accomplish the desired effect (i.e., it did not specify the standard for exclusion from a deposition). After discussion, the Council voted unanimously to not approve the addition of the sentence, "At the request of a party or a witness, the court may order persons excluded from the deposition," to Rule 39 D.

Bruce Hamlin pointed out that in the materials setting forth proposed amendments the deletions and additions in Rule 32 are keyed to the language in the original ad hoc group proposals, not to the language of existing Rule 32. The Executive Director responded that the necessary corrections would be made in the final and official version of amendments as approved and promulgated.

Agenda Item No. 12: Future meeting schedule. The Chair announced that the Council would not meet in January of 1993, but would probably meet at the Bar Center on the first Saturday in February and again on the third Saturday in March, not to conflict with Easter break.

Agenda Item No. 13: NEW BUSINESS. In response to a question from the Chair, John Hart said that his Task Force on subpoenaing of hospital records pursuant to Rule 55 had no report, but could use one additional member from the Council. David Kenagy expressed willingness to be added to this Task Force and was appointed. The Chair suggested that at a coming meeting in the spring it might be useful to continue discussion concerning the handling of Staff Comments in light of the Council's Rules of Procedure, copies of which he asked be provided to any members who might not be familiar with them. Bernie Jolles moved a vote of thanks and commendation to Maury Holland for hard work in connection with the Rule 32 amendments, which was seconded and carried by a round of exhausted applause.

There being no further new business, the meeting was adjourned at 3:00 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

TENTATIVELY ADOPTED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

(for final consideration at 12-12-92 meeting)

TENTATIVELY ADOPTED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

Contents

		Page
RULE 7	SUMMONS..	1
RULE 32	*CLASS ACTIONS....................................	5
RULE 36	GENERAL PROVISIONS REGARDING DISCOVERY.........	17
RULE 38	PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS...............	19
RULE 39	DEPOSITIONS UPON ORAL EXAMINATION..............	20
RULE 46	FAILURE TO MAKE DISCOVERY; SANCTIONS...........	25
RULE 68	ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS.........................	27
RULE 69	*DEFAULT ORDERS AND JUDGMENTS....................	29

* Proposed amendments to Rule 32 and Rule 69 were unanimously adopted at Council's 11-14-92 meeting with eleven members present.

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.

---

* * * * *

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 provides that information.

7 E. The language added removes 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.

CLASS ACTIONS
RULE 32

A. Requirement for class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

A.(1) The class is so numerous that joinder of all members is impracticable; ~~and~~

A.(2) There are questions of law or fact common to the class; ~~and~~

A.(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; ~~and~~

A.(4) The representative parties will fairly and adequately protect the interests of the class; and

A.(5) In an action for damages ~~under subsection (3) of section B of this rule~~, the representative parties have complied with the prelitigation notice provisions of section H of this rule.

B. Class action maintainable. An action may be maintained as a class action if the prerequisites of section A of this rule are satisfied, and in addition the court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to this finding include:

B.(1) The extent to which the prosecution of separate actions by or against individual members of the class ~~would~~ creates a risk of:

B.(1)(a) Inconsistent or varying adjudications with respect to ~~individual~~ members of the class which would establish incompatible standards of conduct for the party opposing the class; or

B.(1)(b) Adjudications with respect to ~~individual~~ members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; ~~or~~

B.(2) ~~The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final~~ The extent to which the relief sought would take the form of injunctive relief or corresponding declaratory relief with respect to the class as a whole; ~~or~~

B.(3) The ~~court finds that the~~ extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members~~, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include: (a)~~;

B.(4) ~~t~~The interest of members of the class in individually controlling the prosecution or defense of separate actions;

~~b~~B.(5) ~~t~~The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

~~c~~B.(6) ~~t~~The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

~~d~~B.(7) ~~t~~The difficulties likely to be encountered in the management of a class action that will be eliminated or significantly reduced if the controversy is adjudicated by other available means; and

~~e~~B.(8) ~~w~~Whether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class~~; and (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal~~.

C. Determination by order whether class action to be maintained.

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether and with respect to what claims or issues it is to be so maintained and~~, in action pursuant to subsection (3) of section B of this rule, the court~~ shall find the facts specially and state separately its conclusions thereon. An order under

this section may be conditional, and may be altered or amended before the decision on the merits.

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relief upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

D. Dismissal or compromises of class actions; court approval required; when notice required. ~~A~~ Any action filed as a class action in which there has been no ruling under subsection C.(1) of this rule and any action ordered maintained as a class action shall not be voluntarily dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to some or all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise ~~to give any~~ of such compensation has been made. If the statute of limitations has run or may run

against the claim of any class member, the court may require appropriate notice.

E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument, including precertification determination of a motion made by any party pursuant to Rules 21 or 47 if the court concludes that such determination will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

E.(2) Requiring, for the protection of ~~the members of the class~~ class members or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all ~~of the~~ class members of any step in the action, ~~or~~ of the proposed extent of the judgment~~,~~; ~~or~~ of the opportunity of class members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses~~,~~ or otherwise to come into the action, or to be excluded from the class;

E.(3) Imposing conditions on the representative parties, class members, or ~~on~~ intervenors;

E.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and

that the action proceed accordingly;

E.(5) Dealing with similar procedural matters.

F. Notice ~~**required; content; statements of class members required; form; content; effect of failure to file required statement**~~ **and exclusion**.

F.(1) When ordering that an action be maintained as a class action under this rule, the court shall direct that notice be given to some or all members of the class under subsection E.(2) of this rule, shall determine ~~whether,~~ when~~,~~ and how this notice should be given ~~under subsection E.(2) of this rule~~ and shall determine whether, when, how, and under what conditions putative members may elect to be excluded from the class. The matters pertinent to these determinations ordinarily include: (a) the nature of the controversy and the relief sought; (b) the extent and nature of any member's injury or liability; (c) the interest of the party opposing the class in securing a final resolution of the matters in controversy; (d) the inefficiency or impracticality of separately maintained actions to resolve the controversy; (e) the cost of notifying the members of the class; and (f) the possible prejudice to members to whom notice is not directed. When appropriate, exclusion may be conditioned on a prohibition against institution or maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separately maintained action of any judgment rendered in favor of the class from which exclusion is sought.

~~F.(1)(a) Following certification, in any class action maintained under subsection (3) of section B of this rule, the court by order, after hearing, shall direct the giving of notice to the class.~~

~~F.(1)(b) The notice, based on the certification order and any amendment of the order, shall include:~~

~~F.(1)(b)(i) A general description of the action, including the relief sought, and the names and addresses of the representative parties;~~

~~F.(1)(b)(ii) A statement that the court will exclude any member of the class if such member so requests by a specified date;~~

~~F.(1)(b)(iii) A description of possible financial consequences on the class;~~

~~F.(1)(b)(iv) A general description of any counterclaim being asserted by or against the class, including the relief sought;~~

~~F.(1)(b)(v) A statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;~~

~~F.(1)(b)(vi) A statement that any member of the class may enter an appearance either personally or through counsel;~~

~~F.(1)(b)(vii) An address to which inquiries may be directed; and~~

~~F.(1)(b)(viii) Other information the court deems appropriate.~~

~~F.(1)(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.~~

~~F.(1)(d) Members of the class shall be given the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort.~~

~~F.(1)(e) For members of the class not given personal or mailed notice, the court shall provide a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. The means of notice may include notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups, or any other means reasonably calculated to provide notice to class members of the pendency of the action.~~

~~F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members. The court may also direct that separate and distinctive notice be included with a regular mailing by the defendant to the class members who are current customers or employees of the defendant.~~

~~F.(1)(g) The court may order, as an alternative to the order and direction under paragraph (f) of this subsection, that a defendant who has a mailing list of class members, including those who are or were current customers or employees of the defendant, provide a copy of that list to the representative parties. The representative parties shall be required to pay the reasonable costs of generating, printing or duplicating the mailing list.~~

~~F.(1)(h) The court may order a defendant who has a list of former customers or employees to provide that list to the representative parties. The court may further order that a separate and distinctive notice be included with a regular mailing by the defendant to current customers or employees of the defendant.~~

~~F.(2) Prior to the final entry of a judgment against a defendant the court shall request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from~~

~~sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court, assessable court costs, and an award of attorney fees, if any, as determined by the court.~~

~~F.(3) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for each claim.~~

F.~~(4)~~(2) ~~Except as otherwise provided in this subsection, the~~ Plaintiffs shall bear ~~the expense~~ costs of ~~notification~~ any notice ordered prior to a determination of liability. The court may, ~~if justice requires~~ however, order that ~~the~~ defendant bear ~~the expense of notification~~ all or a specified part of the costs of any notice ~~to the current customers or employees of the defendant~~ included with a regular mailing by ~~the~~ defendant to its current customers or employees. The court may hold a ~~preliminary~~ hearing to determine how the costs of such notice shall be apportioned.

F.~~(5)~~(3) No duty of compliance with due process notice requirements is imposed on a defendant by reason of the defendant including notice with a regular mailing by the defendant to current customers or employees of the defendant under this section.

F.~~(6)~~(4) As used in this section, "customer" includes a

person, including but not limited to a student, who has purchased services or goods from a defendant.

G. Commencement or maintenance of class actions regarding particular issues; ~~division of class;~~ subclasses. When appropriate~~:~~ ~~G.(1)~~ ~~A~~an action may brought or ~~ordered~~ maintained as a class action with respect to particular claims or issues~~;~~ or ~~G.(2) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly~~ by or against multiple classes or subclasses. Each subclass must separately satisfy all requirements of this rule except for subsection A.(1).

H. Notice and demand required prior to commencement of action for damages.

H.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of ~~subsection (3)~~ of sections A and B of this rule, the potential plaintiffs' class representative shall:

H.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

H.(1)(b) Demand that such person correct or rectify the alleged wrong.

H.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, in the case of a corporation or limited partnership not authorized to transact

business in this state, to the principal office or place of business of the corporation or limited partnership, and to any address the use of which the class representative knows, or on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

* * * * *

M. ~~**Judgment; inclusion of class members; description; names**~~ **form of judgment**. The judgment in an action ordered maintained as a class action ~~under subsections (1) or (2) of section B of this rule~~, whether or not favorable to the class, ~~include and~~ shall specify or describe those ~~whom the court finds~~ found to be members of the class~~. The judgment in an action maintained as a class action under subsection (3) of section B of this rule, whether or not favorable to the class, shall include and specify by name those to whom the notice provided in section F of this rule was directed, and who have not requested exclusion and whom the court finds to be members of the class, and the judgment shall state the amount to be recovered by each class member~~ or who, as a condition of exclusion, have agreed to be bound by the judgment. If a money judgment is entered in favor of a class it shall when possible identify by name each member of the class and the amount to be recovered thereby.

* * * * *

RULE 36
GENERAL PROVISIONS GOVERNING DISCOVERY

* * * * *

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~~a) that the discovery not be had; (~~2~~b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (~~3~~c) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (~~4~~d) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (~~5~~e) that discovery be conducted with no one present except persons designated by the court; (~~6~~f) 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~~g) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (~~9~~h) 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 party may disclose materials or other information covered by a protective order issued under subsection (1) above to a lawyer representing a client in a similar or related matter if the party first obtains a court order, 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 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.

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.

* * * * *

<u>COMMENT</u>

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 added provides 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 added to this subsection makes 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 added to this section 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 reorganized into two distinct subsections. 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 prior language to avoid possible confusion when another jurisdiction might not have counties or where courts are styled differently from those of Oregon. 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 prior language to make the wording consistent with 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.

* * * * *

<u>COMMENT</u>

68 A.(2). The purpose of this 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.

DEFAULT ORDERS AND JUDGMENTS
RULE 69

A. Entry of order of default; failure to appear for trial.

A.(1) Default order. 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 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.

A.(2) Default order on failure to appear for trial. When a party who has filed an appearance fails to appear for trial, the court may enter an order of default against the non-appearing party without further notice.

A.(3) Default judgment on failure to appear for trial. When an order of default has been entered pursuant to subsection A.(2), the court may, without taking evidence, enter a judgment

by default against the non-appearing party on the basis of the pleadings filed by the appearing party or parties; provided that the court, in its discretion, may require evidence in support of a judgment by default by hearing, jury trial, order of reference, affidavits, or other proceedings. The judgment by default may be entered on the trial date or at such later time as the court may deem appropriate.

A.(4) **Notice of default judgment on failure to appear for trial.** The clerk shall mail notice of the date of entry of the judgment in the register as required by Rule 70 B.(1) and also to the attorney of record for the non-appearing party, or if there is no such attorney, to the non-appearing party.

* * * * *

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.

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.

Agnes Marie Petersen
Robert P. VanNatta

VanNatta and Petersen
Attorneys At Law
P.O. Box 748 • 222 S. First Street
St. Helens, Oregon 97051

Phone: (503) 397-4091
FAX: (503) 397-6582

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.

Agnes Marie Petersen
Robert P. VanNatta

VanNatta and Petersen
Attorneys At Law
P.O. Box 748 • 222 S. First Street
St. Helens, Oregon 97051

Phone: (503) 397-4091
FAX: (503) 397-6582

---

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:

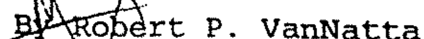
1) You have greatly increased the amount of paperwork required to accomplish any given task.

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

D:\RN\LET-GH\HOLLAND.LET

P. O. Box 12519
1149 Court Street NE
Salem, OR 97309-0519

Telephone:
Salem 503/588-0050
Portland 503/227-5636
Oregon 800/452-7862
FAX 503/588-0052

Portland Office
503/227-3730
FAX 503/227-0462

OFFICERS

Chairman of the Board
JOAN AUSTIN
A-dec, Inc.

First Vice-Chairman
RICHARD ALEXANDER
Viking Industries

President
RICHARD M. BUTRICK

Treasurer
JAMES BARRI
Bank of America Oregon

Secretary
BRUCE O'NEIL
West One Video

Immediate Past Chairman
RIPLEY W. GAGE
Gage Industries

*CHUCK CHACKEL
KUGN Radio

*ROY MARVIN
Precision Castparts

*MORTON MICHELSON
West Linn, Oregon

*DIANA SNOWDEN
Pacific Power & Light

*BILL THORNDIKE, JR.
Medford Steel/Div CSC, Inc.

*District Vice-Chairmen

MAJOR POLICY COMMITTEES

Education Excellence
Environment
Health Care
Labor Law & Human Resources
Retail Council
Revenue & Taxation

AFFILIATED ASSOCIATIONS

Oregon Association of Realtors
Oregon Chamber Executives
Oregon Restaurant Association
Oregon Small Woodlands Association
Oregon Soft Drink Association
Oregon Trucking Associations, Inc.
Portland Advertising Federation

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.

KENNEDY, KING & ZIMMER
ATTORNEYS AT LAW
2600 PACWEST CENTER
1211 S.W. FIFTH AVENUE
PORTLAND, OREGON 97204-3726

JACK L. KENNEDY
GARR M. KING
GARY J. ZIMMER
SUSAN E. WATTS
JOSEPH C. ARELLANO†
DANIEL M. RICKS
GEORGE W MCKALLIP, JR.*
VINCENT J. BERNABEI*
TODD L. VAN RYSSELBERGHE
DAVID E. HULL
SHAWN L. KOCH

AREA CODE 503
TELEPHONE 228-6191
FAX 228-0009

*ALSO ADMITTED TO WASHINGTON BAR

†ALSO ADMITTED TO NEW YORK BAR

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.

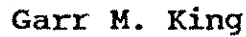
CIBA-GEIGY, headquartered in Ardsley, New York, is a leading developer and manufacturer of healthcare, agricultural, and industrial products.

KENNEDY, KING & ZIMMER
ATTORNEYS AT LAW

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

Very truly yours,

KENNEDY, KING & ZIMMER



Garr M. King

GMK:pw:1112

RECEIVED
NOV 1 8 1992
KANTOR AND SACKS

BIOJECT

BIOJECT INC.
7620 S.W. BRIDGEPORT ROAD
PORTLAND, OREGON 97224
TELEPHONE: (503) 639-7221
FAX: (503) 624-9002

CANADA OFFICE
BIOJECT MEDICAL SYSTEMS LTD.
WORLD TRADE CENTRE
650-999 CANADA PLACE
VANCOUVER, B.C. V6C 3E1
TELEPHONE: (604) 669-8234
FAX: (604) 681-2634

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

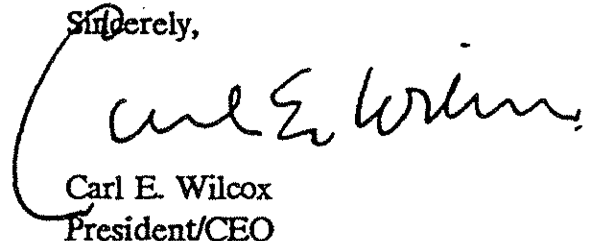
November 17, 1992

"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\orep.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\COV6-1.044]

DUNN, CARNEY, ALLEN, HIGGINS & TONGUE

ATTORNEYS AT LAW

851 S. W. SIXTH AVENUE, SUITE 1500
PACIFIC FIRST FEDERAL BUILDING
PORTLAND, OREGON 97204-1357
FACSIMILE (503) 224-7324
TELEPHONE (503) 224-6440

CENTRAL OREGON OFFICE
700 N.W. HILL STREET
BEND, OREGON 97701
FACSIMILE (503) 389-6907
TELEPHONE (503) 382-6241

ROBERT L. ALLEN
J. WILLIAM ASHBAUGH*
[illegible]LEY O. BAKER
[illegible]THAN A. BENNETT*
[illegible]RT F. BLACKMORE
[illegible]ERT G. BOOTSMA
[illegible]HARD T. BORST
WILLIAM H. CAFFEE
JOHN C. CAHALAN
ROBERT R. CARNEY
GEORGE J. COOPER
ANDREW S. CRAIG
I. KENNETH DAVIS
JOHN C. DEVOE
KITRI C. FORD* **
MICHAEL J. FRANCIS*
NANCY R. GREENE
BRYAN W. GRUETTER**
JACK D. HOFFMAN
ERIC A. KEKEL
MARSHA MURRAY-LUSBY

ROBERT L. NASH**
GREGORY C. NEWTON††
JEFFREY F. NUDELMAN*
JOAN O'NEILL P.C.*
GILBERT E. PARKER
ROGER W. PERRY**
HELLE RODE
CHARLES D. RUTTAN
STACI L. SAWYER
G. KENNETH SHIROISHI††*
JAMES G. SMITH
DONALD E. TEMPLETON*
THOMAS H. TONGUE
DANIEL F. VIDAS
ROBERT K. WINGER

* ADMITTED IN OREGON AND WASHINGTON
†† ADMITTED IN OREGON AND CALIFORNIA
** 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

RECEIVED
NOV 20 1992
KANTOR AND SACKS

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.

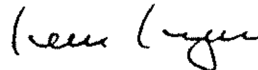
The proposed amendment to my knowledge has not been adopted in any state. There is no body of existing law as to the effect of the proposed amendment. If the proposed change were to be adopted, the result almost certainly would be an increase in Oregon's litigation to determine the confidentiality of 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]

1
2
3
4 COUNCIL ON COURT PROCEDURES
5
6
7 December 12, 1992
8
9
10 Henry Kantor, Chairman
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 COUNCIL MEMBER ATTENDEES

2 Hon. Richard L. Barron

3 Susan G. Bischoff

4 William D. Cramer, Sr.

5 Hon. Robert Durham

6 Hon. Susan B. Graber

7 Bruce C. Hamlin

8 John E. Hart

9 Lafayette G. Harter

10 Bernard Jolles

11 Henry Kantor

12 Richard T. Kropp

13 David R. Kenagy

14 Hon. Winfrid K.F. Liepe

15 Ronald L. Marceau

16 Hon. Robert B. McConville

17 Michael V. Phillips

18 Hon. Charles A. Sams

19 Hon. William C. Snouffer

20 Janice M. Stewart

21 Hon. Elizabeth Welch

22

23

24

25

1 P R O C E E D I N G S
2 MR. KANTOR: As you will notice, we have a
3 court reporter present this morning. Would you like to
4 give your name?
5 THE REPORTER: My name is Tammy
6 Aufdermauer.
7 MR. KANTOR: And what firm are you with?
8 THE REPORTER: Johnson, Beovich, Kirk, May
9 & Friend.
10 MR. KANTOR: I want you to know that the
11 Johnson firm has provided a court reporter for us at no
12 charge to the council, which we appreciate, a little pro
13 bono effort of their own, not really a plug for their
14 services, but they were nice to offer and we appreciate
15 it.
16 Because this is the meeting at the end of
17 the year where we take final action on proposed rules, it
18 seemed appropriate for us to have a court reporter present
19 so that everything gets recorded properly, including the
20 votes we take on the various matters.
21 Because we have a court reporter here for
22 the first time and someone who is not necessarily familiar
23 with each of us, I'm afraid I'm going to have to ask you
24 to identify yourself before you speak to a particular
25 subject. I realize we're probably not going to be perfect

1 in that, but we'll try to make an effort and do the best
2 we can. I have asked the court reporter to interrupt if
3 she needs to, but otherwise to allow us to do our typical
4 business as best we can.
5 We have a lot of items to get through
6 today. As you know, the expectation is that this meeting
7 will last more than just the morning and we have provided
8 for lunches for all the council members and the staff and
9 the court reporter. Unfortunately, we are not able to
10 provide lunches for people from the public, but we will
11 certainly give you time if necessary.
12 This is a public meeting, one of the
13 statutorily required public meetings in the congressional
14 district, and so we will make a special effort to make
15 sure that the people who come today will have an
16 opportunity to present their views on the issues before
17 the council on today's agenda.
18 The first item is approval of the minutes.
19 I hope everyone has had an opportunity to read the
20 minutes, and is there a motion to approve the minutes?
21 MR. HART: So move.
22 MR. KANTOR: Is there a second?
23 MR. HAMLIN: I will second it.
24 MR. KANTOR: Absent opposition, the minutes
25 will be approved.

