3424 HJUD SB 377/HB 532 (FILE 3: BILLS, FISCAL NOTES & AMENDMENTS)

12. The Supreme Court of New Jersey shall adopt rules of court appropriate or necessary to effectuate the purpose of this act. The Administrative Office of the Courts shall not later than March 1 of each year file with the Governor and Legislature a report on the impact of the implementation of this act on automobile insurance settlement practices and costs, and on court calendars and workload.

13. This act shall take effect immediately but sections 1 through 11 shall remain inoperative until January 1, 1984 or until the adoption of appropriate rules by the Supreme Court of New Jersey, whichever shall be later.

STATEMENT

This bill establishes a system of judicial arbitration for tort action claims, for noneconomic or economic loss, filed in the Superior Court of this State, if the amount in controversy is $15,000.00 or less or, in the case of a greater amount, the parties agree to submit the controversy to arbitration. If the action is for both economic and noneconomic loss, the $15,000.00 shall apply to the amount in controversy for noneconomic damages.

The parties to the arbitration may agree to the number and persons to be designated as arbitrators; otherwise the arbitrators shall be selected from a list of retired judges and practicing attorneys compiled by the assignment judge, in a manner to be prescribed by the State Supreme Court. Controversies on which arbitration decisions have been rendered prior to the filing of the action are exempted from the bill's provisions.

Any party to the arbitration may request a trial de novo of the controversy, during which no reference shall be made to the arbitration proceedings or decision. The party asking for a trial de novo shall pay the arbitrators' fees. That party shall also be assessed court costs and the reasonable costs of the trial to the other parties, including reasonable attorneys' fees, not to exceed the amount of damages awarded that party, if that party is the one to which the award is made; the court may reduce or eliminate the assessment to the extent that the court decision is more favorable to the filing party. The payment of court costs may be waived by the court, upon a finding that the payments would create a substantial economic hardship or are not in the interests of justice.

TRANSCRIPT OF TESTIMONY

(J) The Arbitrators shall not be required to make a transcript of the proceedings before them. If any party shall desire a transcript, he shall provide a reporter and cause a record to be made. The party requesting the same shall pay the cost thereof which shall not be considered costs in the case. Any party desiring a copy of any transcript shall be provided with it by the reporter upon payment therefor, based upon the usual charges made for a copy of a deposition plus one-half of the cost of the reporter at the hearing.

Part IV. Report and Award—Not a Judgment

(A) Within thirty (30) days after the hearing, the Board of Arbitration shall file a report and award in the office of the Arbitration Commissioner acting for the Clerk of Courts, and on the same day shall mail or otherwise forward copies thereof to all parties or their counsel. An award may not exceed $10,000.00 exclusive of interest unless, in an action containing several party claimants, the Court, when referring the case to arbitration at pre-trial, orders that the $10,000.00 limitation apply separately to one or more of the claimants or as agreed to by the parties in accordance with Part I hereof. The report and award shall be signed by all of the members of the Board. In the event all three members do not agree on the finding and award, the dissenting member shall write the word "Dissents" before his signature. A minority report shall not be required unless the dissenting arbitrator elects to submit the same due to unusual circumstances. The Arbitration Commissioner shall make a note of the report and award on his docket and file the original report with the Clerk of Courts forthwith.

LEGAL EFFECT OF REPORT AND AWARD;
ENTRY OF JUDGMENT

(B) The report and award, unless appealed from as herein provided, shall be final and shall have the attributes and legal effect of a verdict. If no appeal is taken within the time and in the manner specified therefor, the Court shall enter judgment in accordance therewith. After entry of such judgment, execution process may be issued as in the case of other judgments.

Part V. Compensation of Arbitrators

(A) Each member of a Board of Arbitration who has signed an award or files a minority report shall receive as compensation, for his services in each case a fee of Forty Dollars ($40.00). When more than one case arising out of the same transaction is heard at the same hearing or hearings, it shall be considered as one case insofar as com-

2. That the action of one or more of the Arbitrators was procured by misconduct or corruption.

Copies of said exceptions shall be served upon each Arbitrator and the Arbitration Commissioner within 48 hours after filing and shall be forthwith assigned for hearing before the Administrative Judge or a judge assigned by him to conduct a hearing thereon.

If such exceptions shall be sustained the report of the Board shall be vacated by the Court and the case set for trial. The filing of exceptions shall tol. the running of the thirty (30) days appeal period provided in (A) above until a determination of the exceptions by the Court.

Amended Feb. 25, 1977; Jan. 3, 1978.

Enrolled

House Bill 2361

Sponsored by COMMITTEE ON JUDICIARY (at the request of Commission on the Judicial Branch)

CHAPTER 670

AN ACT

Relating to civil actions.

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

SECTION 1. (1) An arbitration program under this Act for civil actions may be established for:

(a) The circuit court in a judicial district by an affirmative vote of a majority of the judges of the court, subject to the approval of the Chief Justice of the Supreme Court, or by an order of the Chief Justice.

(b) The district court for a county or counties by an affirmative vote of a majority of the judges of the court, subject to the approval of the Chief Justice of the Supreme Court, or by an order of the Chief Justice.

(2) Rules consistent with this Act to govern the operation and procedure of an arbitration program established under subsection (1) of this section for a court may be made in the same manner as other rules applicable to the court pursuant to ORS 1.002 (1), 3.065 (3), 3.220, 46.280 or 46.665 (3). Rules to govern the operation and procedure of a program made pursuant to ORS 3.065 (3), 3.220, 46.280 or 46.665 (3) are subject to the approval of the Chief Justice of the Supreme Court.

(3) This Act does not apply to appeals from a county, justice's or municipal court or actions in the small claims department of a district court.

SECTION 2. (1) In a civil action in a circuit or district court having an arbitration program established under section 1 of this Act, where all parties have appeared, the court shall refer the action to arbitration under this Act if:

(a) The only relief claimed is ~~recovery of money or damages, and no party asserts a claim for money or~~ general and special damages in an amount exceeding ~~$15,000 in the circuit court, or in an amount exceeding $3,000 in the district court, exclusive of attorney fees, costs and disbursements and interest on judgment.~~

(b) The action is a ~~domestic relations suit~~, as defined in ORS 107.510, ~~in which the only contested issue is~~ the division or other disposition of property between the parties.

(2) The ~~presiding judge of the court may exempt from arbitration~~ under this Act a civil action that otherwise would be referred to arbitration under subsection (1) of this section, or may remove from further arbitration proceedings a civil action that has been referred to arbitration under subsection (1) of this section, when, in the opinion of the judge, good cause exists for that exemption or removal.

SECTION 3. (1) In a civil action in a circuit or district court having an arbitration program established under section 1 of this Act, where all parties have appeared and ~~agreed to arbitration by stipulation~~, the court shall refer the action to arbitration under this Act if:

(a) The relief claimed is more than or other than recovery of money or damages.

(c) The case shall be submitted to arbitration at an earlier time upon the written request of all plaintiffs, subject to a motion by a defendant for good cause shown to delay the arbitration hearing.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration ⇨1.1.
C.J.S. Arbitration §§ 17, 22.

§ 1141.17 Tolling limitations on dismissal for lack of prosecution

Submission of an action to arbitration pursuant to this chapter shall not toll the running of the time periods contained in Section 583 as to actions filed on or after the operative date of this chapter. Submission to arbitration pursuant to a court order within six months of the expiration of the statutory period shall toll the running of such period until the filing of an arbitration award.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Limitation of Actions ⇨131.
C.J.S. Limitations of Actions § 256.

§ 1141.18 Arbitrators; qualifications; compensation; selection; disqualification

(a) Arbitrators shall be members in good standing of the State Bar, and shall sit individually. A judge may also serve as an arbitrator without compensation. People who are not attorneys may serve as arbitrators upon the stipulation of all parties.

(b) The Judicial Council rules shall provide for the compensation, if any, of arbitrators, except that no compensation shall be paid prior to the filing of the award by the arbitrator, or prior to the settlement of the case by the parties. Compensation for arbitrators shall, unless waived in whole or in part, be one hundred fifty dollars ($150) per day, except that the board of supervisors of a county or a city and county may set a higher level of compensation for that county or city and county.

(c) The board of governors of the State Bar shall provide by rule for the method of selection of arbitrators after consulting with administrative committees established pursuant to Rule 1603 of the Judicial Arbitration Rules for Civil Cases and with county bar associations in counties where there are no administrative committees. These rules shall provide for specialized panels and shall become operative upon approval of the Judicial Council.

(d) Any party may request the disqualification of the arbitrator selected for his case on the grounds and by the procedures specified in Section 170 or Section 170.6 within five days of the naming of the arbitrator.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Derivation: Former § 1141.20, added by Stats.1975, c. 1006, p. 2364, § 1.

Library References
Arbitration ⇨26, 27.
C.J.S. Arbitration §§ 60 to 66.

§ 1141.19 Arbitrators; powers

Arbitrators approved pursuant to this chapter shall have the powers necessary to perform duties pursuant to this chapter as prescribed by the Judicial Council.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration ⇨29.
C.J.S. Arbitration §§ 54, 68, 107, 109

§ 1141.20 Finality of award; de novo trial; request; limitation; calendar

An arbitration award shall be final if a request for a de novo trial is not filed within 20 days after the date the arbitrator files the award with the court. Any party may elect to have a de novo trial, by court or jury, both as to law and facts. Such trial shall be calendared, insofar as possible, so that the trial shall be given the

same place on the active list as it had prior to arbitration, or shall receive civil priority on the next setting calendar.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

For § 1141.20 operative until July 1, 1979, see Chapter 2.5, ante.

Library References
Arbitration ⇨10.
C.J.S. Arbitration §§ 123 to 125.

§ 1141.21 Judgment upon trial de novo less favorable for party electing; payment of nonrefundable costs and fees

(a) If the judgment upon the trial de novo is not more favorable in either the amount of damages awarded or the type of relief granted for the party electing the trial de novo than the arbitration award, the court shall order that party to pay the following nonrefundable costs and fees, unless the court finds in writing and upon motion that the imposition of such costs and fees would create such a substantial economic hardship as not to be in the interest of justice:

(i) To the county, the compensation actually paid to the arbitrator.

(ii) To the other party or parties, all costs including, but not limited to, those specified in Sections 1032.5, 1032.6, 1032a, and 1032b, and the party electing the trial de novo shall not recover his costs.

(iii) To the other party or parties, the reasonable costs of the services of expert witnesses, who are not regular employees of any party, actually incurred or reasonably necessary in the preparation or trial of the case.

Such costs and fees, other than the compensation of the arbitrator, shall include only those incurred from the time of election of the trial de novo.

(b) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs and fees under paragraphs (ii) and (iii) of subdivision (a) shall be imposed only as an offset against any damages awarded in favor of that party.

(c) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs under paragraph (i) of subdivision (a) shall be imposed only to the extent that there remains a sufficient amount in the judgment after the amount offset under subdivision (b) has been deducted from the judgment.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Costs ⇨158.
C.J.S. Costs § 138.

§ 1141.22 Grounds for correction, modification or vacation of award

The Judicial Council rules shall specify the grounds upon which the arbitrator or the court, or both, may correct, modify or vacate an award.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration ⇨76.
C.J.S. Arbitration §§ 149, 157, 159, 164, 167, 177.

§ 1141.23 Award; writing, signature and filing; entry in judgment book; force and effect

The arbitration award shall be in writing, signed by the arbitrator and filed in the court in which the action is pending. If there is no request for a de novo trial and the award is not vacated, the award shall be entered in the judgment book in the amount of the award. Such award shall have the same force and effect as a judgment in any civil action or proceeding, except that it is not subject to appeal and

Statements of attorneys and the brief or summary are not admissible in any court or evidentiary proceeding.

(7) Decision. Within 14 days after the hearing, the panel will make an evaluation of the case and notify each counsel of its evaluation in writing.

(8) Action on Board's Decision. Each party must file a written acceptance or rejection of the panel's evaluation with the mediation clerk within 21 days after the mailing of the panel's evaluation. The failure to file a written acceptance within 21 days constitutes rejection. There may be no disclosure of a party's acceptance or rejection of the panel's evaluation until the expiration of the 21-day period, at which time the mediation clerk shall send a notice indicating each party's acceptance or rejection of the panel's evaluation.

If the evaluation of the mediation panel is rejected, the mediation clerk shall return to each attorney all the documents submitted by that attorney. The mediation clerk shall place a copy of the mediation evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the clerk of the court. The envelope may not be opened in a nonjury case until the trial judge has rendered judgment.

If the mediation evaluation does not exceed the jurisdictional limitation of the district court, the mediation clerk shall so inform the trial judge.

(G) Effect of Mediation. If all the parties accept the panel's evaluation, judgment will be entered in that amount, which includes all fees, costs, and interest to the date of judgment.

If any party rejects the panel's evaluation, the matter proceeds to trial in the normal fashion.

If the defendant accepts the evaluation but the plaintiff rejects it and the matter proceeds to trial, the plaintiff must obtain a verdict in an amount which, when interest on the amount and assessable costs from the date of filing of the complaint to the date of the mediation evaluation are added, is more than 10 percent greater than the board's evaluation, or pay actual costs to the defendant.

If the plaintiff accepts the evaluation but the defendant rejects it and the matter proceeds to trial, the defendant must obtain a verdict in an amount which, when interest on the amount and assessable costs from the date of filing of the complaint to the date of the mediation evaluation are added, is more than 10 percent below the evaluation of the board, or pay actual costs to the plaintiff.