1 Maury, is there any old business that we
2 have to deal with prior attending to our major matters at
3 hand?
4 MR. HOLLAND: Not that I'm aware of.
5 MR. KANTOR: Anyone else here present aware
6 of any old business?
7 JUDGE BARRON: That was Maury Holland.
8 MR. KANTOR: As we approach the main items
9 on the agenda today, it's important for us to realize that
10 we have heard a substantial amount of testimony and read a
11 lot of literature about the various subjects. John Hart
12 made a suggestion at the last meeting which we thought was
13 a pretty good idea, to limit the amount of time we were
14 going to spend on any individual item to a maximum of one
15 hour. I realize if we spent an hour on everything, we
16 would get ourselves in trouble, but I don't think there is
17 any risk of that.
18 We certainly want the opportunity for
19 people to speak, both from the public and members of the
20 council, and to engage in whatever discussion and debate
21 that may be appropriate. Toward that end, however, we are
22 going to ask the members of the public, limit themselves
23 as much as possible, particularly to the extent they have
24 appeared before and presented testimony on the same issues
25 that they're here to address today the council does not

1 want to hear repetition.
2 At the same time, if there are new comments
3 and new issues, we welcome them, but we appreciate where
4 at all possible being as brief as possible.
5 The first item on the agenda concerns the
6 fact that at the last meeting there was not a quorum
7 present, and while the number of council members present
8 were unanimous in their approval of putting the Rule 32
9 and Rule 69 changes on today's agenda, we weren't able to
10 take official action because there wasn't a quorum
11 present.
12 The first question, and maybe we can do
13 this simply unless people would like to discuss this, I
14 would like to invite a motion that the proposals for Rule
15 32 and Rule 69 be put on the agenda for today's meeting so
16 that we can get to them on the merits.
17 MR. JOLLES: So move.
18 MR. KANTOR: Is there a second?
19 JUDGE LIEPE: Second.
20 MR. KANTOR: Is there any discussion?
21 Those in favor?
22 CHORUS OF COUNCIL MEMBERS: Aye.
23 MR. KANTOR: Opposed? Unanimous.
24 When we get to the individual agenda items,
25 unless -- we may have to take a roll call unless it's very

1 clear either unanimous or that there is a small minority
2 on whichever side so we can identify votes.
3 Also, to the extent people decline to vote,
4 abstain on a particular issue, if you would identify
5 yourselves at that time, we would appreciate it.
6 Maury, I thought I would ask you to cover
7 some of the subjects that we don't have a subcommittee on
8 just to make sure we know what we're voting on, even
9 though you prepared a careful memoranda. Rule 7, if you
10 could just briefly tell everybody what we're voting on
11 without any lengthy discussion.
12 MR. HOLLAND: Sure. Added language to the
13 summons warning, the added language being shown on Page 1,
14 2, and 3 of the set of tentatively adopted amendments
15 highlighted merely giving -- adding the information about
16 the Oregon State Bar's Referral Service and the phone
17 number. Beyond that, a very minor amendment on Page 3 to
18 7E to make that consistent with a statutory provision that
19 permits certain employees of the Department of Justice --
20 wait a minute. Yes, the Department of Justice to serve
21 processes and summons. That's all there is in Rule 7.
22 The brief staff comments, proposed staff
23 comments, are on Page 4 and they say little more than just
24 to repeat what the language of the amendment does.
25 MR. KANTOR: Maury, I think in the package

1 of materials that were passed around today there was a
2 letter from -- Let's see, I've lost that.
3 MR. HOLLAND: Yes, Mr. Van Natta, I believe
4 it was.
5 MR. KANTOR: Has everyone had a chance to
6 see that? Is there anyone here from the public here to
7 speak on Rule 7?
8 JUDGE BARRON: The only comment I had,
9 although I don't normally agree with everything Mr. Van
10 Natta does, I thought he made some valid points in there
11 and I thought that part about adding the thing to the
12 summons about contacting Oregon Referral Service should be
13 out. The Bar may change that language should it become
14 obsolete. I don't think it's necessary, so I'll move that
15 that part of Rule 7 be deleted.
16 MR. JOLLES: I can't hear. What was the
17 motion?
18 JUDGE BARRON: To delete the part in Rule 7
19 that says, if you need help, contact the Oregon State
20 Bar's Lawyer Referral Service. I thought Mr. Van Natta's
21 letter made some good points.
22 MR. KANTOR: Just so there is
23 clarification, although I don't want to interrupt the
24 motion or any possible second, Bernie Jolles asked if this
25 was the entire amendment to Rule 7 and actually, no.

1 There is a second amendment, Rule 7E, which we're also
2 considering.
3 Is there a second to the judge's motion?
4 JUDGE LIEPE: Second.
5 MR. KANTOR: Discussion on the points
6 raised by Mr. Van Natta's letter or anything else?
7 Yes.
8 MR. MARCEAU: Ron Marceau. I share the
9 judge's concern and I wonder if the "call the Bar" can be
10 handled in the comment, if we can provide in the comment
11 that the summons should, or we encourage the summons to
12 say, If you need an attorney, call the Bar. Here's the
13 phone number as of now.
14 JUSTICE GRABER: I oppose motion and
15 support the inclusion of this wording in the summons. We
16 tend to think of people as being relatively sophisticated
17 about knowing that they ought to call a lawyer and knowing
18 how to find one, and it seems to me that we either ought
19 to delete it altogether or put it in the rule. I think
20 putting it in the comment and encouraging people to do it
21 won't solve the perceived problem that led to its
22 inclusion to begin with. I think we ought to accept it or
23 reject it, but I think a halfway measure isn't likely to
24 be particularly useful.
25 It seems to me there are enough people who

1 are unsophisticated that when they receive this legal
2 document, that's the thing that they're going to refer to,
3 maybe only, in trying to decide what to do next, what they
4 ought to do next, and I think there are a lot of people
5 who just don't know what they ought to do, and I think
6 this will be modestly helpful to some of them and I really
7 don't see much downside to it, frankly.
8 JUDGE BARRON: The number could change; I
9 don't know if that's important. The Bar could change the
10 name of that service. I mean why not add "Contact your
11 local legal aid service" if you're an indigent, or contact
12 somebody else. There is other referral services. I just
13 don't think it's necessary to add the language.
14 I agree with you that there are people who
15 may not be sophisticated, but we have had this language in
16 there for a long time and I think you're just promoting
17 one referral service, which is the Oregon State Bar.
18 MR. KANTOR: Janice?
19 MS. STEWART: Jan Stewart. There is an
20 alternative we discussed previously, which just simply
21 said, "Call the Oregon State Bar at", and then leave the
22 number blank and just have something in there saying
23 "Insert number" and you wouldn't have to change it every
24 time the number changed, but I agree with Judge Graber,
25 that the purpose is to put something in the official

1 notice that the defendant receives as to how help find a
2 lawyer. Maybe we don't want to have one referral servce
3 referred over another or put in a phone number of one that
4 may be going out of existence, but I do believe there
5 should be something, so I oppose the motion as stated.
6 MR. JOLLES: Question. Is it the law that
7 any -- the absence of any provision mentioned in Rule 7
8 renders the service -- summons and the service defective?
9 MR. KANTOR: The first time I thought about
10 that was as raised by the letter this morning, and I think
11 that does raise some genuine concern, at least in my
12 perspective. If somebody fails to put the correct
13 language in, are we rendering the summons inneffective,
14 and I don't think that was our purpose in adding
15 information to the summons, but of course there has to be
16 some teeth in it to make people do it.
17 MR. HAMLIN: This is Bruce Hamlin. I would
18 think that 7G, which says that "Error shall generally be
19 disregarded with respect to the form of the summons", et
20 cetera, would take care of that in most instances, but on
21 the other hand, C(3)(a), just to take an example, says
22 that it shall contain the notice in substantially the
23 following form, would at least create an argument about it
24 in some instances.
25 MR. KANTOR: I certainly don't think we

1 should underestimate the ability of a lawyer to pick up on
2 this issue and try to challenge a summons.
3 MS. STEWART: All practicing lawyers use
4 Stevens-Ness forms for summonses. I don't foresee this as
5 a problem that something is not going to be in the summons
6 and therefor there's going to be malpractice committed. I
7 don't think I have ever heard of a case dismissed -- I
8 haven't heard of a circumstance like that in the years
9 that I have been practicing, and I don't think that's
10 something to worry about.
11 JUDGE LIEPE: For some period after the
12 effective date of this rule, if it goes in effect, there
13 will be a number of lawyers' offices who will be operating
14 with copies they have run from the Stevens-Ness forms
15 previously in existence and for about a year or so until
16 this catches on, we'll end up with precisely the problem
17 we just mentioned and we'll end up with litigation that's
18 unnecessary.
19 MR. KANTOR: Also nowadays some people,
20 including my office, some people are putting this on word
21 processors.
22 MS. STEWART: I just think the Bar is doing
23 a very good job of getting out the changes that take place
24 by the legislature and whatnot and there is a very good
25 communication program, so generally they don't fall into

1 those types of traps these days. I think that's happening
2 less and less.
3 MR. CRAMER: Bill Cramer. I never really
4 thought about it until I got Van Natta's letter, but I'm
5 puzzled about how the State Bar Referral Service would
6 actually handle a request like this, particularly in
7 Portland. How many thousands of lawyers are they going to
8 refer this to and how do they select one or another if
9 that's what they do?
10 MR. KANTOR: Is anyone here knowledgeable
11 about how the referral system works? Janice?
12 MS. STEWART: I have some knowledge about
13 that. They have a procedure that they follow that lawyers
14 have indicated in what areas they're willing to accept
15 referrals, and the referral service I think takes three or
16 five names off that list and they circulate through it, so
17 they have a procedure that they use to deal with that.
18 MR. KANTOR: Bernie?
19 MR. JOLLES: I oppose the motion. I think
20 we ought to leave it. It seems to me that the argument
21 that we're going to have litigation because people will be
22 using their old summonses, which we probably will, means
23 that we can never amend Rule 7, it's set in stone for the
24 next 150 years, and I don't think that's the case. I
25 think what Bruce Hamlin pointed out that 7G would take

1 care of the situation if you used an old summons and you
2 had actual notice.
3 With respect to Van Natta's point about
4 we're institutionalizing the lawyer referral service, I
5 mean that -- so what? So what happens if they're
6 abolished? So you have some surplus there. It seems to
7 me the benefit of telling the defendant who may be poor or
8 uninformed or whatever that there is a place to go,
9 however long it exists, completely outweighs the fact that
10 you have a little -- you may have a little surplusage in
11 there if in 10 years the lawyer referral service is
12 eliminated, and the cost, I don't know what this big cost
13 factor is, but I suppose changing summonses, you have to
14 buy new summonses and that's a cost, but putting the extra
15 language in there and comparing that with the existing
16 summons, it seems to me it's infinitesimal, so I oppose
17 the motion and support the amendment.
18 MR. McCONVILLE: Robert McConville. I call
19 for the question.
20 MR. KANTOR: Any other discussion?
21 The motion is to delete from our further
22 consideration, I believe, the proposed amendment to Rule
23 7C(3). Those in favor?
24 Maybe we ought to get them identified.
25 Let's just start here and go around.

1 JUDGE BARRON: Rick Barron.
2 JUDGE LIEPE: Winn Liepe.
3 MR. KROPP: Dick Kropp.
4 MR. MARCEAU: Ron Marceau.
5 MS. BISCHOFF: Susan Bischoff.
6 MR. CRAMER: Bill Cramer.
7 MR. HART: John Hart.
8 MR. KANTOR: Those opposed? Judge, why
9 don't you start.
10 JUDGE SNOUFFER: Bill Snouffer.
11 JUSTICE GRABER: Susan Graber.
12 JUDGE McCONVILLE: Robert McConville.
13 MR. JOLLES: Bernie Jolles.
14 JUDGE SAMS: Chuck Sams.
15 MR. Kenagy: Dave Kenagy.
16 MR. HARTER: Lief Harter.
17 JUDGE DURHAM: Robert Durham.
18 MS. STEWART: Jan Stewart.
19 MR. HAMLIN: Bruce Hamlin.
20 MR. PHILLIPS: Mike Phillips.
21 MR. KANTOR: Henry Kantor.
22 MS. STEWART: Did you count amongst all the
23 name calling? Who won?
24 MR. KANTOR: The motion failed.
25 We're still considering the balance of the

1 proposed change to Rule 7. Susan?

2 JUSTICE GRABER: I move that we terminate

3 debate and vote on the main motion to change Rule 7 as in

4 our materials.

5 MR. KANTOR: I guess what we really need is

6 a motion to vote on it.

7 JUSTICE GRABER: Motion to vote, is that

8 what you want? I move that we vote on Rule 7 as in our

9 materials.

10 JUDGE McCONVILLE: Second.

11 MR. KANTOR: Discussion on the balance of

12 Rule 7? Those in favor say "aye."

13 CHORUS OF COUNCIL MEMBERS: Aye.

14 MR. KANTOR: Opposed?

15 CHORUS OF COUNCIL MEMBERS: No.

16 MR. KANTOR: Let's just count the opposing

17 votes.

18 JUDGE BARRON: Rick Barron.

19 MR. HART: John Hart.

20 MR. KANTOR: All right; any abstentions?

21 Ron Marceau.

22 MR. MARCEAU: Not abstention. I'm a no, if

23 you're counting nos.

24 MR. KANTOR: That adopts the changes to

25 Rule 7.

1 MR. HAMLIN: Henry, before we move into the
2 next rule, it might be worth spending just a brief moment
3 on the comments, because as was pointed out, the materials
4 that were sent out to everybody and I think we all know
5 the staff comments are not officially adopted by the
6 council, but nonetheless, this is a logical time for us to
7 tell or to point out things that we might see in the staff
8 comment that we don't think accurately reflect the rule,
9 and it happens that I don't have anything with Rule 7, but
10 I thought if we covered each the staff meetings
11 immediately following the rule, then we might eliminate
12 possible errors.
13 MS. BISCHOFF: Point of order. I
14 understood we were voting on a motion on whether we were
15 going to vote on Rule 7, so what was that vote? Because
16 if we were voting on Rule 7, I would like to change my
17 vote to no.
18 MR. KANTOR: I think that we were unclear.
19 I'm concerned; I'm sorry. I certainly thought that the
20 proposal was to -- I think we had three nos and everyone
21 else said yes. Let's make it clear.
22 Did everyone else who voted understand that
23 we were voting on the merits?
24 MR. CRAMER: No, I didn't.
25 MR. KANTOR: I think we need to call for a

1 new vote. Too much confusion.

2 MR. KENAGY: In answer to the Chair's

3 question, I also understood we were voting on the motion

4 to cease debate, although it would not have affected my

5 vote if we were voting on something else.

6 MR. KANTOR: Allow me to invite a motion to

7 adopt the changes to Rule 7 that are in the materials that

8 we are considering on today's agenda.

9 JUSTICE GRABER: I'll try again and so

10 move.

11 JUDGE McCONVILLE: Second.

12 MR. KANTOR: Discussion? We'll vote.

13 Those in favor say "aye."

14 CHORUS OF COUNCIL MEMBERS: Aye.

15 MR. KANTOR: Those opposed?

16 CHORUS OF COUNCIL MEMBERS: No.

17 MR. KANTOR: Let's count the opposed.

18 JUDGE BARRON: Rick Barron.

19 MR. KROPP: Dick Kropp.

20 MR. MARCEAU: Ron Marceau.

21 MS. BISCHOFF: Susan Bischoff.

22 MR. CRAMER: Bill Cramer.

23 MR. HART: John Hart.

24 MR. KANTOR: Any abstentions? The motion

25 passes, although we'd better count, I think, just to be

1 sure. Just raise hands, those in favor. I'll let Maury
2 be the official counter.
3 MR. HOLLAND: I count 13.
4 MR. KANTOR: Any further discussion on the
5 staff comments to Rule 7? I think Bruce's idea is a good
6 one, to take them up as we go along.
7 MR. JOLLES: What is the effect of staff
8 comments?
9 MR. HAMLIN: What we learned in the case
10 that had to do with default judgments is that even though
11 the staff comments are not officially adopted either by
12 the council or the legislature in considering the work of
13 the council, the Court will likely give them substantial
14 weight, and for that reason they ought to be as accurate
15 as possible.
16 MR. MARCEAU: Why aren't they officially
17 adopted?
18 MR. KANTOR: I'm not sure, other than to go
19 back in history, and I'm not aware that they ever have
20 been.
21 MR. MARCEAU: I guess I've always thought
22 that they were at least authoritative. I guess I probably
23 also thought that they were adopted by the council, and I
24 thought it wasn't necessary for the legislature to adopt
25 them because if the legislature does not act, the

1 promulgations become effective.

2 JUDGE LIEPE: Regarding staff comments or

3 any other comments or legislative history, I think it's

4 very important to separate the legislation, which is what

5 we're doing, from what is said about the legislation. It

6 may be that what is said about the legislation, the

7 legislative history, is going to be helpful in determining

8 ambiguities, but whatever we promulgate as a rule should

9 stand by itself without -- and should be sufficient and

10 sufficiently clear without any staff comments.

11 Staff comments are simply intended to be of

12 help for those who want to read them in understanding the

13 rules, but they don't effect or change or add or detract

14 from a rule, and I think it would be a mistake for this

15 council to adopt staff comments formally and give them

16 some recognition beyond that function, and so I think if

17 there is a problem with what we're adopting in the rule,

18 let's fix the rule, but not do it by staff comment.

19 MR. KANTOR: Maury, did you have a comment

20 about that?

21 MR. HOLLAND: Yes. Since this matter has

22 come up, I thought of myself as the draftsperson for this

23 group, not writing a personal memo. I think the title of

24 these comments is perhaps a little misleading. I thought

25 staff comments would to me imply the comments by the staff

1 that might include practice pointers and "watch out for
2 this," and that sort of thing, but if they are -- I think
3 they should be more appropriately called council notes, as
4 the federal rules committee, they are called notes, and
5 the only -- the most legitimate and useful -- if not the
6 only useful thing these things can do is to express the
7 purpose or intent behind an amendment where the amendment
8 doesn't speak for itself in terms of what the council had
9 in mind where there is a clear example. For example,
10 Judge Liepe, what were you up to and what was the council
11 up to at the last meeting with Rule 69? I think it's
12 useful perhaps to lawyers and judges working with this to
13 know that we were dealing with Van Dyke and so forth, so
14 that's what I tried to focus on, the intent or
15 understanding.
16 Another example of that, and it has to be
17 the council's intent, is that in this Rule 36 with
18 protective orders, modification of protective orders, when
19 we get to it, I think there may be some discussion. I put
20 down what I remembered. What most people said is that
21 this provision for discovery sharing would not apply to a
22 protective order that was entered by stipulation or
23 agreement. That was very important. The rule doesn't say
24 that, but the comments do as they now stand, and therefore
25 it's very important that the majority at least of the

1 council agree with that.

2 Those are my notes, because there was a big

3 debate about what happens with these agreed-to protective

4 orders and so forth.

5 MR. KANTOR: Ron Marceau?

6 MR. MARCEAU: It seems to me there is a

7 difference between the status that Maury Holland would

8 give the council notes -- I think that's a good label --

9 and the status that Judge Liepe would give them, and I

10 think they're far more than legislative history and I

11 guess I also think that they should be accorded the status

12 or stature that Maury Holland has described.

13 Does anyone else wonder about that?

14 MR. HAMLIN: I agree with the judge. I

15 don't think that the comments should be officially adopted

16 because I think to do so would encourage us to imprecision

17 in the language in the rule itself, and to try and bury

18 things in the comments to clarify, I don't think we ought

19 to be doing that.