If both parties reject the panel's evaluation and the amount of the verdict, when interest on the amount and assessable costs from the date of filing of the complaint to the date of the mediation evaluation are added, is no more than 10 percent greater or less than the board's evaluation, each party is responsible for his own costs from the mediation date. If the verdict is in an amount which, when interest on the amount and assessable costs from the date of filing of the complaint to the date of the mediation evaluation are added, is more than 10 percent greater than the board's evaluation, the defendant must pay actual costs. If the

verdict is in an amount which, when interest and assessable costs from the date of filing of the complaint to the date of the mediation evaluation are added, is more than 10 percent below the board's evaluation, the plaintiff must pay actual costs.

(H) Actual Costs. Actual costs include those costs taxable in any civil action and a reasonable attorney fee as determined by the trial judge for services necessitated by the rejection of the board's evaluation.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

STAFF COMMENT:

Proposed rule 2.403 was drafted by the Michigan Judges Association Rules Committee and is published for comment by the Court as submitted. The number indicates where it would appear if the proposed Michigan Court Rules (402A Mich) are adopted; if they are not, the rule would appear as GCR 1963, 316. Compare proposed GCR 1963, 316 appearing at 55 Mich State BJ 56 (January 1976).

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

STATE OF MICHIGAN, ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 23rd day of March in the year of our Lord one thousand nine hundred and seventy-nine.

Robin R Davis Clerk
Deputy

MOTOR VEHICLE DAMAGE ACTIONS

38.215 Arbitration required in damage actions arising out of ownership, maintenance or use of motor vehicles where amount in issue does not exceed $3,000.

1. Except as provided in subsection 2, all civil actions for damages for personal injury, death or property damage arising out of the ownership, maintenance or use of a motor vehicle, where the cause of action arises in the State of Nevada and the amount in issue does not exceed $3,000, shall be submitted to arbitration, in accordance with the provisions of NRS 38.015 to 38.205, inclusive.

2. Any such action over which a justice's court has jurisdiction shall be submitted to such arbitration only upon the mutual consent of the parties.

(Added to NRS by 1971, 1170)

38.225 Arbitration prerequisite to trial. No cause of action specified in NRS 38.215 shall be tried until there has been compliance with all the provisions of NRS 38.215 to 38.245, inclusive.

(Added to NRS by 1971, 1170)

38.235 Trial after arbitration; conditions. After an award has been made pursuant to NRS 38.105, either party to the action may request a trial on any or all issues arising out of the action, subject to all of the following conditions:

1. The party requesting the trial, or his attorney, shall make an oath or affirmation that it is not for the purpose of delay that the trial is requested, but for the purpose of alleviating an injustice that was done by the arbitrators in making the award.

2. Such party shall pay all costs that may have accrued up to the time the request is made.

3. Such a request for a trial shall be made, and all costs which have accrued shall be paid within 20 days after the decision and award of the arbitrators has been filed with the court.

(Added to NRS by 1971, 1170)

38.245 Effective date. NRS 38.215 to 38.245, inclusive, shall apply only to those causes of action arising on or after July 1, 1971.

(Added to NRS by 1971, 1170)

6. The arbitrators may, at their initiative or at the request of any party to the arbitration, issue subpenas for the attendance of witnesses and the production of books, records, documents and other evidence. Subpenas shall be served and shall be enforceable in the manner provided by law.

7. Notwithstanding that a controversy was submitted pursuant to subsection a. of section 2 of this act, the arbitration award for noneconomic loss may exceed $15,000.00. The arbitration decision shall be in writing, and shall set forth the issues in controversy, and the arbitrators' findings and conclusions of law and fact.

8. Unless one of the parties to the arbitration petitions the court, within 30 days of the filing of the arbitration decision with the court, a. for a trial de novo, or b. for the modification or vacation of the arbitration decision for any of the reasons set forth in chapter 24 of Title 2A of the New Jersey Statutes, or an error of law or factual inconsistencies in the arbitration findings, the court shall, upon motion of any of the parties, confirm the arbitration decision, and the action of the court shall have the same effect and be enforceable as a judgment in any other action.

9. Except in the case of an arbitration decision vacated by the court or offers of judgment made pursuant to court rules, the party petitioning the court for a trial de novo shall pay to the court the fees of the arbitrators.

10. No statements, admissions or testimony made at the arbitration proceedings, nor the arbitration decision, as confirmed or modified by the court, shall be used or referred to at the trial de novo by any of the parties, except that the court may consider any of those matters in determining the amount of any reduction in assessments made pursuant to section 11 of this act.

11. The party having filed for a trial de novo shall be assessed court costs and other reasonable costs of the other party to the judicial proceeding, including attorney's fees, investigation expenses and expenses for expert or other testimony or evidence, which amount shall be, if the party assessed the costs is the one to whom the award is made, offset against any damages awarded to that party by the court, and only to that extent; except that if the judgment is more favorable to the party having filed for a trial de novo, the court may reduce or eliminate the amount of the assessment in accordance with the extent to which the decision of the court is more favorable to that party, than the arbitration decision, and as best serves the interest of justice. The court may waive an assessment of costs required by this section upon a finding that the imposition of costs would create a substantial economic hardship as not to be in the interest of justice.

RULE 15. ARBITRATION

The judge or judges of general divisions of courts of common pleas shall consider, and may adopt, a plan for the mandatory arbitration of civil cases.

The plan shall specify the amount in controversy which will require submission of the case to arbitration and arbitration shall be required in cases wherein the amount in controversy does not exceed that specified sum. Arbitration shall be permitted in cases where the amount in controversy exceeds the sum specified in the plan for mandatory arbitration where all parties to the action agree to arbitration. The court shall determine at pre-trial whether a case is to be mandatorily arbitrated.

Every plan for the mandatory arbitration of civil cases adopted pursuant to this rule shall be filed with the Supreme Court and shall include the following basic principles:

(A) **Actions Excluded.** Actions involving title to real estate, equitable relief and appeals shall be excluded.

(B) **Arbitrators.** The court shall appoint a board of three arbitrators from a list of those lawyers who have consented to serve in such capacity and who have no interest in the determination of the case or relationship with the parties or their counsel which would interfere with an impartial consideration of the case. The parties may agree to the appointment by the court of a single arbitrator.

(C) **Report and Award.** Within thirty days after the hearing, the board or the single arbitrator must file a report and award with the clerk of the court and forward copies thereof to all parties or their counsel. Such report and award, unless appealed from, shall be final and have the legal effect of a verdict upon which judgment shall be entered by the court.

(D) **Appeals.** Any party may appeal the award to the court if, within thirty days after the filing of the award with the clerk of the court, he:

(1) Files a notice of appeal with the clerk of court and serves a copy thereof on the adverse party or parties accompanied by an affidavit that the appeal is not being taken for delay; and

(2) Reimburses the county for all fees paid to the arbitrators in the case.

All appeals shall be *de novo* proceedings at which members of the deciding board or the single arbitrator are barred as witnesses.

Exceptions to the decision of the board or single arbitrator based on either misconduct or corruption of the board or single arbitrator may also be filed by any party within thirty days after the filing of the report, and if sustained, the report shall be vacated.

[Effective August 12, 1979.]

pensation of the arbitrators is concerned. In cases requiring hearings of unusual duration or involving questions of unusual complexity, the Administrative Judge, on motion of the members of the Board and for cause shown, may allow additional compensation. The members of a Board shall not be entited to receive their fees until after filing the report and award with the Arbitration Commissioner. Fees paid to arbitrators shall not be taxed as costs nor follow the award as other costs.

(B) The Chairman shall receive as compensation the sum of Ten Dollars ($10.00) for each case heard by the Board, in addition to the compensation fixed for members of the Board of Arbitration.

(C) All compensation for arbitrators shall be paid, upon proper warrant, from funds of Cuyahoga County, Ohio which have been allocatd for the operation of the Common Pleas Court of Cuyahoga County, Ohio.

(D) In the event that a case shall be settled or dismissed more than two (2) days prior to the date scheduled for the hearing, the Board members shall not be entitled to the aforesaid fee. In the event that a case has been settled or dismissed within said two-day period, the Board members shall be entitled to receive said fee. Upon receiving notice that the case has been settled or dismissed more than two days before the date set for hearing, the Arbitration Commissioner shall assign another case to the same Board.

APPEALS

Part VI. Right of Appeal De Novo

(A) Any party may appeal from the action of the Board of Arbitration to the Common Pleas Court of Cuyahoga County. No appeal can be withdrawn without consent of all parties. The filing of a single appeal shall be sufficient to require a de novo trial of the entire case on all issues and as to all parties without the necessity of each party filing a separate appeal de novo. The right of appeal shall be subject to the following conditions, all of which shall be complied with within thirty (30) days after the entry of the award of the Board.

NOTICE OF APPEAL AND COSTS

1. (a) A notice of appeal de novo, together with an affidavit that the appeal is not taken for delay but because he believes an injustice has been done, shall be filed by the appellant in the office of the Arbitration Commissioner acting for the Clerk of Courts and shall pay to the Cashier of the Clerk of Courts the sum mentioned in 1(b) below, after first securing the approval of the Arbitration Commissioner.

REPAYMENT OF ARBITRATION FEES

(b) The appellant shall repay to Cuyahoga County, Ohio by depositing with the Clerk of Courts, all fees received by the members of the Board of Arbitration in the case in which the appeal is taken. The sum so paid shall not be taxed as costs in the case and shall not be recoverable by the appellant in any proceeding.

POVERTY AFFIDAVIT AND NOTICE

(c) A party, desiring to appeal an award may concurrently with the filing of a notice of appeal de novo, file a written motion with affidavit averring that by reason of poverty he is unable to make the payments required for an appeal and request the Court to allow an appeal de novo without payment of the amount specified in 1(b) hereof. If after due notice to the opposite parties, the judge is satisfied of the truth of the statements in such affidavit, he may order that the appeal of such party be allowed although the said amounts are not paid by the appellant.

RETURN TO ASSIGNED JUDGE

2. (a) The case shall thereupon be returned to the judge to whom the case was originally assigned for trial.

APPEAL DE NOVO

(B) All cases which have been duly appealed shall be tried de novo.

TESTIMONY OF ARBITRATORS ON APPEAL

(C) In the event of an appeal from the award or decision of the Board of Arbitration, the arbitrators shall not be called as witnesses as to what took place before them in their official capacity as arbitrators upon any hearing de novo.

EXCEPTIONS AND REASONS THEREFOR

(D) Any party may file exceptions with the Clerk of Courts, at the office of the Arbitration Commissioner, from the decision of the Board of Arbitration within thirty (30) days from the filing of the report and award for either or both of the following reasons and for no other:

1. That the Arbitrators misbehaved themselves in the conduct of the case.

(b) The action is in the circuit court, the only relief claimed is recovery of money or damages and a party asserts a claim for money or general and special damages in an amount exceeding $15,000, exclusive of attorney fees, costs and disbursements and interest on judgment.

(2) If a civil action is referred to arbitration under subsection (1) of this section, the arbitrator may grant any relief that could have been granted if the action were determined by a judge of the court.

SECTION 4. In a civil action in a circuit court having an arbitration program established under section 1 of this Act, where all parties have appeared, where the only relief claimed is recovery of money or damages, where a party asserts a claim for money or general and special damages in an amount exceeding $15,000, exclusive of attorney fees, costs and disbursements and interest on judgment, and where all parties asserting those claims waive the amounts of those claims that exceed $15,000, the court shall refer the action to arbitration under this Act. A waiver of an amount of a claim under this section shall be for the purpose of arbitration under this Act only and shall not restrict assertion of a larger claim in a trial de novo under section 5 of this Act.

SECTION 5. (1) At least five days before the date set for an arbitration hearing, the arbitrator shall notify the clerk of the court of the time and place of the hearing. The clerk shall post a notice of the time and place of the hearing in a conspicuous place for trial notices at the principal location for the sitting of the court in the county in which the action was commenced.

(2) The arbitration proceeding and the records thereof shall be open to the public to the same extent as would a trial of the action in the court and the records thereof.

(3) The compensation of the arbitrator and other expenses of the arbitration proceeding shall be the obligation of the parties or any of them as provided by rules made under subsection (2) of section 1 of this Act. However, if those rules require the parties or any of them to pay any of those expenses in advance, in the form of fees or otherwise, as a condition of arbitration, the rules shall also provide for the waiver in whole or in part, deferral in whole or in part, or both, of that payment by a party whom the court finds is then unable to pay all or any part of those advance expenses. Expenses so waived shall be paid by the state from funds available for the purpose. Expenses so deferred shall be paid, if necessary, by the state from funds available for the purpose, and the state shall be reimbursed according to the terms of the deferral.

SECTION 6. (1) At the conclusion of arbitration under this Act of a civil action, the arbitrator shall file the decision and award with the clerk of the court that referred the action to arbitration, together with proof of service of a copy of the decision and award upon each party.

(2)(a) Within 20 days after the filing of a decision and award with the clerk of the court under subsection (1) of this section, a party against whom relief is granted by the decision and award or a party whose claim for relief was greater than the relief granted to the party by the decision and award, but no other party, may file with the clerk a written notice of appeal and request for a trial de novo of the action in the court on all issues of law and fact. After the filing of the written notice a trial de novo of the action shall be held. If the action is triable by right to a jury and a jury is demanded by a party having the right of trial by jury, the trial de novo shall include a jury.

(b) If a party files a written notice under paragraph (a) of this subsection, a trial fee or jury trial fee, as applicable, shall be collected as provided in ORS 21.270 or 46.221.

(c) A party filing a written notice under paragraph (a) of this subsection shall deposit with the clerk of the court the sum of $150. If the position under the arbitration decision and award of the party filing the written notice is not improved as a result of a judgment in the action on the trial de novo, the clerk shall dispose of the sum deposited in the same manner as a fee collected by the clerk. If the position of the party is improved as a result of a judgment, the clerk shall return the sum deposited to the party. If the court finds that the party filing the written notice is then unable to pay all or any part of the sum to be deposited, the court may waive in whole or in part, defer in whole or in part, or both, the sum. If the sum or any part thereof is so deferred and the position of the party is not improved as a result of a judgment, the deferred amount shall be paid by the party according to the terms of the deferral.