20 MR. KANTOR: Bernie Jolles?

21 MR. JOLLES: I don't know how I feel about

22 it, but if we do that, then what -- if we don't adopt the

23 comments, then they go in and we don't know whether that's

24 our comment or not. If we do adopt them, we're giving

25 them some stature that maybe some people don't want them

1 to have. And if we don't adopt them, then Maury Holland
2 or anybody else can put anything in there they want and it
3 may or may not be accurate.
4 I think we have to decide what we're going
5 to do here. If we just leave it without doing anything,
6 then it's completely up in -- any court can't say anything
7 about that.
8 MR. KANTOR: Let me give just one
9 historical comment, then I'll pass it back out for more
10 discussion. We did have a discussion like this a few
11 years ago. I know Ron was there, and I think we had a
12 similar problem with trying to find out quite what to do,
13 and Fred Merrill talked to us about why he was preparing
14 staff comments in general and sometimes he did and
15 sometimes he didn't, and that there was a difference in
16 publication as well. Some publishers who publish our
17 rules include the staff comments and some do not, and so
18 there was some concern.
19 My recollection of where we ended up -- and
20 it's only my recollection -- is that essentially we
21 exercise veto power. If we noticed something wrong, we
22 would ask the executive director to remove it, but we
23 otherwise didn't mess with it very much.
24 Judge Graber?
25 JUSTICE GRABER: I would also oppose our

1 official adoption of the comments. If nothing else, it
2 will prolong our task immeasurably because if we were to
3 adopt them, we ought to spend the time and care on those
4 that we have spent over the past year on the much briefer
5 proposed amendments to the rules themselves. I'm not
6 concerned that we're going to end up with something
7 bizarre because Maury is our employee and he's supposed to
8 do what we ask him to do and if we ask him to make a
9 change, I presume that he will make that change, so I'm
10 not concerned that the council will be shocked by, and if
11 there were, I think we could call it back and fix it.
12 I don't have that sort of concern, but I
13 really do not want to see us get into the business of
14 trying to adopt officially a vast body of information that
15 we have --
16 MR. JOLLES: How would you fix it, Judge?
17 You would have to vote on it.
18 MR. CRAMER: I agree heartily with Judge
19 Graber. If -- we are putting the cart before horse. If
20 we were going to take this same careful study of the
21 comments that we take in these amendments, we should have
22 started at the very beginning instead of at the last
23 meeting. It's too late now to go back and pick apart
24 these comments. I think it would be crazy for us to
25 officially adopt them.

1 MR. KANTOR: I assume that one reason Maury
2 provided them to us was simply if somebody noticed
3 something wrong, we could comment on it.
4 MR. HOLLAND: In response to Bernie Jolles,
5 I would be delighted to act in response to suggestions
6 from even a single council member about typos or style, or
7 I have some sentences in there I want to clean up, that
8 sort of thing. On the other hand, when we get to a
9 substantive issue, such as for example the one I just
10 mentioned about whether this provision for modification of
11 protective orders does or does not, the intent is that
12 they apply in the case of only contested protective orders
13 or stipulated ones, my staff comments as written take a
14 clear position as to what the council's intent on that is,
15 just as Fred's did years ago with respect to Rule 69's
16 application to failure to show up at trial, and I think if
17 we ever got into that position where there was a
18 disagreement, then there would have to be probably -- the
19 Chair would have to invite a motion and there would be a
20 vote on the accuracy of the representation of the
21 council's intent as opposed to matters of detail and
22 style.
23 MR. KANTOR: Judge Durham?
24 JUDGE DURHAM: Robert Durham. I have a
25 concern that the charge and in effect the authority of

1 this body is to adpot rules, and if we attempt to adopt
2 something that is not a rule of civil procedure, we are
3 really dabbling beyond our authority; and secondly,
4 literally, I see no parallel. The legislature doesn't
5 adopt its own legislative history for its statutes, and
6 the way we ought to proceed is to simply adopt the rules,
7 pay attention and adopt rules as clearly drawn as we can
8 make it and move on.
9 I don't know whether you need a motion to not
10 adopt the commentary, or simply avoiding the point, but I
11 would like to move on. The day is going to run out.
12 MR. KANTOR: At the same time, I like
13 Bruce's idea. If people have comments about the comments,
14 let's hear them. If not today, certainly send a letter to
15 Maury making sure if you notice something in error that
16 you should get that corrected, particularly given that
17 Judge DeMuniz and other judges are going to be quoting
18 them from time to time. It's going to happen.
19 MR. HARTER: But if you have a reservation
20 about some issue that could be cleared up in the comments,
21 it will make a difference how you want to vote on
22 something.
23 MR. KANTOR: That could be true. Well,
24 Judge Liepe?
25 JUDGE LIEPE: I sort of agree with what you

1 said just a little bit ago, that in a sense the council
2 has veto power over what goes in staff comments, and if as
3 we go over some of these rules we see something in the
4 staff comments that we don't like, there isn't any problem
5 with the council members individually or as a group
6 saying, "No, we don't like this; we'd rather have it that
7 way." That doesn't mean we are adopting the staff
8 comments. That's just saying that while you're drafting
9 the staff comments, Executive Director, kindly keep in
10 mind this view, and that's all that we're saying, but
11 we're not adopting the staff comments as such. As you
12 say, we still have veto power, and also power to make,
13 obviously, suggestions regarding how he phrases it.
14 MR. KANTOR: Bernie Jolles?
15 MR. JOLLES: I agree with that. I just
16 want to know, if we follow that procedure, when the staff
17 comments attached to the rule that we adopt and it's to go
18 before a court, what use can a court legitimately make of
19 those comments? I mean, you have got housekeeping
20 comments and then you have got substantive comments, and I
21 think we need to resolve that, with all due -- I want to
22 move on, too, but I don't know what I'm doing here and
23 frankly I would like to.
24 MR. KANTOR: I think -- we can't decide how
25 judges are going to use these things. We can describe

1 them if we want to, but I don't think we can control what
2 a judge does. If they want to look at a staff comment or
3 something --
4 MR. JOLLES: I didn't mean it that way. I
5 wasn't proposing that we control it. I just wanted to
6 know what the effect is, what we think the effect is.
7 MR. KANTOR: Judge Sams?
8 JUDGE SAMS: I concur, we ought to move on,
9 but it seems to me we're reacting to that Van Dyke problem
10 alone. It's been there a long time, and it may come up in
11 the rules down the line, but I think in one case we
12 shouldn't get a knee-jerk reaction and try to change
13 everything.
14 MR. KANTOR: Let's give this some
15 consideration. This is something I think we can do
16 independent of our agenda today. This is something we can
17 take up later, although certainly if you see some comments
18 that present problems as to your votes today, I certainly
19 think we should discuss them today, but I think that might
20 be something we should study and make clear so that we
21 don't get into that problem again, and I think I'm going
22 to follow Judge Durham's suggestion and since this is not
23 on the agenda, we're going to move on.
24 The next item is Rule 32, the class action
25 rule. I know that there are some people here from the

1 public, members of the Bar who wish to address this issue.
2 I thought maybe I would ask Janice just to give us an
3 update.
4 Is there anything new regarding materials
5 or changes or anything else that we need to know about
6 before we hear testimony?
7 MS. STEWART: Well, you should have all
8 received some letters that came in in October from Legal
9 Aid Services and Judge Riggs, and there has been also a
10 recent letter from Phil Goldsmith to the subcommittee that
11 I don't know has been distributed. The defense bar really
12 has not had an opportunity to respond to basically the
13 compromise position that was adopted by the subcommittee,
14 and I think their comments in the most recent letters and
15 perhaps in their testimony will really address what has
16 happened in the last few months they have not really had
17 an opportunity to address before.
18 I think I'll also note for the committee,
19 since you probably don't have it, that Phil gave me an
20 update as to what was happening at the federal level with
21 respect to the proposed changes to the federal rule, and
22 of course as you know, many of the proposed changes to
23 Rule 32 are premised on some of those changes that are
24 being proposed to the federal rule, and he has advised
25 that at its meeting in late November, the Advisory

1 Committee of the Judicial Council discussed the most
2 recent draft and he enclosed that with me, but they're
3 still a long way away apparently from adopting it at the
4 federal level, and I don't know when that might occur,
5 maybe late next year sometime.
6 That draft does differ somewhat from the
7 prior proposal that we had in front of us. Not a lot, but
8 for example with respect to the notice, they make it quite
9 clear that notice is mandatory and they proscribe certain
10 things that should go into the notice which they had not
11 done before in the rule, so there are changes like that,
12 so they're still fiddling around at the federal level and
13 I guess what I should point out to you on the council is
14 that if we adopt what I consider to be the more
15 controversial changes to Rule 32, we will be the first
16 state I think to do so, and certainly will be ahead of the
17 federal rule in making those changes.
18 It causes me, frankly, a little bit of
19 concern to know that they're still fiddling around at the
20 federal level and I'm getting a little bit more cold feet,
21 shall we say, with respect to some of the changes that we
22 may have been talking about previously, so I think maybe
23 the best thing to do is to hear from some of the people
24 who are here from the public.
25 MR. KANTOR: I know that Mr. Goldsmith and

1 C(1).

2 JUDGE LIEPE: And also the addition in

3 C(1)?

4 JUSTICE GRABER: No, we did that already.

5 MS. STEWART: And Page 15, the changes to

6 H(1).

7 MR. HAMLIN: I will make that motion.

8 MR. JOLLES: Second.

9 MR. KANTOR: Any discussion? Those in

10 favor?

11 CHORUS OF COUNCIL MEMBERS: Aye.

12 MR. KANTOR: Opposed?

13 MS. STEWART: No.

14 MR. KANTOR: Any abstentions? The matter

15 passed. Any other class action Rule 32 issues?

16 Let's take a break here.

17 (A short recess was taken).

18 MR. KANTOR: We have some concerns. Not

19 everyone can stay for the whole meeting so I want to get

20 things done as quickly as possible. Some things are going

21 to take some time, and the next item on the agenda is the

22 Rule 36, the protective order issue.

23 I know that we have people here from the

24 public to address this issue and I can't, of course, ask

25 them more strongly than asking these words: Please do not

1 repeat what we have heard before. We have heard extensive
2 presentations on this issue and I'm going to ask the
3 council members to speak up if they feel this is getting
4 repetitive in case I've missed it. We really do not want
5 to have this go on unnecessarily by the same point-making.
6 There may be some new thoughts and comments that we need
7 to hear that will help us make the right decision.
8 Are there again any proponents who wish to
9 address the council? Do you have an order among
10 yourselves how you want to go?
11 Charlie Williamson will begin. It isn't
12 necessarily a per minute. We want you real brief.
13 MR. WILLIAMSON: I just want to bring your
14 attention to this proposal for the Oregon Coalition
15 Against Excessive Litigation. We understand there has
16 been a huge lobbying effort on the council, and I thought
17 you should now that perhaps it wasn't a great public,
18 spontaneous groundswell. You apparently have been the
19 brunt of about a hundred thousand dollars of the best
20 public relations lobbying efforts available in this state.
21 I thought you also should know that Mr. Gardner's biggest
22 lobbying client is Phillip Morris.
23 MR. KANTOR: Bill Gaylord, who has spoken
24 to us before.
25 MR. GAYLORD: Thank you. I have, and so I

1 will remind you that I have, but I'll try not to do it by
2 saying all the same things again.
3 I kind of feel like I may be in a somewhat
4 unique perspective on this issue because I may be the only
5 one in the room who has benefited from shared discovery
6 from other jurisdictions and sought and received an order
7 allowing me to share discovery from my cases with people
8 in other jurisdictions under the present rules. That may
9 not be true, but I look around and I don't know anybody
10 else who has.
11 The cases that this matters to in my
12 particular experience are the Honda all-terrain vehicle
13 cases. I think it is also instructive to think about the
14 breast implant cases which are -- seem to be a new flurry
15 of activity, even though some litigation was very
16 significant and successful six, seven, eight years ago but
17 was prevented from becoming public at the time because of
18 the protective orders that prevented the lawyers who got
19 the verdicts from telling anybody or sharing any of the
20 information that they gained in the discovery. It was
21 only when the same lawyers revisited the same issues
22 several years later with a very successful case in the San
23 Francisco area and then got a court to say, "The
24 protective orders do not exclude sharing discovery," that
25 the word got out and we all learned that breast implants

1 can be a dangerous thing.

2 I don't believe there is any good public
3 policy against sharing discovery in litigation. To the
4 extent there is good public policy against having the
5 existence of litigation take corporate secrets and spread
6 them around the public, we have protective orders. This
7 does not change the protective order rule. What this says
8 is that within the protective orders that can be granted
9 when legitimate trade secrets and competitive, sensitive
10 information is discovered, there is room in the courts and
11 the burden of proof is established in favor of sharing
12 discovery with other victims of injury by the same
13 mechanisms.

14 I think -- I want to comment briefly on the
15 things I have seen in the materials here today from a
16 variety of industry-interested persons. I think there is
17 a great deal of misunderstanding of what this proposed
18 change does inherent in those comments. I think the idea
19 this is somehow a threat to Oregon's business base is
20 poppycock. Can you imagine a responsible business person
21 -- and these are all responsible people, I'm sure --
22 imagine them saying that "I don't want to do business in a
23 state where if one person discovers the facts they need to
24 prove a case against me, that can be made known to other
25 people who are injured by my same conduct"? That's not my

1 idea of how business judgments are made anywhere, and I
2 just -- it's beyond belief that anybody would actually not
3 do business or be upset with doing business in Oregon if
4 we simply codify what ought to be the rule anywhere anyway
5 and probably is. I want to emphasize that I think this is
6 a very minor change we're talking about. When I took the
7 discovered documents in the Obert case before Judge R.B.
8 Jones who was here at the beginning of this year's session
9 and talked about this issue to you and asked him to
10 expressly permit us to share that information, we did not
11 ask -- I didn't ask to overturn the protective order
12 completely. Other public interest groups came in and did
13 that, but I asked for the permission to give the same
14 information to an organization that was a clearinghouse
15 for victims, for plaintiffs in those cases, and Judge
16 Jones, frankly, didn't bat an eye at the idea and thought
17 "Why would there be any doubt but that those people have
18 the right to access to this same information," and I
19 believe that's the usual effect of going into court and
20 asking for that, but what we don't have is a law that says
21 that our public policy places the burden of proof against
22 shared discovery on the party possessing shared discovery.
23 That's really all we're asking for in this change.
24 This doesn't mean that the flood gates of
25 information sharing are thrown open and all discovery of

1 all cases in the future will automatically go into the
2 hands of all people. Quite the contrary. It specifies
3 for the first time a procedural mechanism for going in and
4 asking for information and it says who the burden of proof
5 is on. In those exceptional cases where the documents in
6 question or where some part of the documents are
7 particularly sensitive, the burden of proof can be met;
8 the sharing of discovery won't take place and all of the
9 paranoias about corporate secrets will be avoided and the
10 secrets protected.
11 There has been discussion among you about
12 the effect of a stipulated protective order, and I have to
13 tell you, since the contest in the first of the ATV cases
14 that I had over the protective order and coming back in
15 and getting it modified afterwards, we, me and the others
16 I have been working with in those litigations, have not
17 gone in and fought on proctective orders since then. We
18 have stipulated to protective orders with a particular
19 provision in every one of the agreements that says
20 "Everybody agrees we can come back in after this
21 litigation and seek modification to allow sharing of
22 discovery," and when that happens the court retains
23 jurisdiction, and the burden of proof remains on the party
24 opposing it and no new showing of change of circumstance
25 is necessary later.

1 We have developed that as a paragraph that
2 protects us and says that we can go in and ask and are
3 currently going in and asking to determine shared
4 discovery on the additional roomful of material we
5 discovered in those cases. I'm not really troubled by the
6 idea that this would expressly be restricted to cases
7 where there has not been a stipulation to the protective
8 order as a stipulation to shared discovery. We are trying
9 to think of what effect it has on litigation resulting
10 from all this.
11 I suspect if it's clear that this change
12 did not permit a party to seek shared discovery if there
13 is a shared stipulated protective order, we'll have
14 resistance to stipulated protective orders in the first
15 place, and what I would do in my cases, I would go to
16 court whenever there is a request for a protective order
17 as a prerequisite for a request for production being
18 filed, I would say, "I'm not opposing their protective
19 order in general and what they're seeking but I'm opposing
20 any part that restricts me from shared discovery."
21 I'm asking that we can discover whatever we
22 get from other attorneys on the condition they have to
23 first sign into the protective order, so we would ask the
24 court to invoke this mechanism and put those provisions in
25 place.

1 MR. KANTOR: Wind up.
2 MR. GAYLORD: That's it.
3 JUDGE SNOUFFER: How do you enforce it
4 against an out-of-state attorney?
5 MR. GAYLORD: In the Obert case, Judge
6 Jones modified the protecive order. We asked permission
7 officially to share the information with an outfit that's
8 a member group of the organization of Trial Lawyers of
9 America and they by affidavit came before the court and
10 agreed to put themselves within the jurisdiction of this
11 court and agreed that anybody they give the information to
12 has to keep the protective order and be bound by it.
13 In other issues around the country, in the
14 Honda litigation, the usual ruling is where shared
15 discovery has been granted, if I get discovery from a
16 lawyer in Texas which has a protective order, I sign a
17 copy of his protective order and what I signed binds me to
18 the jurisdiction in that court.
19 I can tell you that legalistically
20 speaking, everybody always agrees in writing to be subject
21 to the jurisdiction of the court where the protective
22 order is issued and bound by the protective order.
23 Enforcement of that is another issue, probably beyond what
24 I know, except that I would observe that that's no
25 different, really, than a tremendous amount of litigation

1 that goes on in these kinds of cases because we're very
2 often talking about enforcing orders in other states where
3 the documents are a variety of different interstate issues
4 about what can be done and ordered Oregon and enforced by
5 a court here.
6 MR. KANTOR: Isn't it also true that often
7 lawyers involved in litigation of the cases in Oregon are
8 non-Oregon lawyers to begin with?
9 MR. GAYLORD: That happens very frequently.
10 All the lawyers seeking all the protective orders in all
11 the cases I'm familiar with by and large are from out of
12 state.
13 JUDGE SNOUFFER: Well, what can I do? I
14 mean, the Pennsylvania lawyer violates the protective
15 order; I say, "You're off this case; go back to
16 Philadelphia." What more can I do? The damage, the harm
17 has occurred; the documents are all over the east coast.
18 MR. GAYLORD: I suppose there are
19 actionable claims for remedies in that, theoretical
20 actionable claims. We have case laws saying when a doctor
21 discloses your physician-patient privileged information,
22 the doctor can be sued for doing that. I don't know what
23 the damages are and how you would make that action stick,
24 but it's the same kind of an idea, it sounds to me like.
25 MR. CRAMER: Have you run into the

1 question, the situation where the recipient of the
2 discovery is -- has a discovery claim filed against him to
3 reveal the documents that were under the protective order?
4 MR. GAYLORD: I'm not sure if I follow you.
5 You mean somebody in another jurisdiction --
6 MR. CRAMER: You have A and B who are the
7 first couple, and here's B who gets these documents under
8 a protective order. C comes along and files a discovery
9 claim against B demanding the documents that B received
10 under the protective order.
11 MR. GAYLORD: I haven't seen or heard of
12 litigation coming up that way. I have seen C come in and
13 say -- in their litigation against A, they say, "I want
14 the same things you gave B." What they don't have is any
15 way to verify what they got.
16 MR. CRAMER: The only reason I'm raising
17 this is because Steve Query (phonetic spelling) called me
18 up a couple days ago and said this very thing happened to
19 him. Representing the defendant, he had to go into the
20 second case and make a special appearance in order to
21 fight for his protective order.
22 MR. GAYLORD: That sounds like it may be
23 something inherent in protective orders, in the general
24 milieu of protective orders.
25 MR. KANTOR: Are there any other questions

1 from Mr. Gaylord?

2 MR. WILLIAMSON: If I could just answer

3 Judge Snouffer's question, I believe you could also hold

4 him in contempt and notify the Pennsylvania Bar

5 Association.

6 MR. KANTOR: Proponents' side? Mr. Foote?

7 MR. FOOTE: I'm Jeff Foote from Portland.

8 This year, I'm the president of the Trial Lawyers for

9 Public Justice Foundation, a national organization. Our

10 principal business, I guess, is to run a public interest

11 law firm, and in the last several years we have dealt with

12 a lot of these protective order issues through a project

13 we have. The first case was Bill's case, the Obert case

14 where we intervened in Judge Jones' courtroom and actually

15 lifted portions of the protective order in that case to

16 make the information public to consumer groups that we

17 represented.

18 This proposal does not go as far as we did

19 in that case and I was surprised a couple of days ago when

20 I learned that it was as controversial as it is because

21 it's really a fairly benign proposal to simply allow

22 lawyers that are pursuing the same litigation, the same

23 goal, if you will, to share information, and I guess the

24 only point I want to make is more and more we're dealing

25 with national litigation with these products and in some

1 cases there are massive numbers of cases such as with
2 breast implants and asbestos and some of the others, and
3 some cases you may be dealing with only 10 or 12 cases
4 around the country, but the ability to share discovery
5 amongst the plaintiffs' lawyers is just as important, and
6 all this rule does is put it us on the same playing field
7 as the defense bar because in most of these cases there is
8 a law firm somewhere that's sort of quarterbacking the
9 defense of these cases on behalf of whatever manufacturing
10 interest is involved, and there's nothing wrong with that;
11 that's an efficient way to handle the litigation, and
12 documents are certainly shared amongst the defense
13 attorneys without these sorts of difficulties, so all
14 we're really talking about doing is putting us on the same
15 playing field and cutting down the amount of time we're
16 spending in court arguing over discovery kinds of issues.
17 You know, going to court, seeking the discovery, dealing
18 with the objections, dealing with protective order issues
19 and that sort of stuff.
20 If one judge such as Judge Jones in the ATV
21 litigation has taken the time to go through the -- I
22 understand in that case -- thousands of documents to
23 determine what ought to be protected and what not, it
24 certainly doesn't make much sense to have Judge Barron
25 have to go through the same exercise down in Coos Bay a

1 couple months later when a simple procedural change like
2 this would allow the sharing, so I would encourage you to
3 pass the proposed change.
4 MR. KANTOR: Any other speakers on behalf
5 of the proposal?
6 Are there any speakers here who are going
7 to speak against the proposal?
8 MS. BAILEY: I would like to.
9 MR. KANTOR: Please identify yourself.
10 MS. BAILEY: My name is Betsy Bailey and I
11 am from Associated Oregon Industries, and for those of you
12 that don't know us, we are one of the state's larger,
13 maybe the largest, business lobby association. We
14 represent approximately 15,000 members before the Oregon
15 Legislature and administrative bodies such as yourself.
16 AOI is opposed to the proposed amendment to
17 Rule 36. It is our position that this would have the
18 effect of raising the cost of doing business in the state
19 of Oregon and it would diminish Oregon state's ability to
20 attract business to the state, and for the business that
21 has already been attracted to the state, it would decrease
22 their ability to compete effectively with businesses in
23 states that do not have the shift of the burden of proof
24 such as this amendment proposes.
25 Currently, judges in Oregon have the

1 flexibility to fashion protective orders that are
2 appropriate for particular cases. The system from AOI's
3 point of view works perfectly well. It balances all
4 legitimate interests, and we don't see any reason to
5 change a system that's not broken. That's our first
6 argument against it.
7 The second thing we'd like to say is that
8 the legal climate in Oregon is an important part of
9 attracting business, and that climate is a lot of times
10 influenced as much by perception as by fact. The proposed
11 amendment would create a perception of a more hostile
12 legal system in the state, and as much as some people will
13 tell you that this is a benign amendment, not a big deal
14 and they can't believe that businesses would not come to
15 this state just because of it, I assure you, we would not
16 be down here if we didn't think this was very important.
17 Several of our members have told us that
18 they are considering not expanding into Oregon simply
19 because of the perception that this creates for the
20 climate of doing business in this state.
21 To be granted a contested protective order,
22 companies, as I'm sure you all know, have to show good
23 cause. One of our main concerns is that if this ruling is
24 granted, they would have to justify good cause over and
25 over as companies or related parties who are interested in

1 particular research and development information brought
2 frivolous suits against those companies.
3 The proposed amendment also increases
4 public access which naturally will have a chilling effect
5 on research and development activities in this state.
6 It's our concern that as much as the economy depends right
7 now on the production and sale of information, research
8 and development should be encouraged, not discouraged, and
9 this amendment tends to do that quite a bit.
10 There is one final point I wanted to make,
11 and it sounds to me from listening to you this morning
12 that you're all well aware of it, but there's a fairly
13 close relationship between procedural rules and
14 substantive rights when you're looking at something like
15 this or just about anything, I think, and it's our
16 position that this proposed change to ORCP 36 affects
17 company's property rights in this state. Confidential
18 information has been viewed by the Supreme Court as a
19 property interest, and shifting the burden of proof as
20 proposed by the amendment would effect that property
21 interest.
22 That's about it. Thank you.
23 MR. KANTOR: Mr. Gardner?
24 MR. GARDNER: Thank you. I'm Jim Gardner,
25 for those who I haven't had the opportunity to meet with

1 before. I just wanted to respond briefly to Charlie's
2 statement. You know, when I was first in law school one
3 of the first questions I learned in trial practice was you
4 never ask a question on cross-examination you don't know
5 the answer to, sort of Rule No. 1 of trial procedure and
6 the proposal that you have seen, I'm very proud of.
7 Unfortunately, it was not funded so that we
8 were not able to engage in the efforts to educate the
9 business community about the rule to the degree that we
10 would have been able to had that been proposed. I think
11 it's extremely important that this council be aware of the
12 larger context in which it acts because its rules do have
13 a significant effect on the perception of Oregon outside
14 of its borders. As Betsy has said, this is a rule that
15 has already received some degree of national notoriety.
16 It has been discussed at the Business Roundtable, which is
17 a group of the CEO's of the Fortune 500, and it will, I
18 assure you, have an impact on the state's ability to bring
19 in new business.
20 That's a critically important need. Those
21 of you who may have read a report by Joe Cartwright, the
22 staff person for the legislative committee on Trade and
23 Economic Development identifies perhaps Oregon's most
24 pressing need right now, the need to bring in family wage
25 jobs, to attract businesses that will really sustain our

1 economy.

2 I would urge you to give careful

3 consideration to the potential impact of the rule on the

4 perception of Oregon in the larger business community.

5 Thank you.

6 MR. KANTOR: Are there other speakers?

7 MR. RUTTAN: I'm Chuck Ruttan. I have been

8 before you before. I have a letter that I believe was

9 mailed to all of you by Paul Fortino of the Oregon

10 Association of Defense Counsel. If you've got this, I

11 will sit down and defer to the next speaker. If you

12 didn't receive it, Mr. Fortino has asked that I read it

13 into the record.

14 JUSTICE GRABER: We have received it.

15 MR. KANTOR: It's been received. Mr.

16 Hubel?

17 MR. HUBEL: Dennis Hubel appearing on

18 behalf of the Procedure and Practice Committee. We have

19 met in our last two meetings and discussed ORCP 36 and its

20 proposed amendment.

21 The thing I want to say first is that the

22 committee reached no consensus either in favor or opposed

23 to the amendment. The only thing there was consensus on,

24 and this was uniform throughout the committee, was that

25 the proposal from our perception raises far more issues

1 than it solves and it's likely to result in litigation
2 over those issues, both in Oregon courts and elsewhere.
3 The committee wanted me to convey to you
4 the concerns we have regarding the rule and the proposed
5 change. First, we kind of started back at the basics. We
6 all have been focusing on the right to have public access
7 to documents and discovery that goes through our court
8 system. We have kind of lost the focus sometimes, at
9 least from our perception, of the importance of trade
10 secrets. Some companies owe their very existence and the
11 jobs of all their employees to the trade secrets which
12 form the basis of their existence. This is an equally
13 vital concern to the members of our committee, and the
14 problem comes, then, when you have trade secret
15 information which is entitled to protection that's
16 recognized throughout the United States intertwined with
17 information that is the legitimate concern of litigants to
18 get at for purposes of preparing their case.
19 That's what the whole protective order
20 rules have been grown up around is the desire to recognize
21 both concerns, and I think you need to recognize both
22 concerns when you consider an amendment that changes the
23 status quo of protective orders that have been adopted by
24 a court.
25 We were concerned about the availability of

1 those documents in case No. 2 via the discovery mechanisms
2 in case No. 2 in whatever jurisdiction they might be
3 brought. We know of no jurisdiction where documents which
4 would be produced in Oregon would not also be available to
5 be produced in that jurisdiction, and so we wonder about
6 the need for rules that allow for this kind of change to
7 the protective order that's been put in place and shifting
8 the burden of proof, which I'll get to in a minute as one
9 of our concerns.
10 Some members of the committee, and frankly
11 there were both plaintiffs lawyers and defense lawyers who
12 raised this issue, wondered if this applies to closed
13 cases, open cases or both. If it applies to closed cases,
14 how long does the court retain jurisdiction of these cases
15 -- Forever? -- to relitigate once, twice, a hundred
16 times, a thousand times, in the case of these large
17 product cases around the country, the vitality of the
18 protective order, and how many jurisdictions do we have to
19 worry about the information going to and the protective
20 order being observed?
21 The enforcement issue bothered everybody on
22 our committee and it wasn't just the enforcement issue.
23 How do you enforce, what state do you notify the bar of
24 for which lawyer who has violated a protective order, but
25 how do you know as the judge in Oregon what's happened in

1 Texas, Illinois, New York, Massachusetts, New Jersey,
2 where this information has gotten to? How do you even
3 know it happened to bring it to the court's attention as
4 the defendant, so we were concerned about enforcement on
5 those two levels.
6 The same or similar standard in the rule
7 caused a lot of concern as well. It's easy to think about
8 this problem when you have the case such as has been
9 alluded to, the Honda-ATVs where you're just worried about
10 the next case against Honda, but the rule doesn't limit
11 itself to that situation in any way. Suppose we're
12 dealing with instead of a Honda-ATV case, seat belt
13 litigation, and there is a state-of-the-art defense raised
14 on behalf of General Motors in case No. 1 about the
15 state-of-the-art in the development of seat belts, and
16 case No. 2, not in Oregon but in Illinois, is a case about
17 seat belts involving Honda Motors. Is there anything that
18 stops, under this rule, somebody from the Honda case in
19 Illinois coming to Oregon to get GM's information that's
20 been produced in Oregon? There is nothing that we see in
21 the rule that limits it in any way to that effect, and now
22 GM, who got the protective order in Oregon, is litigating
23 in Oregon over a case that they're not even concerned
24 about in Illinois to protect their information in Oregon
25 from being disclosed further, perhaps even to a

1 competitor.
2 The burden of proof issue, specifically I
3 would have to say that the committee does not have any
4 consensus as to whether the burden of proof should shift
5 or shouldn't shift. There were lots of issues raised both
6 pro and con as to the burden of proof, and I think I would
7 have to stop there just to say there was a large,
8 unresolved dispute as to whether the burden should shift
9 or not. Largely, people who didn't want the burden to
10 shift felt you have already sustained the burden once, why
11 in this one instance with every other procedural matter
12 that's come before the court should the burden shift when
13 you want to change the status quo? That's already been
14 established.
15 The cons of that was largely that the
16 burden should shift because of public policy reasons
17 favoring disclosure of information. Much of that really
18 boils down to a plaintiff-defendant dispute. The
19 committee fairly uniformly, and I think this again crossed
20 plaintiff and defendant lines, felt that it was inevitable
21 that as drafted, this proposal will result in more
22 litigation not in the sense of more cases perhaps but
23 certainly in the sense of more hearings to deal with this
24 issue, and the concerns and the ambiguities in the rule
25 that we have touched on, and we were also concerned about

1 what does happen in case No. 1 in Oregon where the
2 documents are produced, case No. 2 in Illinois where the
3 lawyer seeks to have the Oregon documents provided to
4 them, they sign on that they will abide by the protective
5 order, now we have case No. 3 in New York and they have
6 got not only in New York the availability of their own
7 discovery devices to get the documents but they can go to
8 Illinois and they can go to Oregon. How many times do the
9 parties involved in the first protective order have to
10 litigate this issue? That seemed to trouble a lot of
11 people.
12 Those were essentially the laundry list of
13 concerns that the committee had which caused it to be
14 unable to either support or come out with a clear vote
15 against.
16 MR. KANTOR: You had some questions?
17 JUSTICE GRABER: Does your committee or did
18 your committee in its discussions have any sense about
19 whether it's an issue that it wished to consider, because
20 I remember your earlier comment at one of our meetings was
21 that you felt there might be an overlap of interest
22 between your activities and ours.
23 Question No. 1: Are you intending to
24 pursue it any further; or No. 2, is that part of your
25 discussion that somebody ought to pursue it further by way

1 of an additional study or something along those lines?
2 MR. HUBEL: There are several levels to
3 that question. We have considered it at length at two
4 meetings now and we don't feel that the issue is dead. We
5 don't feel that this issue should never raise its head
6 again. We just feel that this proposal which we confined
7 ourselves to doesn't solve the problem in a way that is
8 acceptable to the committee. That's why we couldn't reach
9 a consensus in favor of it. I don't want to convey in any
10 way that the committee voted to kill the idea for all
11 time. I think it's fair to say there are certainly
12 members on the committee who would like to see it
13 discussed further.
14 JUSTICE GRABER: By you or us? I don't
15 understand whether you want a shot at it.
16 MR. HUBEL: There is no question the
17 committee wants a shot at it. I think that's the fair
18 answer to your question.
19 MR. KANTOR: Bernie Jolles?
20 MR. JOLLES: Dennis, supposing the words
21 after "related matter" were added "against the same
22 defendant", would that satisfy any of your concerns?
23 MR. HUBEL: It would certainly satisfy the
24 one concern about the GM vs. Honda situation, the seat
25 belt issue. It would clarify at least the scope of the

1 rule.

2 MR. JOLLES: Would it also effect the

3 ability to go to Illinois or have any impact on that?

4 MR. HUBEL: I don't see that that effects

5 that one way or the other. I think the committee would

6 still see that there is going to be multiple jurisdictions

7 potentially involved in this, chasing the documents around

8 the country and having to defend potentially in Oregon

9 against discovery in many, many jurisdictions, and then

10 having to leapfrog around the country.

11 MR. KANTOR: Thank you, Mr. Hubel. Any

12 other speakers?

13 MR. KANTOR: Do you have something further?

14 Charlie Williamson?

15 MR. WILLIAMSON: I talked to my partner

16 yesterday, Mary Ellen Farr, who serves on the committee

17 with Mr. Hubel. It was my understanding that the

18 committee was equally divided in favor and against. I

19 suspect we only heard the concerns of the people against,

20 and I think the council should understand there was a

21 roughly 50/50 vote or discussion on whether or not this

22 should be adopted by the Bar committee.

23 MR. KANTOR: Anything further?

24 MR. HUBEL: Just to comment on Mr.

25 Williamson's comments, the concerns that I raised were the

1 concerns that the entire committee had and they were
2 drafted by an equally populated subcommittee by plaintiff
3 and defense lawyers. They were not concerns of only the
4 opponents of the litigation of this rule. There were
5 concerns of both sides of the fence.
6 MR. KANTOR: Any other speakers?
7 MR. NORTH: If I may, I'm Jerry North, an
8 attorney from Portland, and my practice is primarily in
9 product liability litigation along with construction
10 litigation.
11 The concern that I raise is really what has
12 been expressed together with just a concern that shifting
13 the burden on this interpretation of similar or related, I
14 think, is very troublesome. It seems to me that burden
15 needs to stay with the people trying to get the
16 information, not being shifted to someone who is trying to
17 defend against it being released because of some of the
18 things discussed already about Chrysler vs. Ford vs.
19 Honda. There may be a way of addressing that but there
20 are other concerns on how the court would interpret the
21 terms "similar" or "related" that I think that burden on
22 how those terms are interpretted needs to stay on the
23 parties seeking the release of the information.
24 MR. KANTOR: The way we proceeded before is
25 to invite a motion on the proposal and see if we can go

1 from there.

2 Is there a motion?

3 MR. KROPP: I move the adoption of the

4 motion, to adopt it as set forth in Page 17 and 18 of our

5 brochure.

6 MR. KANTOR: Is there a second?

7 MR. JOLLES: Second.

8 JUDGE LIEPE: Move to amend.

9 MR. KANTOR: Judge Liepe?

10 JUDGE LIEPE: Couple motions. Dealing with

11 the question of a stipulation by the parties for

12 disclosure, and in this case I'm borrowing a thought that

13 was expressed by Justice Graber at the last session,

14 namely that when there is a stipulation limiting

15 disclosure or prohibiting disclosure, that the court ought

16 not at some later time upset it, so I would move that it

17 be added the following sentence at the end: "No order

18 shall be issued modifying a prior stipulation by the

19 parties prohibiting or limiting such disclosure unless the

20 parties consent to the modification."

21 I will have some pro arguments when the

22 time comes to talk about it.

23 MR. KANTOR: Could you repeat it one more

24 time.

25 JUDGE LIEPE: Okay. "No order shall be

1 issue modifying a prior stipulation by the parties
2 prohibiting or limiting such disclosure unless the parties
3 consent to the modification."
4 Then I have got one other motion, or -- do
5 you want me to put both on the table now?
6 MR. KANTOR: Are they related?
7 JUDGE LIEPE: Not necessarily.
8 MR. KANTOR: Why don't we take them one at
9 a time? Is there a second to Judge Liepe's motion to add
10 a sentence at the end of C(2)?
11 MR. MARCEAU: Second.
12 MR. KANTOR: Discussion on the motion to
13 amend?
14 JUDGE DURHAM: I need to have it read one
15 more time. I'm trying to get the exact words.
16 JUDGE LIEPE: "No order shall be issued
17 modifying a prior stipulation by the parties prohibiting
18 or limiting such disclosure unless the parties consent to
19 the modification."
20 MR. HARTER: This doesn't assume that the
21 judge has got to agree to a stipulated protective order,
22 does it?
23 MR. KANTOR: No. I think --
24 MR. HARTER: In Arthur Miller's book here,
25 and he's for protective orders, it says that "Judges must

1 guard against any notion that the issuance of protective
2 orders is routine, let alone automatic, even when the
3 application is supported by all the parties." This is on
4 Page 492.
5 JUSTICE GRABER: Were you done, Leif?
6 MR. HARTER: Yes.
7 JUSTICE GRABER: It seems to me there are
8 two parts to Judge Liepe's idea, both of which are things
9 he correctly points out were of concern to me. The first
10 is the prospective nature of this. There was some
11 discussion earlier about changing the goalposts, and I
12 think as a matter of basic fairness, this kind of a rule
13 cannot suddenly apply to something that parties agreed to
14 last year under a completely different set of rules, and I
15 think that this is an effort to respond to the desire to
16 make the application of this process prospective only.
17 The second piece of it is to recognize that
18 many if not most protective orders are agreed to as a quid
19 pro quo, "I won't fight your ability to get documents just
20 down to every jot and tittle of what I could argue for,
21 but on the other hand, you need to give me the assurance
22 that this material won't be used in an improper way."
23 I think recognizing that, it seems to me
24 entirely appropriate that parties ought even in the future
25 to be able to stipulate out of this process or to

1 stipulate about this process. I don't know whether the
2 specific words that Win has used cover both of those
3 areas, but I think they're both appropriate if we're going
4 to do this at all, that is that it should only be forward
5 looking and not change things that people thought they
6 were operating under a different system; and secondly,
7 people ought to be able to agree to things that make sense
8 to them in their own litigation that might be different
9 from this.
10 MR. KANTOR: I think we should -- I just
11 want to make sure Leif Harter's question is answered, and
12 I didn't mean to skip ahead, Leif. I think your question
13 was whether this proposal, this amendment, would have the
14 effect of requiring a court to take action?
15 MR. HARTER: Yes.
16 MR. KANTOR: I think it's the other way
17 around. I think it would prohibit a court from taking
18 action unless the parties stipulated. I believe that's
19 correct.
20 MR. MARCEAU: I thought the answer to
21 Leif's question is -- you are asking whether this means
22 you have to get a protective order in the first place, and
23 all that we're talking about now is how a protective order
24 can be undone. It doesn't mean that a protective order
25 does or does not have to be issued in the first place, but

1 once it's issued, then how can you undo it?

2 JUDGE DURHAM: Just a question.

3 MR. KANTOR: Judge?

4 JUDGE DURHAM: Could that be addressed
5 perhaps more effectively by creating an effective date
6 statement in the future, as opposed to attempting to
7 regulate past transactions? I don't know.

8 JUSTICE GRABER: It might make sense to
9 have two different sentences, one that says that this rule
10 shall not apply to any protective order entered into
11 whether by stipulation or by court order before "Date X",
12 as sentence one; and sentence two would be that parties
13 may stipulate that this doesn't apply to their protective
14 order even in the future. Those are two different
15 thoughts. I'm not sure that covers the same thought as
16 Win's.

17 JUDGE DURHAM: The reason I raised that is
18 because he had used the word "prior" stipulation. That
19 adjective suggests that it's something that is in
20 existence prior to the adoption of this but wouldn't
21 govern stipulations created after the effective date of
22 this rule.

23 JUDGE LIEPE: I think that's a good
24 question to raise. Maybe we ought to eliminate the word
25 "prior". The thought was twofold: One, that if in the

1 past the parties have entered a stipulation regarding
2 disclosure, limiting or prohibiting, that ought to be
3 respected, and also if in the future they do, that ought
4 to be respected because if you have a stipulation entered
5 into in good faith in connection to particular litigation,
6 that process will encourage disclosure and progress in the
7 case that otherwise you might not get, and if the parties
8 agree to limit disclosure or to prohibit it, that ought to
9 be respected and should not be set aside in the future.
10 That was the point of what I drafted.
11 I agree with Justice Graber. We need to
12 look possibly also at whether with respect to court orders
13 and without stipulation, whether there ought to be in this
14 rule some provision that whatever change we make applies
15 only to the future. I have a view about that, but it's an
16 issue that may need to be discussed also. I'll take out
17 the word "prior" if the second would agree to that.
18 MR. MARCEAU: Yeah.
19 MR. KANTOR: Let me just ask a question.
20 Is there a way we could separate these issues out here? I
21 think there is one question, should what we're doing here
22 apply to protective orders already in existence or that
23 will come into existence prior to the effective date of
24 the rule. From my conversations with people in the past,
25 I think there was a general consensus on that at the last

1 couple meetings, that no one expected what we do now to
2 have a retroactive effect on the existing agreement.
3 MR. MARCEAU: That's not my understanding
4 of the effect or thrust of Judge Liepe's motion.
5 MR. KANTOR: Well, it covered both issues.
6 JUDGE LIEPE: It covers both issues with
7 respect to stipulations but the problem is, what do you do
8 with a judge's protective order entered without a
9 stipulation?
10 MR. KANTOR: Bruce Hamlin?
11 MR. HAMLIN: On the question of retroactive
12 effect, Rule 1 (C) already deals with that situation and
13 says that unless the court determines that application of
14 new rules would work an injustice on the parties or would
15 be not feasible, the new procedure applies. Whether in an
16 amendment you could state the intent to have an effective
17 date, I don't know. That may be something that the court
18 would take into account in determining whether or not it
19 would be feasible or whether it would work an injustice.
20 JUSTICE GRABER: The concern that I have,
21 though, is how to apply that, whether retroactive under
22 the ordinary sense refers only to this new procedure that
23 is coming in today. To ask for shared discovery after
24 something was enacted last week is not retroactive in the
25 normal sense, but if we wanted it to apply only to new

1 protective orders, I think we need to to make that clear.