(d) Notwithstanding any other provision of law or the Oregon Rules of Civil Procedure, a party filing a written notice under paragraph (a) of this subsection whose position under the arbitration decision and award is not improved as a result of a judgment in the action on the trial de novo shall not be entitled to attorney fees or

costs and disbursements, and shall be taxed the costs and disbursements of the other parties to the action on the trial de novo.

(3) If a written notice is not filed under paragraph (a) of subsection (2) of this section within the 20 days prescribed, the clerk of the court shall enter the arbitration decision and award as a final judgment of the court, which shall have the same force and effect as a final judgment of the court in the civil action and may not be appealed.

SECTION 7. This Act is repealed January 1, 1986.

Approved by the Governor August 2, 1983.
Filed in the office of Secretary of State August 2, 1983.

Chapter 7.06
MANDATORY ARBITRATION OF CIVIL ACTIONS

Sections

7.06.010 Authorization. The superior court of a county by majority vote of the judges thereof may authorize mandatory arbitration of civil actions under this chapter. [1979 c 103 § 1.]

7.06.020 Actions subject to mandatory arbitration. All civil actions, except for appeals from municipal or justice courts, which are at issue in the superior court in counties which have authorized arbitration, where the sole relief sought is a money judgment, and where no party asserts a claim in excess of ten thousand dollars, exclusive of interest and costs, are subject to mandatory arbitration. [1979 c 103 § 2.]

7.06.030 Implementation by supreme court rules. The supreme court shall by rule adopt procedures to implement mandatory arbitration of civil actions under this chapter. [1979 c 103 § 3.]

7.06.040 Qualifications, appointment and compensation of arbitrators. The qualifications and appointment of arbitrators shall be prescribed by rules adopted by the supreme court. Arbitrators shall be compensated in the same amount and manner as judges pro tempore of the superior court. [1979 c 103 § 4.]

7.06.050 Decision and award——Appeals——Trial——Final judgment. Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

If no appeal has been filed at the expiration of twenty days following filing of the arbitrator's decision and award, the clerk shall enter the arbitrator's decision and award as a final judgment in the cause, which shall have the same force and effect as judgments in civil actions. [1979 c 103 § 5.]

7.06.060 Costs and attorney's fees. The supreme court may by rule provide for costs and reasonable attorney's fees that may be assessed against a party appealing from the award who fails to improve his position on the trial de novo. [1979 c 103 § 6.]

7.06.070 Right to trial by jury. No provision of this chapter may be construed to abridge the right to trial by jury. [1979 c 103 § 7.]

7.06.900 Severability——1979 c 103. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1979 c 103 § 9.]

7.06.910 Effective date——1979 c 103. This act shall take effect July 1, 1980. [1979 c 103 § 10.]

WASHINGTON

SUPERIOR COURT MANDATORY ARBITRATION RULES (MAR)

Originally Effective July 1, 1980

Table of Rules

RULES FOR SUPERIOR COURT

VII. TRIAL DE NOVO

VIII. GENERAL PROVISIONS

I. SCOPE AND PURPOSE OF RULES

RULE 1.1 APPLICATION OF RULES

These arbitration rules apply to mandatory arbitration of civil actions under RCW 7.06. These rules do not apply to arbitration by private agreement or to arbitration under other statutes, except by stipulation under Rule 8.1.

Judicial Council Comment

A number of statutes authorize arbitration in specific instances. See, e. g., RCW 3.62.070 (justice court filing fee—city and county); 4.56.240 (personal injury damages—annuity payments); 7.70.030 (medical malpractice); 39.04.120 (public works contracts); 39.12.060 (public works contracts); 41.56.450 (collective bargaining by uniformed personnel); 49.66.090 (health care activities); 59.18.320 (landlord-tenant disputes); 77.12.280 (damages caused by game). The rules do not apply to arbitration under these specialized statutes.

The rules do not apply to arbitration by private agreement except when the parties stipulate to arbitration under these rules of a case which would not otherwise be subject to arbitration under RCW 7.06.

These rules do not restrict voluntary methods of settlement such as mediation.

RULE 1.2 MATTERS SUBJECT TO ARBITRATION

A civil action, other than an appeal from a court of limited jurisdiction, is subject to arbitration under these rules if the action is at issue in a superior court in a county which has authorized mandatory arbitration under RCW 7.06, if the sole relief sought is a money judgment, and if (1) no party asserts a claim in excess of $10,000, exclusive of attorney's fees, interest and costs, or if (2) all parties for purposes of arbitration waive claims in excess of $10,000, exclusive of attorney's fees, interest and costs. Other matters may be arbitrated under these rules only by stipulation under Rule 8.1.

Judicial Council Comment

The rule, up through subdivision (1), parallels RCW 7.06.020. A second provision is added allowing arbitration if all parties waive claims in excess of $10,000 for purposes of arbitration. Thus, for example, a plaintiff who could potentially be awarded more than $10,000 may choose to limit the claim to $10,000 in order to qualify for arbitration. Neither provision restricts the assertion of larger claims upon a trial de novo in superior court. A trial de novo is available, however, only to an aggrieved party. Thus, if the plaintiff asserts a claim for $10,000 and is awarded that amount by the arbitrator, the plaintiff is not entitled to a trial de novo under Rule 7.1. The plaintiff would be entitled to a trial de novo only if the arbitrator's award were less than the amount claimed by the plaintiff.

Reference is made to Rule 8.1, allowing parties to arbitrate by stipulation in cases not otherwise within the statute.

RULE 1.3 RELATIONSHIP TO SUPERIOR COURT JURISDICTION AND OTHER RULES

(a) **Superior Court Jurisdiction.** A case filed in the superior court remains under the jurisdiction of the superior court in all stages of the proceeding, including arbitration. Except for the authority expressly given to the arbitrator by these rules, all issues shall be determined by the court.

(b) **Which Rules Apply.** Until a case is assigned to the arbitrator under Rule 2.3, the rules of civil procedure apply. After a case is assigned to the arbitrator, these arbitration rules apply except where an arbitration rule states that a civil rule applies.

Judicial Council Comment

Rule 1.3 disengages the court from the arbitration process to the extent feasible. The court, after assignment of a case to the arbitrator, will not ordinarily entertain procedural motions, receive

papers for filing, or the like. The case is, for all practical purposes, in the hands of the arbitrator until entry of the award.

The court will intervene in the arbitration process only under the most exceptional circumstances. In most instances, a trial de novo under Rule 7.1 or a motion to vacate under Rule 7.2 will provide an adequate safeguard against an unjust result from arbitration. See also the comment to Rule 3.2.

II. TRANSFER TO ARBITRATION AND ASSIGNMENT OF ARBITRATOR

RULE 2.1 TRANSFER TO ARBITRATION

The point at which a case is transferred to arbitration and the procedures for accomplishing the transfer to an arbitration calendar shall be established by local rule adopted in accordance with Rule 8.2.