2 I don't think it would be clear unless we
3 said what we mean by "prospective," whether it means the
4 shared discovery request or the underlying protective
5 order which one has to be after the effective date.
6 That's the ambiguity that concerned me.

7 MR. KANTOR: Ron Marceau?

8 MR. MARCEAU: I seconded Judge Liepe's
9 motion because I thought that the thrust of the motion was
10 the same as the staff comment that we have at Page 9, the
11 last paragraph of that, and that's an important issue with
12 me and that staff comment, when you look at it, says that
13 the procedure authorized is intended to have no
14 application to any effort to modify or relax by means of
15 court order any prior written agreement between the
16 parties, and that's a point that I have raised before and
17 one that continues to be important to me, in fact
18 continues to dismay me, that we are talking about the
19 promulgation of a court rule that will permit one party to
20 an agreement, to a stipulation, to call off the agreement,
21 to undo the stipulation, to go back on the deal, and in
22 fact I'm so dismayed and feel so strongly about that that
23 I told myself I'm not going to let Bernie Jolles talk me
24 out of this.

25 MR. JOLLES: I might as well leave. I came

1 here just for that purpose.
2 MR. MARCEAU: I thought that that would be
3 the effect of Judge Liepe's motion. Of course, I like
4 that plugged into the rule in light of the discussion we
5 had earlier about whether the staff comments is worth the
6 paper it's written on or not, and I was mindful in Bill
7 Gaylord's presentation, I think he said in his ATV case
8 that they essentially stipulated that there can be a
9 reopen -- that the agreement can be reopened if the court
10 approved, which tells me that if this feature were plugged
11 into the rule that it would work with stipulations. All
12 you have to do, if you are a plaintiff and you want to
13 later share this information, is be up front about what
14 the agreement is, say, "I'll stipulate to the protective
15 order but I also want the stipulation to provide that if
16 at some later date there is a good reason to disclose it"
17 -- whatever "it" is -- "we'd make application to the court
18 to do that."
19 I don't have any problem with that. The
20 problem I have is the stipulating of a protective order
21 and then later saying, "I'm going to the judge and ask the
22 judge to undo that protective order that I agreed to,"
23 because I am concerned that litigants, parties, the people
24 that we've heard from here, may very well have more than a
25 perception that -- of what's going on here. That

1 perception will be a reality, that we will be undoing
2 stipulations.
3 Now, Judge Liepe, do I understand your
4 amendment right, because I'm confused about this
5 retroactive/not retroactive. I thought that the effect of
6 your motion would be to make stipulations immune from
7 being later undone, period, not retroactive, prospective,
8 but all of them.
9 JUDGE LIEPE: That was the primary point,
10 that the stipulation between the parties should be
11 respected and the court should have no authority to set it
12 aside, regardless of whether it was a past stipulation or
13 one yet to come.
14 Sue Graber raised the issues -- we were
15 talking just a little bit amongst each other. There is
16 also a question regarding retroactivity of the rule, so it
17 appeared with respect to stipulations, this covers the
18 matter of retroactivity, but it just so happens that it
19 does, but it does not cover the issue of retroactivity
20 with respect to protective orders entered by the court
21 after argument by the parties without stipulation of the
22 parties.
23 MR. MARCEAU: But you didn't intend it?
24 JUDGE LIEPE: I intended that.
25 MR. MARCEAU: So what's the problem?

1 JUDGE LIEPE: All we're saying is if we
2 want to look at dealing with retroactivity also with
3 respect to orders entered by the court without
4 stipulation, then as Sue pointed out, we need to have a
5 separate provision.
6 MR. KANTOR: Let's consider having a lunch
7 break.
8 JUDGE LIEPE: Why don't we wrap this up and
9 then have lunch later?
10 JUSTICE GRABER: On this one piece.
11 MR. KANTOR: On this motion? We have 39,
12 46, 68 and 69, so we're going to be here for a while.
13 This is clear. Why don't we at least resolve the motion
14 to amend that's pending, even if we take a break after
15 that.
16 JUDGE WELCH: I hope this isn't too
17 ingenuous. The question is to Ben or Susan. Isn't the
18 practical effect of this motion to gut the major motion?
19 Is that true, No. 1, and then if that's not true, isn't
20 that then the effect?
21 JUDGE LIEPE: I wouldn't have the
22 experience or the expertise to be able to answer that
23 question. I don't think it does.
24 JUSTICE GRABER: I don't think so. At
25 least that wasn't my intention in being concerned about

1 this issue. I don't know if most of them are stipulated
2 or not, but it seems to me that we ought to give parties
3 the opportunity to make agreements in this area that are
4 binding. That's really my only concern, and how that will
5 play out, I'm not sure. I really looked at it as more a
6 theoretical problem, which may be the wrong way to look at
7 it.
8 JUDGE WELCH: It seems to me people have
9 been saying in this dispute and debate from the outset
10 that most of these protective orders are agreed to by the
11 parties, and if that's true, then this amendment will --
12 MR. KANTOR: Janice Stewart?
13 MS. STEWART: I would like to respond to
14 that. I think that is true. I think most protective
15 orders are stipulated. However, I think what's going to
16 happen if this rule passes with this amendment is that
17 there will be no more stipulated protective orders because
18 the plaintiffs will require shared discovery and if they
19 don't get it, they're going to go to court to get it and
20 they're not going to stipulate to a protective order, so
21 we're going to take care of the protective orders that are
22 there now that are stipulated to, but there won't be any
23 in the future with this kind of a rule.
24 MR. JOLLES: I agree, it discourages that.
25 I don't think it's going to eliminate it because it's

1 going to depend on how much public interest the particular
2 plaintiffs lawyer is willing to opt for. I agree with you
3 that it will, and that's what was going to be my question
4 to Judge Liepe is, is that really -- do you recognize that
5 that would probably lessen the stipulations that are
6 entered into, or at least it would be an incentive against
7 entering into a stipulation?
8 JUDGE LIEPE: Bernie, in the absence of
9 this rule, what's the effect of stipulations? Can they
10 just be set aside?
11 MR. JOLLES: No.
12 JUDGE LIEPE: Why would the adoption of
13 this rule with this amendment be any different?
14 MR. KANTOR: Mike Phillips?
15 MR. PHILLIPS: I'm sorry. Notwithstanding
16 the repeated language, is it that the stipulation cannot
17 be modified, or an order entered into pursuant to a
18 stipulation cannot be modified?
19 JUDGE LIEPE: No order shall be issued
20 modifying this stipulation by the parties.
21 MR. PHILLIPS: That was where we started
22 the discussion, and I thought we had dispensed with it,
23 that to do that affects contract law, but what we had the
24 power to do was to affect procedures for courts' orders,
25 and we have talked about both, and I don't have any

1 quarrel about adding a rule, although I don't think we can
2 say one way or the other. I just don't think we have any
3 power to promulgate a rule that changes the contract, but
4 if what you're really talking about is that the court
5 cannot enter an order, that it is never considered on the
6 merits, that it's just considered based on the stipulation
7 because there was a stipulation, that elevates
8 stipulations in this area to a position they don't have
9 anyplace else, and if the court retains the power to
10 change its orders if there is a reason to change them, and
11 now you're saying, "You can't do that if the parties have
12 once stipulated," without saying even what you have to
13 stipulate to, and what's most likely to happen in the real
14 world is that you get a stipulation that you can enter a
15 protective order that does not specifically address the
16 issue of sharing with counsel and it just says it won't be
17 shared, and now we say you can't even change that, if
18 that's the stipulation. I think the proposal is a giant
19 step backward to the existing state of the law.
20 MR. KANTOR: I think Judge Welch's question
21 presented -- I think that the amendment would gut the
22 entire proposed rule, and I think we should face that, and
23 the amendment presents the entire issue.
24 John Hart?
25 MR. HART: My question is, would it be

1 appropriate as a procedural matter for us to say, Well,
2 there was a protective order that was stipulated to and
3 entered as an order of the court last week. We would like
4 to pass a rule and recommend it to the legislature that
5 says whatever the parties agreed to -- I'm saying does
6 this language overtly tell the Bar that their agreement
7 last week has no effect or it may not have an effect?
8 MR. KANTOR: Let me make sure I understand
9 your question. When you say "last week," you're talking
10 figuratively, not literally, prior to the effective date
11 of this?
12 MR. HART: Right.
13 MR. KANTOR: I think we have a consensus on
14 one point that there is no intent for this rule to apply
15 to protective orders and stipulations that are in effect
16 today.
17 MR. HART: Right, but then people are
18 saying that Judge Liepe's suggestion guts this and what
19 he's doing is he's at least attempting to; based on that
20 question from my reading of this proposed language is not
21 answered. If there is an order, this says the order may
22 be changed; it may be readdressed by another court; the
23 burden of proof is changed, and it was an order that was
24 entered under the law last week and the outcome can be
25 different than the parties agreed to last week when this

1 takes effect, and I think Judge Liepe has addressed that
2 about whether this is in fact retroactive or not.
3 MR. KANTOR: I think maybe we're just
4 talking across each other.
5 MR. MARCEAU: I have a question about the
6 question that the Chair raised. Maybe I'm losing my way
7 here, but you have an indication that agreements that are
8 in place that have been made would have to be followed and
9 respected.
10 MR. JOLLES: Stipulated orders.
11 MR. MARCEAU: Stipulated, yeah. I guess my
12 question would be, why wouldn't stipulations made in the
13 future, why wouldn't agreements made in the future -- why
14 aren't deals that we make in the future also expected to
15 be followed and not undone by court order?
16 MR. KANTOR: The reason for my statement
17 is not because the previous or currently existing today
18 stipulated orders deserve to be followed more or less than
19 ones in the future. I just don't think it's fair to apply
20 a new rule to something that the parties or the court did
21 before they even knew the rule was in effect. That's the
22 point I'm making only. I think it's a question of
23 retroactivity in the application of the rule. I think
24 we're talking on two different levels. Some people, I
25 think, believe Ludge Liepe's proposal is just dealing with

1 retroactivity --

2 JUDGE LIEPE: Huh-uh.

3 MR. CANTOR: I know, but then some people

4 believe it is more, and I think it clearly goes a lot

5 further than retroactivity.

6 JUDGE McCONVILLE: It seems to me that the

7 source of confusion at this point, if there is confusion,

8 is the reference to the stipulation in the amendment

9 proposed by Judge Liepe. The court has no power to modify

10 stipulation; the obligation of contracts cannot be

11 impaired. I think what is probably being suggested is

12 that the court would have power to order the modification

13 of an order based upon a stipulation.

14 I happen to be opposed to that, as I am to

15 any part of the proposed amendment, but it seems to me

16 that that's the area of confusion.

17 MR. KANTOR: Maybe you have identified it.

18 MR. HAMLIN: Although as a very practical

19 matter, most stipulated orders contain the recitation of

20 the stipulation and at the bottom it says "It is so

21 ordered", so the distinction between changing the

22 stipulation and changing the order may be hard to arrive

23 at in a particular circumstance.

24 MR. JOLLES: But one is procedural and one

25 is substantive.

1 JUDGE DURHAM: I just wanted to make it
2 known to you that I would want to support or offer an
3 amendment to this to deal with the effective date issue,
4 and I thought it was fair to announce that in our
5 discussion here so that people would not feel that this
6 was the last. I'm very interested in having some
7 attention given to the subject of the effective date and I
8 don't think your language addresses that and I'm more
9 interested in the effective date. The reason I'm more
10 interested in it is because of the phrase "good cause".
11 I think that the presence of an agreement
12 that led to the order can be taken into account as an
13 element of good cause, and that may alleviate some of the
14 need for your concern. It's just a matter that I would
15 ask you to take into account.
16 MR. KANTOR: Do people feel they have an
17 understanding of the effect of amendment being proposed to
18 proposed Rule 36B(2)?
19 JUDGE LIEPE: Just to clarify the language
20 and in the light of what's just been pointed out, I'll
21 change it to read "No order shall be issued modifying an
22 order based on a stipulation by the parties" or instead of
23 based on -- yes, "based on a stipulation by the parties
24 prohibiting or limiting such disclosures", so it's very
25 clear what we're saying.

1 JUSTICE GRABER: Just a friendly
2 suggestion. I'm still not sure whether I'm for this or
3 against this, but I think that's potentially confusing.
4 Couldn't it just say "modifying a stipulated order"?
5 Because there can be a stipulation that is the basis of an
6 order but it's not the whole thing, and I see those as
7 different -- potentially different.
8 MS. STEWART: I was going to suggest an
9 amendment that was even simpler than that. We already
10 have a sentence up there that says, "disclosure shall be
11 allowed by the court", and then there's an exception,
12 "except for good cause". You could add another exception
13 to the end of that sentence basically saying "or unless
14 the protective order was stipulated to by the parties",
15 which is a lot cleaner.
16 MR. KANTOR: I don't see how this changes
17 at all what's going on today. I think it could be --
18 MR. JOLLES: It may alleviate some
19 concerns.
20 MR. KANTOR: What would be the effect of
21 what we pass? If we pass something with this amendment,
22 how does that change the status quo today?
23 MR. PHILLIPS: It will say that the court
24 cannot change it at all. Now if the court changes it
25 based on the people that want the information bearing the

1 burden of proof, now we're talking about a rule that says
2 you can't change it at all.
3 JUDGE LIEPE: It's not saying that. You
4 can't change it unless the parties consent.
5 MR. KANTOR: Isn't this whole discussion
6 based on the premise that the defendant is objecting?
7 Otherwise, we wouldn't be having this discussion at all.
8 The defendant is always going to object, or the defendant
9 will have voluntarily given the information to the party
10 requesting the information.
11 MR. MARCEAU: Not at all. My part of the
12 discussion is based on just the opposite premise, and that
13 is that the plaintiffs consented in the first place. The
14 plaintiff said, "I will agree to a protective order if you
15 disclose these materials." Now the plaintiff wants out of
16 that commitment. That's what we're talking about, and
17 specifically we're talking about, how do you get out of a
18 deal that you have made? How do you get out of performing
19 a contract that you agreed to perform? That's the thrust
20 of it, and Judge Liepe's amendment would say that once you
21 stipulate, that you can't get out of it, that is a "no can
22 do" unless the other party agrees to it.
23 MR. KANTOR: So there would be no
24 stipulations by plaintiffs lawyers who ever think they
25 might want to share information?

1 MR. MARCEAU: We could have a Bill Gaylord
2 stipulation in the first instance that the plaintiff
3 stipulates that there will be a protective order, except
4 the plaintiff reserves the right to ask for the judge to
5 decide differently at some later date.
6 JUSTICE GRABER: There is also a built-in
7 assumption there that plaintiffs' lawyers universally will
8 be more interested in helping somebody else's client than
9 their own, and that's why I'm not sure that it will have
10 as great an impact as is being stated.
11 If this plaintiff right now needs this
12 information and can get it by agreement without going
13 through six weeks of anguish, there may still be an
14 incentive to stipulate. That's why I'm not so sure how it
15 will play out in real life.
16 MR. KANTOR: And upon that stipulation,
17 unless both parties agree at a later date, there will
18 never be a change; the plaintiff will not be able to
19 share, even if later on that plaintiff's lawyer learns
20 that there is another case out there that he or she may
21 not have known about beforehand and then will not be
22 allowed to share that information.
23 JUSTICE GRABER: Well, no, but they can
24 always say, "Gee, I filed the most interesting request for
25 discovery," and the request itself is not necessarily

1 protected, that is asking for the minutes of your meeting
2 or whatever, so there are still I think legitimate ways
3 that that interest can be served.
4 MR. KANTOR: Bernie Jolles?
5 MR. JOLLES: If we don't adopt that
6 amendment and a defendant wants to make a deal with a
7 plaintiff, just leave it out, there is nothing in the
8 existing language that prevents the parties from entering
9 into an agreement whereby the plaintiff waives his rights
10 under 36C(2) as stated there. I mean, if you can waive
11 your Constitutional rights, I assume you can waive your
12 rights to an order allowing you to share discovery, so the
13 only thing -- the difference between adopting the language
14 and not adopting the language is that defendants or
15 parties would have to include in the stipulation an
16 agreement that there is a protective order and the
17 protective order says thus and so, and in addition, the
18 parties agree that no shared discovery shall take place,
19 despite the provisions of 36C(2), so I don't see what the
20 difference is.
21 MR. MARCEAU: Then the plaintiff would be
22 saying, "I agree that you shall have a protective order,
23 and I further agree to waive my right to go back on my
24 agreement that you shall have a protective order."
25 MR. JOLLES: I agree to have a protective

1 order and I agree to waive my rights under 36C(2), which
2 permits me to share discovery despite the protective
3 order.
4 MR. MARCEAU: That's what I thought I just
5 said.
6 MR. JOLLES: But the rule says that.
7 MR. KANTOR: Let me ask a question here.
8 How long is this discussion going to go on?
9 JUDGE LIEPE: May I make a suggestion? I
10 was going to suggest just one language change and if it's
11 agreeable to Ron, the second, we can go ahead with that
12 and then we can vote this up or down and go on, and the
13 language would be: "No order shall be issued modifying an
14 order upon stipulation by the parties prohibiting or
15 limiting such disclosure unless the parties consent to the
16 modification."
17 Would you agree with that?
18 MR. MARCEAU: Yes.
19 JUDGE LIEPE: So that's the motion.
20 MR. KANTOR: Is there a second?
21 MR. HAMLIN: I think we should vote.
22 JUSTICE GRABER: Ron is the second.
23 MR. KANTOR: I'm sorry. I heard him agree.
24 Jeff Foote is wanting to be heard very briefly.
25 MR. FOOTE: I realize this is unusual, but

1 there is an issue here that is not being addressed and I
2 think it is very important, and that is the public
3 interest issue.
4 If you pass an amendment like this, you're
5 in effect saying that if Henry and John have a lawsuit and
6 for expediency's sake they decide they're going to agree
7 to a protective order, they're not going to argue about
8 trade secrets or whatever, and there is some information
9 in those documents to do affect the public, such as in the
10 breast implant litigation Mr. Gaylord referred to; eight
11 years ago documents came out of that litigation which
12 showed that the silicone was dangerous to the women. That
13 was under a protective order that was stipulated to by the
14 parties. That information could not become public under a
15 rule like this. In this case it didn't become public and
16 available to the FDA for another eight years and a lot of
17 women had those implants.
18 What you're saying here and in the Obert
19 case, TLPJ intervened on behalf of consumer groups not to
20 get trade secrets but to get access to information that
21 was not a trade secret, an order for that information to
22 be made available to the consuming public in order to make
23 wise purchasing choices, so I think there is a real health
24 and safety issue. I know that's not the intention of the
25 amendment, but if you specifically say that you can't ever

1 modify one of these deals, you're prohibiting the public
2 from coming in and saying, "We think there might be some
3 important information here that we ought to know about."
4 MR. KANTOR: Okay. I sense that people
5 still want to discuss this further before voting. I don't
6 sense a desire to close this off.
7 Are people ready to vote?
8 JUSTICE GRABER: I think on this piece of
9 it.
10 MR. KANTOR: Let's have the current motion
11 read one more time so that it's very clear.
12 JUDGE LIEPE: "No order shall be issued
13 modifying an order upon stipulation by the parties
14 prohibiting or limiting such disclosure unless the parties
15 consent to the modification."
16 MR. KANTOR: This is an amendment to the
17 proposed Rule C(2)?
18 JUDGE LIEPE: Yes, just an added sentence.
19 MR. KANTOR: Those in favor say aye.
20 CHORUS OF COUNCIL MEMBERS: Aye.
21 MR. HOLLAND: 12.
22 MR. KANTOR: Those opposed?
23 MR. HOLLAND: 8.
24 MR. KANTOR: Any abstentions?
25 MR. HOLLAND: 8 opposed, one abstention.

1 MR. KANTOR: With that, let's take a break.
2 (Lunch recess taken).
3 MR. KANTOR: Thank you all for staying here
4 for lunch and not going too far. We are in the middle of
5 Rule 36, and I have sort of a combination of an
6 announcement and a motion to make. Some of the proponents
7 who brought Rule 36C(2) to the table are concerned enough
8 about the effect of the amendment which just passed that
9 they would prefer not to go forward on the proposal, the
10 original proposal, and with that information, I move to
11 table the existing motion.
12 MR. HAMLIN: I'll second that motion.
13 UNIDENTIFIED COUNCIL MEMBER: Which motion
14 are we tabling?
15 MR. KANTOR: The motion to adopt the Rule
16 36C(2) as just amended.
17 MR. MARCEAU: Why would we table it?
18 Tabling is a procedure to defer something from now to
19 another time, and if they bunched it, what --
20 MR. KANTOR: Maybe I don't know what the
21 right words are. I move to terminate consideration of
22 this matter at this time.
23 MR. MARCEAU: Second it.
24 MR. HARTER: This means that this is done
25 for this session?

1 MR. KANTOR: It would be done for this
2 session.
3 MR. HARTER: And we don't bring it up?
4 MR. KANTOR: It's over unless somebody
5 wants to bring it up again, some new Council on Court
6 Procedure or legislature or committee or whatever.
7 That's my motion and we have a second, and
8 I believe this is the type of motion -- although please
9 correct me if I'm wrong -- that doesn't involve debate?
10 MR. JOLLES: It's nondebatable.
11 MR. KANTOR: Those in favor?
12 CHORUS OF COUNCIL MEMBERS: Aye.
13 MR. KANTOR: Opposed?
14 Let's move along. Rule 38.
15 MR. KROPP: Mr. Chairman, I move the
16 adoption of Rule 38.
17 MR. HART: John Hart, second.
18 MR. KANTOR: Any discussion on this motion?
19 (Council members' voices, unreportable).
20 THE REPORTER: Excuse me.
21 MR. KANTOR: Let's return to the remember
22 that we have a court reporter present and only one of us
23 can speak at one time. The motion, I believe, was to
24 adopt just Rule 38, but we have in the past considered
25 these matters together, Rule 38 and 39.

1 MR. KROPP: May I amend my motion? I move
2 to adopt Rule 38 and 39 as amended.
3 MR. KANTOR: And 46?
4 MR. KROPP: And 46.
5 MR. HART: That's my second, exactly.
6 MR. KANTOR: There is a motion by Dick
7 Kropp and a second by John Hart that the council adopt the
8 proposed changes to Rules 38, 39 and 46. Any discussion
9 on that motion?
10 Those in favor?
11 CHORUS OF COUNCIL MEMBERS: Aye.
12 MR. KANTOR: Opposed? Unanimous.
13 MR. KROPP: Let's take on 68.
14 MR. KANTOR: Rule 68, is there a motion?
15 MS. STEWART: I move the adoption of 68.
16 MR. KROPP: Second.
17 MR. KANTOR: Discussion? Those in favor?
18 CHORUS OF COUNCIL MEMBERS: Aye.
19 MR. KANTOR: Opposed?
20 Agenda Item 11, Rule 69 regarding defaults?
21 Let me invite a motion.
22 JUDGE LIEPE: Move adoption.
23 JUDGE SNOUFFER: Second.
24 MR. KANTOR: Motion by Judge Liepe, second
25 by Judge Snouffer.

1 JUDGE DURHAM: Question. This is more a
2 statement than a question. Parties have filed briefs in a
3 case before my court that raises the question of the
4 viability of the Van Dyke case. I can't tell you further
5 about it than that.
6 MR. KANTOR: Maybe we should do a new staff
7 comment that relates to that.
8 JUDGE DURHAM: The reason it's relevant,
9 for people that may not have been here for the last
10 meeting where we discussed this Van Dyke case extensively,
11 this rule is directly in response to the Van Dyke case.
12 JUSTICE GRABER: Would you care to couple
13 that with a suggestion, or are you just dropping that
14 little --
15 MR. HAMLIN: Let's assume that a court
16 determines that Van Dyke was wrongly decided. It wouldn't
17 have any effect on the adoption of these amendments to
18 Rule 69 which provide a sensible procedure for dealing
19 with the same situation.
20 MR. MARCEAU: Isn't the proposed Rule 69,
21 what we thought Rule 69 -- the effect Rule 69 should have
22 had anyway, but for Van Dyke?
23 MR. HAMLIN: And an errant staff comment.
24 MR. MARCEAU: Wouldn't passage of this be
25 at least like chicken soup, it can't hurt?

1 JUDGE DURHAM: Probably. That's probably
2 correct. This would be a longer -- and my reaction is,
3 this would be a longer way of stating what was meant by
4 Rule 69, assuming hypothetically that Van Dyke were
5 reversed.
6 MR. JOLLES: There is always the
7 possibility it would be affirmed.
8 JUDGE LIEPE: There is one other thing that
9 this rule does, so that we're aware of it, that was not
10 strictly speaking in the prior law, and that says that
11 when there is a default for failure to appear for trial,
12 then the court can determine the issue based on the
13 pleadings filed by the appearing parties, which is a
14 shortened way of dealing with disposition of the case that
15 is not strictly available under the present law, because
16 nowadays counsel always feels they need to run in with a
17 prima facie case and they have a witness go on and they
18 swear to tell the truth and they recite the complaint and
19 that's it and they sit down. Here we avoid that.
20 The court can make a decision based on the
21 pleadings, if it's appropriate, filed by the appearing
22 parties. That is one of the effective changes from prior
23 law.
24 MR. KANTOR: I made an error of procedure
25 here. We have a public speaker on Rule 69, and I should

1 have invited you to speak first, sir, and I forgot.
2 MR. WILKINSON: I'm Douglas R. Wilkinson
3 and I'm a member of the Bar's Practice and Procedure
4 Committee.
5 We have gone through and we have reviewed
6 Judge Snouffer's and Judge Liepe's letters and different
7 comments on that. The comments that the committee wanted
8 me to make were with respect to the first paragraph of
9 A(2). There was some comment that either in this
10 particular rule itself or in a commentary that there would
11 be an opportunity for postponement with the procedure for
12 costs, and we had proposed some language that would just
13 be at the end of that where it says, party without further
14 notice, or the court may proceed in accordance with Rule
15 52 to make it clear that if by telephone or something like
16 that the nonappearing party has contacted the judge and
17 said, "Hey, I had a car wreck," I had something, or "I
18 just haven't been able to get my clients together," and
19 the other side says, "Well, we don't want them to go ahead
20 because we have all these experts here and we believe the
21 judge still has the authority to postpone it and go ahead
22 and require the parties requesting the postponement to pay
23 some charges.:
24 That was the first comment. The --
25 MR. HART: Can we address those one at a

1 time and perhaps ask some questions?

2 MR. KANTOR: Sure.

3 MR. HART: Don't you think that's covered

4 by the word "may"? It doesn't say the court "shall" enter

5 a default and go forward.

6 MR. WILKINSON: Yes, we think it is. We

7 just wanted to make it clear that it could indeed go the

8 other way, and we wanted it to either be in the rule or in

9 the commentary, but absent that, we thought that certainly

10 it's there.

11 The last one is with respect to this is

12 entitled A(4), the sending out of notice. We wanted to

13 put the burden on the party who was getting the judgment

14 to send out a form of judgment because we were concerned

15 that if the clerk didn't send it, there may still be a

16 problem with an appeal. When does the appeal start

17 running? It starts obviously upon the entry of judgment.

18 We wanted some language that would require

19 the party that received the judgment to serve that form of

20 judgment on the other party and that a judgment taken in

21 this manner could not be entered until that proof of

22 service had been filed with the court, and we had language

23 that said the judgment of default may be entered on such

24 date as the court may deem appropriate; however, it may

25 not be entered until service of the form of judgment has

1 been made and proof of service has been filed in
2 accordance with Rule 9.
3 MR. KANTOR: What's the reason for that?
4 MR. WILKINSON: The purpose for that is if
5 indeed the party didn't appear for trial because the
6 notice of trial went to somebody -- went to the wrong
7 address, the notice of this judgment would still be on the
8 court's computer and would be sent out to the same
9 address. That was the first thing we thought about.
10 The second thing was sometimes the clerks
11 don't send it out promplty. The third thing is that if
12 it's a judgment that doesn't involve money, then the
13 computerized statement showing how much the judgment is
14 isn't attached. All you get is a form that there has been
15 a judgment entered, so we wanted the form of the judgment
16 to be clear to the party that was having the judgment
17 taken against them what it was, and we wanted them to be
18 on notice for it.
19 So those were our comments on the two.
20 JUDGE LIEPE: Were you intending that that
21 notice be sent before a judgment is entered by the court?
22 MR. WILKINSON: Yes, that the form of
23 judgment has to be served, so that if indeed you made the
24 decision that day and you held a hearing and you conducted
25 and finished it, before that judgment could be actually

1 entered, the form of judgment has to be served. If the
2 individual has already been prepared and knows they're not
3 going to be there, they could submit to proof of service
4 at that particular time.
5 JUDGE LIEPE: There is a problem with that
6 procedure, and that's this: Let's say a form of judgment
7 is served and then submitted to the clerk and the court
8 looks at it and he says, Oh, that isn't exactly what I
9 meant. I want to change it around to say thus and such
10 and so and so, then you would have to go through all that
11 process again before it's served.
12 MR. WILKINSON: That was not our intent.
13 Our intent was that it would be the form of judgment and
14 not the judgment itself.
15 JUDGE LIEPE: The form of the judgment --
16 if the judge then enters the judgment in a different form
17 because the form that's served isn't what the judge
18 intended or had in mind or ruled, then we would have to go
19 through the whole process again, and there is that problem
20 which is among the reasons we used the clerk's procedure
21 because that's also a procedure that's involved in other
22 cases.
23 JUDGE DURHAM: In regular judgments.
24 JUDGE LIEPE: Yes, in regular judgments,
25 and so felt use the same procedure here.

1 If in fact there has been a failing by the
2 clerk to notify, then I suppose that's going to come up at
3 a time that later on there is going to be a motion to set
4 aside the judgment or whatever, if that's appropriate.
5 Also there is, of course, if the prevailing
6 party wants to make sure that the other side knows about
7 it, the prevailing party may of course voluntarily send a
8 copy to the other side also. In many cases, I'm inclined
9 to think they might do just that because what the clerk
10 sends out is a notice of date of entry of judgment, not
11 the whole judgment.
12 MR. WILKINSON: Those things we discussed,
13 and the reason we still wanted the form of judgment is
14 because we thought it provided more information. Even if
15 it was wrong, it would be more information than just the
16 notice of the entry, and we recognize indeed that the
17 judge might change the form from what was being submitted,
18 but we still felt that it would be providing more
19 information, and the other part, we wanted the adverse
20 party, the party receiving the judgment, to have a burden
21 to go forth and send this as opposed to relying on
22 goodwill.
23 MS. BISCHOFF: Question. Don't the Uniform
24 Trial Court rules that impose a burden on lawyers to send
25 and submit an order or form of judgment to opposing

1 counsel three days prior to the time they submitted to the
2 court remedy your concern?
3 MR. WILKINSON: I don't think so. I think
4 my number is wrong. I think it's 5.100 is the uniform
5 trial court rules, and I think it only applies to orders;
6 it doesn't apply to judgments.
7 MR. KANTOR: 5.100 does say orders only,
8 but --
9 MR. HAMLIN: That's in part because the
10 rule on judgments no longer says that judgments will be
11 served in a particular amount of time before they're
12 presented to the court; it's up to the court to settle its
13 own schedule.
14 JUDGE SNOUFFER: Just to comment, it seems
15 to me in one sense we are regarding the nonappearing party
16 by giving them more information than they would have been
17 entitled to had they come to court in the first place, and
18 in one sense I can understand that by saying if you assume
19 somebody is not at court because of causes beyond his or
20 her ability to control, judgment is entered, send them a
21 copy personally in addition and over and above what 70B(1)
22 requires, and that is perhaps some commendable solicitude
23 for that person who is unable to get to court, but I think
24 we're making a mistake by making this procedure more
25 cumbersome than is already required under Rule 70B(1).

1 JUDGE DURHAM: Can we call for the
2 question?
3 MR. KANTOR: I don't believe so. Janice
4 Stewart?
5 MS. STEWART: I'm looking to the title to
6 A(4). In the title it's talking about notice of default
7 judgment on failure to appear for trial, but the sentence
8 following it just says, "notice of the date of entry of
9 the judgment". It doesn't define what judgment you're
10 talking about, whether it's the judgment entered under
11 A(3), which I assume you're talking about, so it seems
12 like some clarification is necessary.
13 JUSTICE GRABER: It's the only judgment
14 talked about in the rule.
15 MS. STEWART: It may be that we need to add
16 some words, entry of the judgment, the default judgment
17 under A(4), because I think later in the ruling under
18 subsection D there is a default judgment and whatnot.
19 JUDGE LIEPE: A(2) and A(3) don't define
20 the default judgment to which A(4) refers.
21 JUSTICE GRABER: She's just saying, I
22 think, that the word "default" is not in A(4) on Page 30.
23 It just says "the entry of the judgment". You're saying
24 it should say "the entry of the default judgment"?
25 MR. MARCEAU: What it should say is "the

1 entry of a judgment pursuant to A(3)" so that it not be
2 confused with default judgments under B, right?
3 MS. STEWART: Yes.
4 JUSTICE GRABER: I see what you're saying.
5 MR. MARCEAU: Two kinds of default
6 judgments. One is appearance at trial, and two is default
7 for failure to appear in a case.
8 JUDGE LIEPE: The way to fix that would be
9 -- what would you suggest?
10 MS. STEWART: Just add "pursuant to A(3)"
11 after the word "judgment" would be one way to do it.
12 MR. JOLLES: After the word "judgment"?
13 MS. STEWART: Yes, unless there's a better
14 suggestion.
15 MR. KANTOR: Is that an amendment?
16 MR. STEWART: If no one else has a better
17 suggestion, I will so move.
18 MR. SNOUFFER: I have some concerns now
19 because you're getting into some grammatical problems
20 concerning A(3) between between "shall mail notice as
21 required by Rule 70B(1), so maybe we should say, "the
22 clerk shall mail notice of the date of the judgment
23 entered" --
24 JUDGE LIEPE: -- "of the judgment entered
25 under subsection A(3)".

1 MR. HAMLIN: It should still say the date
2 of entry. That's the appropriate date.
3 MR. JOLLES: What if we just say that "the
4 clerk shall mail notice of the date of the A(3) judgment"?
5 JUDGE LIEPE: How about of the judgment
6 entered under subsection A(3)"? Will that fix that?
7 MR. MARCEAU: Second.
8 MR. KANTOR: That was an impatient second.
9 MR. MARCEAU: I'm Judge Liepe's
10 professional seconder.
11 JUDGE LIEPE: Trapped you, didn't I?
12 MR. KANTOR: We have a second to a motion
13 which would amend A(4) to somehow include a definition of
14 the judgment to be sure it's an A(3) judgment.
15 MS. STEWART: There is another option.
16 Just say "date of entry of the default judgment on failure
17 to appear for trial".
18 MR. KANTOR: Without reference to the
19 specific rule? Maybe that's a better way to do it.
20 MS. STEWART: Is that grammatically better?
21 Default judgment on failure to appear for trial -- why
22 don't you say, date of entry in the register of the
23 default judgment on failure -- Oh, God, that's cumbersome.
24 JUDGE LIEPE: Entry of the default judgment
25 for failure to --

1 MS. STEWART: What if you just said --
2 MR. KANTOR: One moment. I am going to
3 suggest that we go off the record unless there is an
4 objection for a drafting session because this is something
5 very difficult. The court reporter is getting three words
6 here and there.
7 (A discussion was held off the record).
8 MR. KANTOR: Back on the record. Judge
9 Snouffer, could you make the amendment?
10 JUDGE SNOUFFER: That paragraph A(4) is
11 amended to read "the clerk shall mail notice of the date
12 of entry of the subsection A(3) judgment in the register",
13 et cetera, et cetera.
14 MR. KANTOR: Second?
15 MS. STEWART: Second.
16 MR. KANTOR: Any discussion of the
17 amendment? All those in favor?
18 CHORUS OF COUNCIL MEMBERS: Aye.
19 MR. KANTOR: Opposed? Unanimous.
20 Judge Durham, maybe you could summarize the
21 comments you made.
22 JUDGE DURHAM: I merely wanted to record a
23 reservation of my own that this rule seems to be creating
24 a new adjective -- a new term called "default judgment for
25 failure to appear for trial", which is a legal misnomer.

1 This party is not in default. They have merely failed to
2 appear for trial and they should not be burdened with the
3 obligation to seek relief from default for the mere
4 failure to show up for trial. That's not a guilty act
5 under our rule system. I feel a bit uncomfortable calling
6 that person in default. I think it's a mislabeling that
7 may be misleading, although I do fully agree with the
8 concept that Judge Liepe and others, including myself,
9 have endorsed here, which is to streamline the procedure
10 for the entry of a judgment when the party has failed to
11 appear for their trial date.
12 MR. HAMLIN: It's not the case currently
13 that the only type of judgment by default is for failing
14 to file a pleading. There are other types of judgment by
15 default. For example, under Rule 46B(2)(c), if you engage
16 in certain kinds of discovery abuse, one of the orders
17 that the court can record is one, quote, "rendering a
18 judgment by default against the disobedient party", end
19 quote.
20 So I'm not sure that it really is apples
21 and oranges. You can have a default entered for a couple
22 of reasons. One is failing to file a pleading; another is
23 failing to conduct discovery appropriately, whatever that
24 means; and a third now is failing to show up for trial
25 even though you may have filed pleadings prior to that.

1 JUDGE DURHAM: I appreciate your comment.
2 I think both of the items that you have mentioned, though,
3 failing to file a pleading, that's ignoring the processes
4 of the court; failure to engage in discovery in good
5 faith, that's also a sanctionable act; but failing to come
6 to trial on the day of trial is not a guilty act. It's a
7 perfectly lawful response to a lawsuit. You file your
8 pleadings and you're prepared to let your affirmative
9 defense stand or fall, or whatever your pleading position
10 might be.
11 MR. HAMLIN: How would your affirmative
12 defense stand or fall if you weren't there to support it,
13 because we don't have notice pleading, I'll grant you
14 that. We do have pleadings of ultimate facts, but
15 ordinarily, say, contributory fault wouldn't sort of prove
16 itself --
17 JUDGE DURHAM: Certainly there may be
18 defenses that require evidence, but others that you may
19 just bring to the court's attention through an affirmative
20 defense, such as the statute of frauds or statute of
21 limitations, lack of jurisdiction, failure to state a
22 claim. Any of those can be fully brought to the court's
23 attention through a pleading and I'm not in default if I
24 have filed that kind of a pleading and let my case go.
25 I'm not ignoring the court; I'm not guilty of a

1 sanctionable offense.

2 MR. HAMLIN: I agree with you that some
3 types of defenses are purely legal matters and wouldn't
4 require the introduction of proof, but on the other hand,
5 that's a pretty big burden to put on the trial judge to
6 then have to go through all the defenses and say, "Which
7 ones of these require proof, which ones should I search
8 the record and try and figure out whether the statute of
9 limitations has expired or not?"

10 JUDGE DURHAM: Understand, I'm perfectly
11 ready to let that party lose their defense if they haven't
12 proven something that needs to be proved. All I'm talking
13 about is creating the label of default and applying it to
14 this party who is not in default.