RULE 2.2 COURT MAY DETERMINE ARBITRABILITY

(a) Generally. The court may, on its own motion or on motion of a party, determine whether a case is actually subject to arbitration under RCW 7.06.020 and Rule 1.2 and may accordingly order a case transferred to or from the arbitration calendar. Only in extraordinary circumstances after a case has been assigned to an arbitrator under Rule 2.3 will the court order a case returned from the arbitration calendar to the trial calendar.

(b) Effect on Right to Appeal. If a party asserts a claim which disqualifies a case for arbitration but the court nevertheless orders a transfer to arbitration under section (a), any party is deemed aggrieved under Rule 7.1 if the arbitrator awards less than the party's original claim.

Judicial Council Comment

The court may determine whether a case should be arbitrated under Rule 1.2 and the underlying statute. Thus, for example, if frivolous equitable claims or exaggerated damages are asserted for the sole purpose of avoiding arbitration, the court might order the case transferred to arbitration if the case is otherwise eligible for arbitration.

The second sentence of Rule 2.2 reflects the belief that the court should intervene in the arbitration process only under exceptional circumstances. Any party to the arbitration who has asserted a disqualifying claim and has been awarded less than the claimed amount is an "aggrieved party". See also the comments to Rules 1.3 and 3.2.

RULE 2.3 ASSIGNMENT TO ARBITRATOR

(a) Generally. The parties may select an arbitrator by stipulation. If an arbitrator is not chosen by stipulation within 14 days after a case has been placed on the arbitration calendar, the court shall promptly select an arbitrator and notify the arbitrator and the parties of the assignment. The case is deemed assigned for purposes of Rule 1.3 upon the final selection of the arbitrator under this rule.

(b) Communication with Potential Arbitrator Restricted. The restrictions on communication defined by Rule 4.1 apply to communication with a person under consideration as a possible arbitrator in a case.

Judicial Council Comment

Rule 2.3 leaves most of the details of the assignment procedure to be developed by local rule. By local rule, for example, an arbitrator might be selected from a panel on the basis of special expertise or experience. It is expected that by local rule each party will have one opportunity to object to an arbitrator selected by the court, paralleling the opportunity to object to the judge assigned to a trial. Other methods of selection and objection may also be developed locally.

The authority of the arbitrator to act does not arise until the case is assigned to a specific arbitrator and any disputes over the assignment are settled. See Rule 1.3.

III. ARBITRATORS

RULE 3.1 QUALIFICATIONS

Unless otherwise ordered or stipulated, an arbitrator must be a member of the Washington State Bar Association who has been admitted to the bar for a minimum of five years, or who is a retired judge. The parties may stipulate to a non-lawyer arbitrator.

To qualify as an arbitrator, a person must sign and file an oath of office, either to serve in a particular case, or as a member of a panel of arbitrators.

Judicial Council Comment

The rule requires arbitrators to be lawyers unless otherwise ordered or stipulated. Membership in the Washington State Bar Association is required and assures the ability to discipline an arbitrator who acts improperly. Both active and inactive members qualify under the rule.

MAR 3.2 RULES FOR SUPERIOR COURT

RULE 3.2 AUTHORITY OF ARBITRATORS

An arbitrator has the authority to:

(1) Decide procedural issues arising before or during the arbitration hearing, except issues relating to the qualifications of an arbitrator;

(2) Invite, with reasonable notice, the parties, to submit trial briefs;

(3) Examine any site or object relevant to the case;

(4) Issue a subpoena under Rule 4.3;

(5) Administer oaths or affirmations to witnesses;

(6) Rule on the admissibility of evidence under rule 5.3;

(7) Determine the facts, decide the law, and make an award;

(8) Perform other acts as authorized by these rules or local rules adopted and filed under Rule 8.2.

Judicial Council Comment

An arbitrator may exercise the authority conferred by Rule 3.2 only after the case is assigned to a specific arbitrator and any disputes over the assignment are settled. See Rules 1.3 and 2.3. After the case is assigned to an arbitrator, the superior court retains jurisdiction but will intervene in the arbitration process only under the most exceptional circumstances. The court, for example, might entertain a challenge to the qualifications of an arbitrator on grounds which could not reasonably be discovered prior to the assignment of the arbitrator to the case.

Neither the rule nor the underlying statute authorizes the arbitrator to award witness fees or other costs. Costs are not awarded until entry of the judgment on the award.

IV. PROCEDURES AFTER ASSIGNMENT

RULE 4.1 RESTRICTIONS ON COMMUNICATION BETWEEN ARBITRATOR AND PARTIES

No disclosure of any offers of settlement made by any party shall be made to the arbitrator prior to the announcement of the award. Neither counsel nor a party may communicate with the arbitrator except in the presence of, or on reasonable notice to, all other parties.

Judicial Council Comment

The Code of Professional Responsibility also restricts ex parte communication between counsel and an arbitrator.

RULE 4.2 DISCOVERY

After the assignment of a case to the arbitrator, a party may demand a specification of damages under RCW 4.28.360, may request from the arbitrator an examination under CR 35, may request admissions from a party under CR 36, and may take the deposition of another party, unless the arbitrator orders otherwise. No additional discovery shall be allowed, except as the parties may stipulate or as the arbitrator may order. The arbitrator will allow discovery only when reasonably necessary.

Judicial Council Comment

Before assignment of a case to an arbitrator, discovery is allowed to the full extent authorized by the civil rules. In determining the extent of discovery, the arbitrator should consider the amount in controversy and the nature of the case.

RULE 4.3 SUBPOENA

In accordance with CR 45, a lawyer of record or the arbitrator may issue a subpoena for the attendance of a witness at the arbitration hearing or for the production of documentary evidence at the hearing. A subpoena for discovery purposes may be issued only with the permission of the arbitrator or by stipulation.

Judicial Council Comment

Rule 4.3 allows an arbitrator to issue a subpoena regardless of whether the arbitrator is a lawyer.

V. HEARING

RULE 5.1 NOTICE OF HEARING

The arbitrator shall set the time, date, and place of the hearing and shall give reasonable notice of the hearing date to the parties. Except by stipulation or for good cause shown, the hearing shall be scheduled to take place not sooner than 21 days, nor later than 63 days, from the date of the assignment of the case to the arbitrator. The hearing shall take place in appropriate facilities provided or authorized by the court.

Judicial Council Comment

The rule follows the current practice of defining time limits in multiples of seven days. This approach allows time to be computed by the week and ordinarily results in the due date falling on a business day.

MAR 5.1 RULES FOR SUPERIOR COURT

The last sentence of the rule authorizes a court to allow, by local rule, hearings in facilities other than the courthouse.