15 MR. KANTOR: Justice Graber?

16 JUSTICE GRABER: I share some of what Judge
17 Durham has stated as a reservation. I think all of this
18 got complicated by -- from the basic principle, which is
19 simply that when one party fails to appear at trial, the
20 judge ought to be permitted to proceed with the people who
21 are then in the courtroom, either by way of taking
22 evidence on a prima facie case or other appropriate
23 actions without having to go back and start over and give
24 notice, and maybe what has been proposed here is just
25 overly complicated or appearing in the wrong place. Maybe

1 it ought to be its own rule that simply says that when one
2 party fails to appear, the judge may proceed to do "X",
3 without labeling it default or labeling it anything else
4 because that's really the point of this is to avoid the
5 need for an additional procedure, but we don't have to
6 label it a default. We can simply say affirmatively that
7 when a party who has filed an appearance fails to appear
8 for trial, and then skip all the way down -- I'm sorry;
9 I'm looking at Page 29. If you went and left out pieces
10 of A(2) and A(3) and simply said "When a party who has
11 filed an appearance fails to appear for trial" and skip
12 all the way down, "the court may without taking evidence
13 enter a judgment", leaving out the words "by default",
14 "against the nonappearing party", take out all the wording
15 about default and arrive at the same place.
16 JUDGE DURHAM: I raised that last meeting,
17 and if I recall it correctly, I think Judge Liepe felt
18 that it would be important to empower the trial judge to
19 enter an order of some kind upon the nonappearance of a
20 party, and I simply agree with how you have laid it out.
21 I think a judge should be fully entitled without the
22 burden of entering an order about your nonappearance, the
23 judge ought to be able to say, "I'm entering judgment on
24 the pleadings without taking evidence or perhaps seeing
25 that in fact evidence is required." It's left to the

1 trial judge without the duty of entering an order. That
2 was my concept.
3 JUDGE McCONVILLE: I support the view
4 expressed by Judge Durham and Justice Graber, except I am
5 troubled with the notion that the rule would say that the
6 court could proceed without taking evidence because by the
7 filing of the pleadings, the allegations that support the
8 claims necessarily are controverted, but at least
9 controverting to those, evidence would be necessary, and I
10 think Justice Graber is correct in observing that probably
11 the rule that best addresses this, at least looking at it
12 as Judge Durham has suggested it be viewed, and I happen
13 to share that view, would be a separate rule, not a
14 default, and I might say something on the order of a
15 caption, just failure to appear for trial, and when a
16 party who has filed an appearance fails to appear for
17 trial, the court may proceed to trial and judgment without
18 further notice to the party.
19 JUDGE DURHAM: Would that take care of your
20 concern? Because I'm very concerned that you raised a
21 desire last meeting that the trial judge ought to be
22 permitted to enter an order, that that was significant,
23 and I'm not fully aware of why that is.
24 JUDGE LIEPE: I feel there ought to be some
25 sort of order that appears in the court record that

1 perpetuates the fact that one of the parties hasn't
2 appeared. It may be that the court will not be ready at
3 that time to enter a judgment. It may be there is some
4 other things that need to occur, maybe there is some
5 additional evidence that needs to be taken before a
6 judgment can be formulated, but it ought to be in a
7 situation whereby the other party who failed to appear is
8 then excluded from that process, and because that other
9 party becomes excluded from the process because they
10 failed to appear in court, that's why this is like a
11 default situation. Default is whatever we define it to
12 be, and it doesn't mean that the word "default" is
13 necessarily limited to failure to file a pleading. I
14 think default can be anything that we define it to be, if
15 that makes sense.
16 JUDGE DURHAM: If a party is not in default
17 on the pleadings, trial date is appointed, notice has gone
18 out, it's all in due course, defendant fails to appear for
19 trial but the judge declines to enter judgment because the
20 appearing party says, "I need a postponement," or
21 something, what's the problem with allowing the
22 nonappearing party to appear on the second day for trial,
23 because they're not in default?
24 JUDGE SNOUFFER: Nothing.
25 JUDGE LIEPE: It may depend on the

1 circumstances.

2 JUDGE DURHAM: Do you think it's important
3 to penalize or burden or somehow give a demerit to that
4 nonappearing party?

5 JUDGE LIEPE: I think it is important to
6 penalize parties who fail to appear in court on the trial
7 day, and that's part of the whole procedural process
8 whereby the court ensures efficiency rather than having
9 people traipse in later on without any reasonable excuse
10 to drag out the proceedings.

11 JUDGE SNOUFFER: I just want to reiterate
12 what I said a couple meetings ago, and that is I think
13 what is really important to keep in mind is Van Dyke
14 presently ties our hands and says, "If we don't have a
15 person at trial, we have to stop, go back, give 10 days'
16 notice and start over again."

17 What we were trying to do by this is simply
18 fix Van Dyke, short-term fix. The Committee on Procedure
19 wrote a letter as I recall somewhere in our files and got
20 into all the things Judge Durham is talking about, about
21 the difference between default for failing to -- a party
22 being in default for failing to follow through on the
23 pleadings versus what we're choosing to call a default
24 judgment here, and those are theoretical and academic
25 kinds of distinctions which probably have a lot of merit,

1 but I was hoping we could fix Van Dyke right now and then
2 the next biennium sit down and worry about these
3 theoretical distinctions and perhaps draw up an entirely
4 new rule.

5 MR. KANTOR: Judge Graber?

6 JUSTICE GRABER: I think that what we were
7 talking about earlier, though, is to try to fix Van Dyke
8 in a simpler form. I don't think anyone -- at least I am
9 not suggesting that we ought not fix it. I think it's a
10 problem and I think we ought to fix it. I just think
11 there is an easier way to do it, and I'll go ahead and
12 propose it as an amendment, that is as a substitution for
13 the changes now shown on Pages 29 and 30 of our materials
14 to have a newly numbered rule entitled "Failure to Appear
15 for Trial" that would read as follows: "When a party who
16 has filed an appearance fails to appear for trial, the
17 Court may in its discretion proceed to trial and judgment
18 without further notice to the nonappearing party."

19 MR. McCONVILLE: Second.

20 MR. KANTOR: Discussion on the proposed
21 amendment? Bruce Hamlin?

22 MR. HAMLIN: We don't have gaps in the
23 numbering because of the way that the original set of
24 rules was produced. 1 through 64 were adopted during the
25 first biennium. We do, however, have a Rule 58, which is

1 entitled Trial Procedure, and that might be a logical
2 place to put it.
3 MR. HOLLAND: We do have some reserved
4 numbers. Those are vacant, aren't they, for rules?
5 MR. KANTOR: They are.
6 MR. HOLLAND: They're out of order.
7 MR. KANTOR: They're out of order and I
8 recommend the same thing, Rule 58, Trial Procedure.
9 JUSTICE GRABER: I accept that as a
10 friendly suggestion, and if my seconder would permit that
11 could be a new Rule 58, subsection I believe it should be
12 E, or whatever the next subsection is, and it would have
13 the same title and the same text, but it could be in the
14 rule on trials because that's really what it is. It's a
15 description of another situation in which a trial would
16 proceed.
17 JUDGE McCONVILLE: I adhere to my second.
18 JUDGE WELCH: It's kind of six of one and
19 half a dozen of another. I was thinking we could change
20 the title on Rule 69 so it isn't about default judgments
21 but about default judgments and orders taken after a party
22 fails to appear. It's a little of six of one, half a
23 dozen of another.
24 JUSTICE GRABER: I think conceptually, it
25 makes more sense in 58 because it's one situation in which

1 a trial would proceed and it takes out the concept that we
2 have to then mush the language of 69.
3 JUDGE LIEPE: Judge Graber, would you be
4 willing to incorporate in your recommendation that in that
5 situation, on failure to appear for trial, the court may
6 without taking evidence enter a judgment against the
7 nonappearing party on the basis of the pleadings filed by
8 the appearing party or parties?
9 JUSTICE GRABER: I would not want to put
10 that language in there, and the reason is that the wording
11 that I have suggested is broad, and to me it suggests that
12 the trial judge has discretion to do anything that the
13 judge believes is appropriate that would otherwise be
14 appropriate at the trial, and if a motion for judgment on
15 the pleadings as to an issue would be appropriately
16 entertained, it still arguably would be appropriately
17 entertained at that point, so my intention is to make it
18 simple and just simply do away with Van Dyke in the
19 shortest possible sentence which is simply to say that --
20 69 isn't about that, and in this situation, no further
21 notice is required and things can proceed without being
22 any more specific than that, and I would not want to make
23 it more specific than that.
24 JUDGE LIEPE: One of the things that's of
25 real concern to trial judges is this matter of evidence at

1 the time when there is a nonappearance, and it's really a
2 waste of time to have required prima facie evidence under
3 the pleadings when they're going to -- when the prima
4 facie evidence really is going to produce nothing but the
5 pleadings themselves, so it was the thought that in the
6 "failure to appear for trial" situation, the judge should
7 be able to enter a judgment on the same basis and in the
8 same way in which a judge enters a judgment in case of a
9 default or failure to appear at all, which is provided for
10 in 69B(2), and so that's the reason why these other
11 provisions are in the proposed rule.
12 MR. KANTOR: My feeling is that Judge
13 Liepe's concerns are completely valid but they tend to
14 raise a host of other related issues that go beyond the
15 quick fix, and I think they may be more appropriate for
16 consideration of how to deal with the problem of prima
17 facie hearings generally than just reversing the effects
18 of the Van Dyke case.
19 JUDGE LIEPE: They do both, that's right.
20 This would address both issues, and it would deal with,
21 for instance, in district court and F.E.D. cases, there is
22 a failure to appear by the tenant. Those things are
23 handled on a very -- there are a lot of those cases.
24 They're handled on a rapid basis where you have the same
25 kind of thing and all kinds of collections procedures and

1 so forth, where it makes no sense to require a witness to
2 appear and to mouth something already in the complaint, so
3 it would be very helpful to have a procedure such as we
4 have outlined here.
5 MR. KANTOR: Currently we have Judge
6 Graber's motion which is seconded without the language.
7 She has declined to change her motion accordingly, so
8 either you need to make an amendment to her amendment or
9 wait until her amendment gets voted down.
10 JUDGE LIEPE: Maybe it would be approved.
11 MR. KANTOR: If it is, that effectively
12 ends the discussion.
13 JUDGE DURHAM: Point of order. Is her
14 motion in lieu of, and you quietly not adopt the other?
15 JUSTICE GRABER: It was a motion to
16 substitute, and I don't know if that's the right word.
17 I'm not up on those kinds of rules of procedure.
18 MR. KANTOR: I believe the effect of Judge
19 Graber's motion if approved would be to terminate the
20 discussion.
21 JUSTICE GRABER: Of the current material on
22 Pages 29 and 30 of Rule 69.
23 MR. MARCEAU: As we say in central Oregon,
24 I'm afraid we are getting further away from the pickup all
25 the time. One thing we know for sure is we have to do

1 something, and I'm not sure I understand why we are
2 thinking of the proposal as a quick fix, why it will not
3 last for the ages, for instance. Specifically this
4 proposed rule doesn't say that failure to appear at trial
5 is a default. What it says is if you don't appear for
6 trial, the other guy is entitled to a default order and a
7 default judgment. What violence or damage does that do to
8 anything? I am afraid I don't understand the consequences
9 of putting this in place. What bad thing will happen or
10 may happen if we do this?
11 JUDGE DURHAM: Typically, it's my
12 understanding that if the party is in default, they are
13 not entitled to be heard further on the matter because
14 they had their opportunity and blew it. My understanding
15 is, however, that a party who has fully met their pleading
16 obligations and has chosen not to appear for trial is in
17 no way confronting the court in a rude matter; they are
18 not violating anything and they should not have any burden
19 to seek relief from a default before they are entitled to
20 be heard on a motion for a new trial, a motion to set
21 aside a judgment or anything of the kind, because they are
22 not in default, conceptually. That's why I use the
23 apples-and-oranges notion. This is not a party who is in
24 default.
25 MR. MARCEAU: This really doesn't say

1 you're in default if you fail to appear at trial. This
2 just says that the other guy is entitled to do something.
3 JUDGE DURHAM: But if an order of default
4 is entered against me, I am not entitled to be heard
5 further until I go through the process of seeking relief
6 from default, which should not be my burden. I am a party
7 who is fully appearing and litigating.
8 MR. MARCEAU: How would you have that
9 person who doesn't show be heard further?
10 JUDGE DURHAM: On a motion for a new trial
11 because the judge obviously missed a completely
12 dispositive affirmative defense, statute of limitations or
13 the like.
14 MR. KANTOR: Judge Liepe was first here.
15 JUDGE LIEPE: With all due respect, I
16 disagree with the basic philosophy that's expressed in the
17 notion that someone can just not appear for trial and then
18 expect on that basis to have actions set aside and so
19 forth. The duty of a litigant is to appear for trial, and
20 I think that's a duty -- a litigant has that duty also
21 when he's filed pleadings, or she's filed pleadings. The
22 trial is set because evidently there are disputed issues
23 and so the court does expect both parties to be there.
24 It's an imposition and a waste of time for the court when
25 one of the parties isn't there, and so those persons who

1 are not there for trial when they're supposed to be after
2 they have been duly notified and when they have absolutely
3 no excuse for not appearing, they should suffer the
4 penalties that results from what amounts to a default.
5 JUDGE DURHAM: I don't agree. They're not
6 violating anything by not coming to trial.
7 MR. JOLLES: Skip, you've forgetten your
8 appearance before Judge Solomon.
9 JUDGE WELCH: I completely agree with the
10 last speaker. I think that this is a very graphical
11 problem.
12 MR. KANTOR: It comes up in Don Morrell.
13 JUDGE WELCH: The idea that you can simply
14 not show you and then move for a new trial? I don't
15 understand that. I don't think there is a basis for a new
16 trial. The person who doesn't show up for trial, when
17 they file an objection or a response or an answer or
18 whatever, has an obligation to come into court. If they
19 don't, they're just as much in default in terms of the
20 process as anybody else, and getting relief from a default
21 under those circumstances if perhaps they didn't have
22 notice, which is apparently what people are worried about,
23 that they didn't know they belonged there, it's not that
24 difficult to do if they can make a bona fide showing.
25 MR. KANTOR: Judge Sams?

1 JUDGE SAMS: Isn't that addressed really
2 right in the beginning at 69(A) there about that fourth
3 line, that the party has failed to plead or otherwise
4 defend? Doesn't that mean coming into court?
5 JUDGE LIEPE: That's the way it was
6 construed in the Van Dyke case. The Court of Appeals in
7 the Van Dyke case tells us that failure to defend by
8 appearing at trial is a default. That's the problem with
9 the Van Dyke case.
10 MR. KANTOR: That's basically the issue and
11 the problem. Judge Graber?
12 JUSTICE GRABER: I wanted actually to
13 address a question to Judge Welch, which is that the
14 problem, the practical problem in the Don Morrell
15 situation, is there anything about my proposed substitute
16 that would leave you in the lurch? So you're shaking your
17 head no?
18 JUDGE WELCH: No.
19 JUSTICE GRABER: Either the format, the one
20 that's currently proposed, or my substitute would allow
21 you to go forward and deal with the parties that are there
22 and get finished with the case.
23 JUDGE WELCH: I guess one of the things I'm
24 worried about -- Yes, yes, to answer your question.
25 I'm worried about -- people use the

1 language "default" all the time in that circumstance. You
2 don't show up in juvenile court, in domestic relations,
3 all the high-activity -- district court, civil-type
4 matters, people are dealing in vast volumes there and if
5 you're not there, you're in default and the court
6 proceeds.

7 JUSTICE GRABER: If you're not there the
8 court proceeds. The question is whether we want to also
9 say "and you're in default" in between. I can envision
10 unusual situations where somebody might say, "The first
11 two days of this trial are going to be about things I
12 don't care about and my client wants me to show up at the
13 very end to look at a question of custody," in a Don
14 Morrell case, or to look at a question of damages where we
15 aren't contesting liability, there are multiple parties.

16 I can envision multiple situations where a
17 party does not choose to show up at the beginning of the
18 trial but might they wish to show up later. It's
19 possible.

20 MR. KANTOR: Just so you know, when we're
21 all talking at once, I'm asking the court reporter not to
22 take any of it down.

23 MR. HOLLAND: Just a technical
24 consideration. We have not given any form of public
25 notice of any possible amendments to Rule 58, but we did

1 to 69. Whether that's enough to drive us, I don't know,
2 but --
3 MR. MARCEAU: That's a biggie.
4 MS. STEWART: That is a biggie.
5 MR. KANTOR: I don't think we can change
6 another rule without notice.
7 MS. BISCHOFF: We could go back and change
8 the title, Rule 69.
9 MR. KANTOR: I think we could do that.
10 Otherwise, the relatively good idea --
11 MR. HART: We have been spending a lot of
12 time worrying about the people that get summons and don't
13 appear and a lot of time on what we should do for them
14 when they appear with an answer and then they do not show
15 up. It seems to me that that is not a big interest group
16 that's going to challenge anything we did here and we
17 should just move forward with the resolution. Really, the
18 judges want it. This is all a judges' issue. It's a
19 matter of saying, "What do you want and we'll adopt it."
20 MR. MARCEAU: Ignore the notice that says
21 we're going to deal with 69 and do a 58?
22 MR. HART: I think Susan has hit right on
23 it. Yes, that's exactly right. Susan said we change the
24 number. Who is going to say we didn't give these
25 malcontents that we're protecting most of the day?

1 MR. KANTOR: I personally believe that we
2 cannot amend Rule 58. I think that notice provision under
3 the Procedures Act prohibits us.
4 MR. MARCEAU: Unless it's in our statute.
5 It's not just the Administrative Procedures Act.
6 JUSTICE GRABER: Can I speak to that,
7 because my motion is currently on the table and I would
8 rather have a solution that is within our legitimate
9 province than not have a solution because we didn't do the
10 notice in that way, and I suppose another way to deal with
11 it is to have a new subsection under Rule 69 that reads
12 the same way as what I proposed earlier and just have
13 different words.
14 MR. KANTOR: This was essentially Judge
15 Snouffer's original proposal?
16 JUSTICE GRABER: Yes. It's slightly
17 reworded from that.
18 MR. JOLLES: Susan, why don't we amend your
19 amended motion and call A(2) Failure to Appear for Trial
20 and use your language and then we've got it, haven't we?
21 We have the right rule and we have everything you want.
22 JUSTICE GRABER: Should I just -- My
23 seconder is nodding madly over here. Is that all right?
24 MR. JOLLES: He's been nodding off.
25 MR. KANTOR: What about making it Rule 69C

1 as compared to trying to fit it into Rule A when Rule A
2 talks about all kinds of other things?
3 JUSTICE GRABER: 69C.
4 MR. KANTOR: It would either be a new C and
5 pushing everything down, or an F at the end.
6 MR. HAMLIN: I think it would make more
7 sense to have a new C, push everything down.
8 MS. STEWART: How about a B?
9 JUDGE LIEPE: How about F for "flunky"?
10 MR. HOLLAND: I would be cautious about
11 putting anything into Rule 69 that had nothing to do with
12 default, and I think Justice Graber's language doesn't say
13 a word about default, and the next thing would say
14 "setting aside default".
15 MR. MARCEAU: Are we all being mindful of
16 the existing 69(C) which says, For good cause shown, the
17 court may set aside an order of default and if a judgment
18 by default has been entered may likewise set it aside"?
19 Why doesn't that solve the problem that Judge
20 Durham raises, and if that is important, if you put in the
21 Judge Graber rendition, then don't the persons against
22 whom judgments are rendered via the Judge Graber version
23 lose that opportunity? In other words, isn't the
24 possibility that you described, Judge Durham, going to
25 happen by proceeding in this fashion?

1 JUDGE DURHAM: It's a tiny, I believe,
2 important issue and that is that the party who has filed a
3 pleading that states that the complaint is based on a
4 cause of action barred by the Ultimate Statute of Repose
5 or any other airtight affirmative defense can stay home
6 and watch daytime TV and trust that the trial judge will
7 dismiss the complaint, and if they don't, they can move
8 for a new trial and should not have to show good cause for
9 not coming to the trial because they fully appeared and
10 fully pled an airtight, 100-percent successful defense.
11 They can say -- they cannot say, "I have good cause for
12 not coming because I intended to watch daytime TV and not
13 come. I'm moving for a new trial because you have not
14 read the Statute of Ultimate Repose defense that I
15 asserted and you should have." It's an airtight defense.
16 This is a tiny problem but a theoretically important one
17 to hold on to.
18 MR. HAMLIN: I hope that I'm never
19 representing such a party and that these words will come
20 back to haunt me, but I question whether you would be
21 entitled to a new trial under Rule 64. The obvious ones
22 are 64(B)(1), which is, irregularity in the proceedings in
23 court, jury or adverse party or order of the court where
24 the use of discretion by which such party is prevented
25 from having a fair trial. I would say, "Boy, that didn't

1 happen," and B(6) is error in law occurring at the trial
2 and objected to or excepted to by the party making the
3 application. Clearly that didn't happen because they were
4 watching daytime TV, so I would say, "Motion for new trial
5 denied."
6 MR. KANTOR: What about B(5), or that it is
7 against the law?
8 JUDGE McCONVILLE: Taking Judge Durham's
9 example, Ultimate Repose, suppose that the defendant had
10 filed a motion for summary judgment, established it and
11 the court nevertheless had denied the motion for summary
12 judgment. Under the rule as it's presently proposed in
13 the booklet, there would be a default entered and there
14 could not be an appeal taken on the merits of the
15 judgment, and under Justice Graber's formulation, which I
16 support, you simply appeal and the the court would review
17 the interlocutory ruling of the trial court erroneously
18 denying the defense.
19 JUDGE DURHAM: Without burdening the
20 appellant with the label of default.
21 MR. MARCEAU: Is that right, that an appeal
22 could not be taken or that you are limited in what one may
23 assign as error in that situation?
24 JUDGE McCONVILLE: You can appeal from the
25 merits of a judgment entered on default? You appeal, do

1 you not, from the decision of the court not to set aside
2 default?
3 JUDGE LIEPE: If there is --
4 MR. KANTOR: We're getting a little out of
5 range here. Judge Liepe, on this subject. Let's see if
6 we can finish this up.
7 JUDGE LIEPE: Perhaps I didn't understand
8 the situation. If there was a motion for summary judgment
9 and the motion was improperly denied by the court, are you
10 saying that error would not then be preserved if the party
11 fails to appear for trial?
12 JUDGE McCONVILLE: Correct. If you have an
13 entry of default, the effect of that is to set aside the
14 pleadings. That's just a fact.
15 JUDGE LIEPE: Tell me why it is that the
16 person who knows he had a ruling against him, then why
17 wouldn't that person want to appear for trial to preserve
18 the record?
19 JUDGE McCONVILLE: Because he knows he has
20 a perfectly valid defense that has been erroneously
21 rejected by the trial court and he'll get it taken care of
22 at the appellate level.
23 MR. KANTOR: Maury Holland?
24 MR. HOLLAND: May I suggest that the
25 council consider taking Justice Graber's proposed version

1 and Rule 58, which we can't touch, and stick it onto Rule
2 69(F), and make a note to ourselves at the next biennium
3 to shift it to the right rule number? I don't think it's
4 going to cause great havoc and mayhem to have it in an
5 inappropriate rule for a couple of years. It will fix it.
6 I'll even put in a staff comment in highlighter, "This
7 should have been in 58 and it's solving the Van Dyke."
8 MR. KANTOR: Dick Kropp?
9 MR. KROPP: I have a question. Basically,
10 when we present this to the legislature, can't they put it
11 under Rule 58?
12 MR. KANTOR: Actually, they can make any
13 changes to what we do, and if our letter of instruction
14 suggests that --
15 MR. KROPP: Why don't we follow Maury's
16 suggestion and you as the chairman, being all-knowing,
17 tell them that we have it under 69 but we made a mistake
18 and it should be under 58.
19 MR. KANTOR: Actually, the legislature
20 isn't the only one who can do that, but the Office of
21 Legislative Council can move things, and they have moved
22 some of our rules in the past.
23 MR. MARCEAU: The reason why I don't think
24 we want to ask them to do that, and that's one point we
25 made earlier, we're trying to establish ourselves as the

1 experts with the legislature. They look upon us as having
2 expertise. Is it consistent with that image to go to the
3 legislature and say we can't get our numbers straight?
4 JUDGE DURHAM: The real answer, I suppose,
5 is to ask for the freedom to avoid this problem by being
6 empowered in a meeting like this to put it on to 58 if we
7 really feel that's appropriate. That really ought to be
8 within our authority.
9 MR. MARCEAU: Let me make one more comment
10 on the merits. This has to do with appeal. It's my
11 belief that you can appeal a default judgment. The
12 problem you run into is that you cannot assign anything as
13 error because you did not raise it in the trial court.
14 That's the rub, and that appealability really doesn't have
15 any relevance to this discussion. This judgment for
16 failure to appear at trial is available as any judgment,
17 except --
18 MR. JOLLES: Except you can't win.
19 MR. MARCEAU: -- except you can't win, yes.
20 If it's a pleading issue, it would seem to me that you
21 could raise that, if you have pleaded, which I think is
22 Judge Durham's scenario.
23 MR. CRAMER: My thought, you know it's
24 been mentioned, summary judgment, it's real common for
25 people to file a summary judgment based upon a motion for

1 judgment on the pleadings, in effect, is what we used to
2 call it, and to raise these pleading issues and say,
3 "Look, the pleadings by themselves show that we are
4 entitled to win this issue or maybe this case," I don't
5 think the court has the burden of deciding those things
6 the way he thinks they should be decided if there has been
7 no motion filed, and furthermore, I would be terribly
8 shocked if I go into court with a controversy in the
9 pleadings like this, like a good example he gave is the
10 Statute of Limitations. You know, the Statute of
11 Limitations does not bar or does not destroy a cause of
12 action. All it does is give you the right to
13 affirmatively raise that issue and prove it, that this is
14 barred by statute. The cause of action still exists; you
15 just can't collect on it.
16 So I don't think the judge has the right in
17 that situation to go in and make a decision that this case
18 is done because the Statute of Limitations says so when
19 I'm there ready to go and proceed with the trial and the
20 other attorney doesn't bother to show.
21 JUDGE WELCH: I agree with him.
22 MR. JOLLES: There are nonwaivable
23 defenses, like want of jurisdiction.
24 JUDGE DURHAM: That is a much better
25 example. Mine is a defense that must be proven.

1 MR. JOLLES: A party files an answer, no
2 jurisdiction; you don't waive that by not raising it, and
3 I don't know if you enter a default. I think that would
4 probably be appealable even on a default judgment. I
5 would defer to Justice Graber on that.
6 JUSTICE GRABER: I'm not sure of the answer
7 on that.
8 MR. KANTOR: Subject matter of jurisdiction
9 is certainly always raisable.
10 MR. JOLLES: Suppose you file for divorce
11 in the district court or something? We have had some
12 judges that would grant it.
13 JUDGE McCONVILLE: Are we ready for the
14 question?
15 MR. KANTOR: John Hart has pointed out that
16 the statute is a little mushy on what our rights are and
17 in one sentence it talks about giving notice of a proposed
18 change to a rule, and then the next sentence or two down
19 says that we're supposed to give notice of the substance
20 of our proposed amendment. I'm not sure how they can be
21 reconciled, if we tried to distinguish this.
22 MR. JOLLES: As I understand it, there is a
23 motion to use Susan Graber's language as section C of Rule
24 69. I move the question.
25 MR. CRAMER: Ron raised an issue that was

1 very valid here. He said, look, if you don't use the word
2 "default" in here, you don't get the benefits of the
3 present section C. If you put this in section C, you're
4 going to throw out the old section C.
5 MR. JOLLES: Move it down.
6 MR. CRAMER: But then it wouldn't apply to
7 this kind of action, and I think you have screwed it up.
8 MR. KANTOR: Unless we also change Rule 69C
9 to have it apply to any order under this rule.
10 MR. PHILLIPS: I don't think you need to do
11 that. Rule 69C existed because it applied to an order and
12 allowed you to mess with it before the judgment was
13 entered.
14 MR. KANTOR: That relates to an order.
15 MS. STEWART: Although there are slightly
16 different grounds showed on an order.
17 MR. MARCEAU: 69C relates to order and
18 judgment.
19 JUSTICE GRABER: I think that Mike's point
20 was that Rule 70 by its terms applies to all judgments and
21 it would thus apply to a judgment entered after failure to
22 appear for trial, Rule 71.
23 MR. MARCEAU: That is giving notice of the
24 judgment.
25 JUSTICE GRABER: I'm sorry; I misspoke

1 myself.

2 MR. KANTOR: Any further discussion, or do

3 you want to vote on Judge Graber's amendment?

4 MR. HAMLIN: I need to hear it again.

5 JUSTICE GRABER: The title of the section

6 would be Failure to Appear for Trial and the text would

7 read "When a party who has filed an appearance fails to

8 appear for trial, the court may in its discretion proceed

9 to trial and judgment without further notice to the

10 nonappearing party."

11 MR. HOLLAND: Can I make a final appeal

12 that you resolve -- that the council resolve this issue?

13 I think that's an excellent formulation, but I think we

14 look kind of silly putting that totally non-germane thing

15 in the context of defaults, and therefore, I would urge

16 the council to consider -- be gutsy; do it under 58E and

17 construe that statute -- we certainly did give notice of

18 the substance in the advance sheet.

19 JUSTICE GRABER: In a sense, the whole

20 point of it is to say, "We don't agree with Van Dyke which

21 put this problem under Rule 69 to begin with."

22 MR. KANTOR: I certainly don't think there

23 would be any harm or prejudice. I'm concerned somebody

24 will challenge the legal effect.

25 MR. MARCEAU: Because our notice said ORCP

1 69 default judgment may be entered without notice.

2 MR. HART: If anybody read the material

3 they would know it was the Van Dyke problem, and that's

4 the substance of our many hours of discussion and there is

5 nothing in ORS 1.730 says you have to give them notice

6 that it was Rule 58 we were taking up today. It was the

7 Van Dyke problem.

8 MR. MARCEAU: This doesn't say Van Dyke.

9 Maybe we have some customers who say that's fine as long

10 as it's a default judgment but if it's something else --

11 MR. HART: I think it's interesting nobody

12 has even written to us about these problems.

13 MR. KANTOR: We have had several speakers.

14 Janice Stewart?

15 MS. STEWART: I would frankly prefer to

16 keep it under Rule 69 just from the standpoint that if you

17 are researching this issue, you're going to come across

18 Van Dyke in Rule 69 and that's where the change ought to

19 be at this point in time. If the legislature wants to

20 move it, fine, but from the practitioner point of view,

21 I'd rather see it in Rule 69.

22 MR. WILKINSON: From a practitioner point

23 of view, it's all called a default.

24 MR. KANTOR: Further discussion, or shall

25 we call the question?

1 MR. KROPP: Question.
2 JUSTICE GRABER: Question.
3 MR. KANTOR: Those in favor of substituting
4 Justice Graber's proposal as a new subsection of Rule 69
5 to the proposal in the materials presented today?
6 CHORUS OF COUNCIL MEMBERS: Aye.
7 MR. KANTOR: Opposed?
8 JUSTICE GRABER: Now, it's been
9 substituted. Now don't we vote on its merits, or is that
10 it?
11 MR. KANTOR: We substituted.
12 JUDGE LIEPE: I think we need to say if we
13 want to adopt it.
14 MR. KANTOR: Just in case, let us do that
15 before anybody leaves.
16 MR. JOLLES: I have one short item of new
17 business.
18 MR. KANTOR: We're not done with Rule 69.
19 JUSTICE GRABER: I now move that we adopt
20 the mertis of what we substituted.
21 JUDGE McCONVILLE: Second.
22 MR. KANTOR: Discussion? Those in favor?
23 CHORUS OF COUNCIL MEMBERS: Aye.
24 MR. KANTOR: Opposed?
25 MS. STEWART: I need to back up to Rule 39

1 because I noticed on Pages 20 to 21, there is a sentence
2 that has been crossed out. That sentence is not in the
3 original 39D. That was something that the council
4 proposed tentatively to cure my problem with depositions.
5 I don't like that change. It doesn't solve my problem so
6 I'm not going to bring it up to the council unless
7 somebody else wants to, but I think what goes out should
8 not have that crossed-out sentence because that's not
9 there in the first place.
10 MR. KANTOR: That's right; we didn't vote
11 on that.
12 MS. STEWART: We adopted the changes with
13 Rule 39 in the course of dealing with the depositions out
14 of state, so it technically --
15 JUSTICE GRABER: You're saying that's a
16 nonchange?
17 MS. STEWART: It is. I need to point that
18 out that unless somebody is going to have the council
19 amend and add that sentence, whatever is published
20 shouldn't have that sentence in it at all. It shouldn't
21 be in there and crossed out. It never existed.
22 Technically it should have been highlighted
23 instead of crossed out as a tentative proposal that they
24 were to consider.
25 MR. KROPP: That was in my motion.

1 MR. KANTOR: That's on the bottom of Page
2 20?
3 MS. STEWART: The sentence on the bottom of
4 Page 20, top of Page 21 should have been highlighted
5 instead of stricken. I think the way -- we haven't yet
6 voted on it because if we adopt the changes to Rule 39,
7 it's not in there because it shows that it's being
8 stricken, but in whatever we publish, it shouldn't be
9 there, period. That's all I'm pointing out.
10 MR. KANTOR: Can we have an understanding?
11 JUDGE DURHAM: I'll move its adoption.
12 MS. STEWART: I don't want to adopt the
13 change.
14 MR. JOLLES: It's a mistake of the
15 scrivener.
16 MS. STEWART: It's a mistake of the
17 scrivener because that sentence was tentatively adopted by
18 the council for consideration at this meeting. It was an
19 amendment in response to a problem that I initially
20 brought up to the council this year, but it's not --
21 MR. JOLLES: And that change was crossed
22 out before it was adopted so it doesn't need to be there?
23 MS. STEWART: Right. Unless somebody wants
24 to add that sentence to the rule, we don't have to
25 consider it.

1 JUDGE DURHAM: Is the substance of this
2 sentence dealt with otherwise?
3 MS. STEWART: No. I just think that --
4 JUSTICE GRABER: There's a comment
5 concerning it that would have to go out as well because
6 that no longer makes any sense on Pages 23 and 24. It
7 talks about a sentence added which has now been added and
8 subtracted.
9 MR. KANTOR: Maury, what's your
10 recollection of what happened?
11 MR. HOLLAND: I don't remember.
12 MR. KANTOR: Gilma, whose memory is often
13 the most trustworthy of everyone here says at some earlier
14 meeting we voted to approve it and to put it on the
15 agenda.
16 MS. HENTHORNE: But they didn't know why
17 they did it.
18 MS. STEWART: I will do this real quickly.
19 The history of this was to deal with the problem of who
20 can be excluded from depositions, and we went round and
21 round on this in the council initially with the proposal
22 that certain people could be excluded from the depositions
23 and then we had a lot of disagreement on that and then
24 finally this sentence was proposed by somebody and
25 adopted, which really doesn't do anything at all because

1 the court always can consider some motion by somebody to
2 exclude, so anyway, that was finally adopted. I voted
3 against it because it didn't accomplish what I wanted. I
4 suppose at this meeting, in order to have that proposal go
5 forward to the legislature, someone has to move to adopt
6 it, right?
7 MR. HAMLIN: I think we ought to do the
8 reverse, because Dick Kropp's motion was to adopt all the
9 printed amendments that we had in 38, 39 and 46, and that
10 passed and that language was sitting there, and maybe just
11 to clarify the record, we ought to make it clear that the
12 language which is stricken out at the bottom of Page 20
13 and the top of Page 21 is not in fact part of our
14 submission to the legislature.
15 MS. STEWART: That's what I was trying to
16 say.
17 MR. KROPP: My motion included that.
18 MR. KANTOR: Then we have to deal with the
19 fact that it's a separate agenda item essentially and we
20 have to either vote on it or decide not to vote on it.
21 MR. HAMLIN: That's what you meant?
22 MS. STEWART: Right.
23 MR. KANTOR: If I understand people
24 correctly, we want to make a decision to not take any
25 action on what the proposed Rule 39D changes.

1 MR. MARCEAU: I guess my question is, why
2 would we not want to include that second sentence in light
3 of the fact that our notice says that ORCP 39 revisions
4 will include discretionary authority of trial judges upon
5 request of a party or deponent to exclude specified
6 persons from taking a deposition?
7 MR. KANTOR: I'm sorry, only because I
8 thought the original proponent was withdrawing it. If you
9 want to vote on it, let's get a motion.
10 MR. MARCEAU: Is that the reason we don't
11 want to do it?
12 MR. KANTOR: Janice Stewart?
13 MS. STEWART: Can I move not to adopt the
14 change?
15 JUSTICE GRABER: Move to reject?
16 MS. STEWART: I move to reject the proposed
17 change to Rule 39D.
18 MR. KROPP: Second.
19 JUDGE DURHAM: Just that one sentence?
20 MS. STEWART: Right.
21 JUDGE DURHAM: Why would you want it
22 deleted?
23 MS. STEWART: I don't want it added because
24 I think what it says right now is nothing in addition to
25 what is already in place. In other words, if you go to

1 court and ask the court to exclude somebody, you can do
2 that under Rule 36C. This rule, if you have it in here, I
3 think is going to throw you right back to Rule 36C, which
4 deals with basically protective orders from discovery.
5 What I was looking for was something that
6 went beyond Rule 36C. In other words, you don't have to
7 show good cause because it's going to cause annoyance or
8 embarrassment or oppression or whatever, which are the
9 standards under Rule 36C. I wanted the ability for the
10 court to exclude people really for any reason and not have
11 to go through the 36 standard.
12 The way I read this sentence in here, all
13 it's going to do is just throw you right back to Rule 36C
14 and it doesn't do anything to help out the situation I was
15 concerned with.
16 MR. MARCEAU: How does it take you back?
17 MS. STEWART: It doesn't say on what basis
18 you can order persons excluded from the deposition. It
19 doesn't specify what's the standard. If I were a party in
20 this case, I would say, "Okay, you can exclude persons
21 from the deposition. Now, what on basis can you do that?"
22 That throws you back to 36C, which says the court can
23 enter orders concerning depositions --
24 MR. JOLLES: It says that discovery be
25 conducted with no one present except persons designated by

1 the Court. That's 36C.

2 MS. STEWART: Thank you, Bernie.

3 MR. JOLLES: So it's already there.

4 MS. STEWART: I think here in order for
5 this to have any different effect, you would basically
6 have to say that the court may order persons excluded from
7 the deposition for any reason in order to add anything
8 new.

9 MR. KANTOR: I think when we discussed this
10 many months ago, early in the biennium, I guess this
11 language passed, but I think there was a general consensus
12 this didn't add much to 36, but that's a long time ago and
13 my memory is not good enough. Fred Merrill told Gilma
14 that it didn't have any effect at the time.

15 Any further discussion? We're calling the
16 question, which is to not approve the language in 39D
17 which should have been highlighted but which instead has
18 been crossed out.

19 Those in favor?

20 CHORUS OF COUNCIL MEMBERS: Aye.

21 MR. KANTOR: Opposed?

22 MR. HOLLAND: So you don't approve the
23 strike through, which means it will be in the rules? Just
24 checking to see if you people are still here.

25 MR. KANTOR: He's kidding.

1 MR. HAMLIN: I raised something about Rule
2 32. Phil Goldsmith mentioned this to me and I had
3 forgotten it until just now when we were talking about
4 things.
5 The portion of Rule 32 which appears at
6 Pages 10 through 14, you would have the impression that
7 the language there is the existing rule with either
8 shading to indicate added portions or strike-outs to
9 indicate portions which are being deleted. That's not
10 true, though, because F(1) as it appears on Page 10 is all
11 brand-new language. The shading and striking out only
12 represents changes from the committee's prior draft, not
13 from the rule as it exists in this book, and as long as
14 everybody understands that.
15 MR. STEWART: That should all be
16 highlighted?
17 MR. HAMLIN: That should all be highlighted
18 when it's submitted to the legislature because it's all
19 brand-new language.
20 MR. KANTOR: Just so we're not confused, as
21 long as you assumed that all of that on Page 10 is going
22 to be part of new rule, I think we're okay.
23 All right. We're through the substative
24 items on the agenda. Regarding future meeting schedule,
25 we have a February meeting, I believe, first Saturday in

1 February. It's hard for me to know right now exactly how
2 much business we're going to have after the first of the
3 year.
4 Do people want to go ahead and schedule
5 another meeting now or wait until February to do so?
6 Could we perhaps schedule one meeting ahead of that toward
7 the end of March so we have something we can all plan for?
8 When is the holiday, the school holiday?
9 JUDGE DURHAM: Second or third week in
10 March.
11 MR. KANTOR: Is the last Saturday in March
12 safe for everybody?
13 MS. STEWART: Could be spring break in
14 Portland.
15 MR. KANTOR: How about we make it the last
16 Saturday in March unless that's spring break.
17 MR. KENAGY: It is spring break at
18 Willamette.
19 MR. KANTOR: I guess I wasn't taking into
20 consideration universities.
21 MS. STEWART: That is the last weekend for
22 spring break in Portland.
23 MR. KANTOR: I suppose we could do it March
24 15th or so, a Saturday around there if that's before
25 spring break. Does anybody know the Saturday closest to

1 March 15?

2 MR. KENAGY: 13th.

3 MR. KANTOR: What's the first Saturday in

4 February?

5 MS. HENTHORNE: 8th.

6 MR. MARCEAU: No, no, the 6th.

7 MR. KANTOR: The first Saturday in February

8 and then March 13, and I think that should do it for now.

9 MR. MARCEAU: These are both in Portland?

10 MR. KANTOR: Under new business, couple of

11 matters, maybe one which is really old business. Rule 55

12 Task Force, I think we need to report to the legislature

13 that there is a Rule 55 Task Force. This is the hospital

14 records issue.

15 Do we need to have a report, John?

16 MR. HART: No.

17 MR. KANTOR: Do you need some more people

18 on your task force?

19 MR. HART: Yes.

20 MR. KANTOR: We wonder if there might be

21 some people to join John and members on that task force.

22 MR. KENAGY: That's the medical records

23 section? I'd be happy to join with you on that.

24 MR. KANTOR: We should deal in the future

25 perhaps at the next meeting with the council staff comment

1 issue. I think we need to get that clarified in
2 connection with perhaps our discussion of rules of
3 procedure, generally, and see if they're solving our
4 procedural questions and problems.
5 For those of you who have our rules and
6 procedures, about eight pages, just take a look at them.
7 If you do not have them, let Maury or Gilma know and we'll
8 send you a copy.
9 Anything else?
10 MR. JOLLES: One item of new business. I
11 think we ought to it recognize the tour de force that
12 Maury Holland has concocted here with this Rule 32 and the
13 rest of it and summarize it in the minutes, and I think he
14 deserves a vote of thanks and commendation, and I so move.
15 (Applause).
16 MR. KANTOR: Thank you all very much.
17 (Meeting adjourned 3:00 p.m.)
18
19
20
21
22
23
24
25

1 STATE OF OREGON)
2) ss.
3 County of Multnomah)
4
5 I, TAMARA A. AUFDERMAUER, a Certified Shorthand
6 Reporter for Oregon, hereby certify that I reported in
7 stenotype all oral proceedings had in the foregoing
8 matter; that thereafter my notes were reduced to
9 typewriting under my direction; and the foregoing
10 transcript, pages 1 to 189, inclusive, constitutes a full,
11 true and correct record of such oral proceeding had and of
12 the whole thereof.
13 WITNESS my hand at Portland, Oregon, this 21st
14 day of December, 1992.
15
16
17

TAMARA A. AUFDERMAUER
18 CSR #90-0199
19
20
21
22
23
24
25