RULE 5.2 PREHEARING STATEMENT OF PROOF

At least 14 days prior to the date of the arbitration hearing, each party shall file with the arbitrator and serve upon all other parties a statement containing a list of witnesses whom the party intends to call at the arbitration hearing and a list of exhibits and documentary evidence. The statement shall contain a brief description of the matters about which each witness will be called to testify. Each party, upon request, shall make the exhibits and other documentary evidence available for inspection by other parties. A party failing to comply with this rule, or failing to comply with a discovery order may not present at the hearing the witness, exhibit, or documentary evidence required to be disclosed or made available, except with the permission of the arbitrator.

RULE 5.3 CONDUCT OF HEARING

The arbitrator shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the facts, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. A witness shall be placed under oath or affirmation by the arbitrator prior to presenting testimony, a violation of which oath shall be deemed a contempt of court in addition to any other penalties that may be provided by law. The arbitrator may question a witness. The extent to which the Evidence Rules will be applied shall be determined in the exercise of discretion of the arbitrator.

Judicial Council Comment

The first sentence is adapted from Evidence Rule 611(a).

RULE 5.4 ABSENCE OF PARTY AT HEARING

The arbitration hearing may proceed, and an award may be made, in the absence of any party who after due notice fails to participate or to obtain a continuance. If a defendant is absent, the arbitrator shall require the plaintiff to submit the evidence required for the making of an award. In a case involving more than one defendant, the absence of a defendant does not preclude the arbitrator from assessing as part of the award damages against the defendant or defendants who are absent. The arbitrator, for good cause shown, may allow an absent party an opportunity to appear at a subsequent hearing before mak-

ing an award. A party who fails to participate without good cause waives the right to a trial de novo.

VI. AWARD

RULE 6.1 FORM AND CONTENT OF AWARD

The award shall be in writing and signed by the arbitrator. The arbitrator shall determine all issues raised by the pleadings, including a determination of any damages. Findings of fact and conclusions of law are not required.

Judicial Council Comment

Costs are not awarded until entry of a judgment on the award, as in other civil cases.

RULE 6.2 FILING OF AWARD

Within 14 days after the conclusion of the arbitration hearing, the arbitrator shall file the award with the clerk of the superior court, with proof of service of a copy on each party. On the arbitrator's application in cases of unusual length or complexity, the arbitrator may apply for and the court may allow up to 14 additional days for the filing and service of the award. The arbitrator may file with the court and serve upon the parties an amended award to correct an obvious error made in stating the award if done within the time for filing an award or upon application to the superior court to amend.

Judicial Council Comment

The rule does not authorize the use of an amended award to change the arbitrator's decision on the merits. An amended award may only modify an award in order to correct an inadvertent miscalculation or description, to adjust the award in a matter of form rather than substance, or the like. In general, the grounds for modifying an award under this rule parallel the grounds for modifying an award in voluntary, private arbitration. See RCW 7.04.170.

RULE 6.3 JUDGMENT ON AWARD

If within 20 days after the award is filed no party has sought a trial de novo under Rule 7.1, the prevailing party on notice as required by CR 54(f) shall present to the court a judgment on the award of arbitration for entry as the final judgment. A judgment so entered is subject to all provisions of law relating to judgments in civil actions, but it is not subject to appellate review and it may not be attacked or set aside except by a motion to vacate under CR 60.

MAR 6.3 RULES FOR SUPERIOR COURT

Judicial Council Comment

The judgment on an award is not subject to appellate review. As a practical matter, appellate review is precluded by the lack of a record of the arbitration proceeding. The remedy to correct an error or impropriety in the arbitration proceeding is a trial de novo or a motion to vacate the judgment on the award.

The rule does not restrict appellate review of a judgment following a trial de novo or of a ruling on a motion to vacate.

RULE 6.4 WITNESS FEES AND COSTS

Witness fees and other costs provided for by statute or court rule in superior court proceedings shall be payable upon entry of judgment in the same manner as if the hearing were held in court.

VII. TRIAL DE NOVO

RULE 7.1 REQUEST FOR TRIAL DE NOVO

(a) Service and Filing. Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for a trial de novo in the superior court along with proof that a copy has been served upon all other parties appearing in the case. The 20-day period within which to request a trial de novo may not be extended.

(b) Calendar. When a trial de novo is requested as provided in section (a), the case shall be transferred from the arbitration calendar in accordance with Rule 8.2 in a manner established by local rule.

Judicial Council Comment

Only an aggrieved party may seek a trial de novo. For an explanation of the relationship between this requirement and the claims originally asserted, see Rule 2.2 and the comment to Rule 7.2.

RULE 7.2 PROCEDURE AT TRIAL

The trial de novo shall be conducted as though no arbitration proceeding had occurred. If tried to a jury, no reference may be made during the trial to the arbitration award, to the fact there had been an arbitration proceeding, or to any other aspect of the arbitration proceeding.

RULE 7.3 COSTS AND ATTORNEY'S FEES

The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's posi-

KING COUNTY LOCAL RULES FOR MANDATORY ARBITRATION

I. SCOPE AND PURPOSE OF RULES

RULE 1.1 APPLICATION OF RULES—PURPOSE AND DEFINITIONS

(a) *Purpose.* The purpose of mandatory arbitration of civil actions under RCW 7.06 as implemented by the Mandatory Arbitration Rules is to provide a simplified and economical procedure for obtaining the prompt and equitable resolution of disputes involving claims of $10,000 or less. The Mandatory Arbitration Rules as supplemented by these local rules are not designed to address every question which may arise during the arbitration process, and the rules give considerable discretion to the arbitrator. The arbitrator should not hesitate to exercise that discretion. Arbitration hearings should be informal and expeditious, consistent with the purpose of the statutes and rules.

(b) *"Director" Defined.* In these rules, "Director" means the Director of Arbitration for the King County Superior Court. The appointment of the Director and other administrative matters are addressed in Local Rule 8.6, Administration.

RULE 1.2 MATTERS SUBJECT TO ARBITRATION [no local rule]

RULE 1.3 RELATIONSHIP TO SUPERIOR COURT JURISDICTION AND OTHER RULES—MOTIONS

All motions before the court relating to mandatory arbitration shall be noted on the civil motions calendar in accordance with Local Civil Rule 12, except as otherwise provided in these arbitration rules.

II. TRANSFER TO ARBITRATION AND ASSIGNMENT OF ARBITRATOR

RULE 2.1 TRANSFER TO ARBITRATION

(a) *Statement of Arbitrability.* In every civil case the party filing the note for trial provided by CR 40(a)(1) and Local Civil Rule 40(a)(1) shall, upon the form prescribed by the court, complete a statement of arbitrability.

(b) *Response to a Statement of Arbitrability.* Within 14 days after the note for trial and statement of arbitrability have been served and filed, any party disagreeing with the statement of arbitrability shall serve and file a response to the statement of arbitrability on the form prescribed by the court. In the absence of such response, the statement of arbitrability shall be deemed correct and the non-re-

sponding party shall be deemed to have stipulated to arbitration if the statement of arbitrability provides that the case is arbitrable. If a party asserts that its claim exceeds $10,000 or seeks relief other than a money judgment, the case is not subject to arbitration except by stipulation.

(c) *Failure to File—Amendments.* A party failing to serve and file an original response within the time prescribed may later do so only upon leave of court. A party may amend the statement of arbitrability or response at any time before assignment of an arbitrator or assignment of a trial date and thereafter only upon leave of court for good cause shown.

(d) *By Stipulation.* A case in which all parties file a stipulation to arbitrate under MAR 8.1(b) will be placed on the arbitration calendar regardless of the nature of the case or amount in controversy.

[Amended Sept. 1, 1981.]

RULE 2.2 COURT MAY DETERMINE ARBITRABILITY [no local rule]

RULE 2.3 ASSIGNMENT TO ARBITRATOR

(a) *Generally; Stipulations.* When a case is set for arbitration, a list of five proposed arbitrators will be furnished to the parties. A master list of arbitrators will be made available on request. The parties are encouraged to stipulate to an arbitrator. In the absence of a stipulation, the arbitrator will be chosen from among the five proposed arbitrators in the manner defined by this rule.

(b) *Response by Parties.* Each party may, within 14 days after a list of proposed arbitrators is furnished to the parties, nominate one or two arbitrators and strike two arbitrators from the list. If both parties respond, an arbitrator nominated by both parties will be appointed. If no arbitrator has been nominated by both parties, the Director will appoint an arbitrator from among those not stricken by either party.

(c) *Response by Only One Party.* If only one party responds within 14 days, the Director will appoint an arbitrator nominated by that party.

(d) *No Response.* If neither party responds within 14 days, the Director will appoint one of the five proposed arbitrators.

(e) *Additional Arbitrators for Additional Parties.* If there are more than two adverse parties, at least two additional proposed arbitrators shall be added to the list with the above principles of selection to be applied. The number of adverse parties shall be determined by the Director, subject to review by the Presiding Judge.

Amended Sept. 1, 1981.

III. ARBITRATORS

RULE 3.1 QUALIFICATIONS

(a) *Arbitration Panel.* There shall be a panel of arbitrators in such numbers as the administrative committee may from time to time determine. A person desiring to serve as an arbitrator shall complete an information sheet on the form prescribed by the court. A list showing the names of arbitrators available to hear cases and the information sheets will be available for public inspection in the Director's office. The oath of office on the form prescribed by the court must be completed and filed prior to an applicant being placed on the panel.

(b) *Refusal; Disqualification.* The appointment of an arbitrator is subject to the right of that person to refuse to serve. An arbitrator must notify the Director immediately if refusing to serve or if any cause exists for the arbitrator's disqualification from the case upon any of the grounds of interest, relationship, bias or prejudice set forth in CJC Canon 3(c) governing the disqualification of judges. If disqualified, the arbitrator must immediately return all materials in a case to the Director.

RULE 3.2 AUTHORITY OF ARBITRATORS

An arbitrator has the authority to:

(a) Determine the time, place and procedure to present a motion before the arbitrator including motions for summary award in a manner generally described in CR 56.

(b) Require a party or attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure of such party or attorney or both to obey an order of the arbitrator unless the arbitrator finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The arbitrator shall make a special award for such expenses and shall file such award with the Clerk of the Superior Court, with proof of service of a party on each party. The aggrieved party shall have 10 days thereafter to appeal the award of such expense in accordance with the procedures described in RCW 2.24.050. If within 10 days after the award is filed no party appeals, a judgment shall be entered in a manner described generally under MAR 6.3.

(c) Award attorney's fees as authorized by these rules, by contract or by law.

[Amended Sept. 1, 1981.]

LMAR 4.1 SUPERIOR COURT FOR KING COUNTY

IV. PROCEDURES AFTER ASSIGNMENT

RULE 4.1 RESTRICTIONS ON COMMUNICATION BETWEEN ARBITRATOR AND PARTIES [no local rule]

RULE 4.2 DISCOVERY

(a) In determining when additional discovery beyond that directly authorized by MAR 4.2 is reasonably necessary, the arbitrator shall balance the benefits of discovery against the burdens and expenses. The arbitrator shall consider the nature and complexity of the case, the amount in controversy, values at stake, the discovery that has already occurred, the burdens on the party from whom discovery is sought, and the possibility of unfair surprise which may result if discovery is restricted. Authorized discovery shall be conducted in accordance with the civil rules except that motions concerning discovery shall be determined by the arbitrator.

(b) *Discovery Pending at the Time Arbitrator is Assigned.* Discovery pending at the time the case is assigned to an arbitrator is stayed pending order from the arbitrator or except as the parties may stipulate or except as authorized by MAR 4.2.

Amended Sept. 1, 1981.

RULE 4.3 SUBPOENA [no local rule]

V. HEARING

RULE 5.1 NOTICE OF HEARING—TIME AND PLACE—CONTINUANCE

An arbitration hearing may be scheduled at any reasonable time and place chosen by the arbitrator. The arbitrator may grant a continuance without court order. The parties may stipulate to a continuance only with the permission of the arbitrator. The arbitrator shall give reasonable notice of the hearing date and any continuance to the Director.

RULE 5.2 PREHEARING STATEMENT OF PROOF—DOCUMENTS FILED WITH COURT

In addition to the requirements of MAR 5.2, each party shall also furnish the arbitrator with copies of pleadings and other documents contained in the court file which that party deems relevant.

RULE 5.3 CONDUCT OF HEARING—WITNESSES—RULES OF EVIDENCE

(a) *Oath or Affirmation.* The arbitrator shall place a witness under oath or affirmation before the witness presents testimony.

(b) *Recording.* The hearing may be recorded electronically or otherwise by any party or the arbitrator.

(c) *Rules of Evidence, Generally.* The Rules of Evidence, to the extent determined by the arbitrator to be applicable, should be liberally construed in accordance with Local Rule 1.1 (Application of Rules) to promote justice. The parties should stipulate to the admission of evidence when there is no genuine issue as to its relevance or authenticity.

(d) *Certain Documents Presumed Admissible.* The documents listed below, if relevant, are presumed admissible at an arbitration hearing, but only if (1) the party offering the document serves on all parties a notice, accompanied by a copy of the document and the name, address and telephone number of its author or maker, at least 14 days prior to the hearing in accordance with MAR 5.2; and (2) the party offering the document similarly furnishes all other parties with copies of all other related documents from the same author or maker. This rule does not restrict argument or proof relating to the weight of the evidence admitted, nor does it restrict the arbitrator's authority to determine the weight of the evidence after hearing all of the evidence and the arguments of opposing parties. The documents presumed admissible under this rule are:

(1) A bill, report, chart, or record of a hospital, doctor, dentist, registered nurse, licensed practical nurse, physical therapist, psychologist or other health care provider, on a letterhead or billhead;

(2) A bill for drugs, medical appliances or other related expenses on a letterhead or billhead;

(3) A bill for, or an estimate of, property damage on a letterhead or billhead. In the case of an estimate, the party intending to offer the estimate shall forward with the notice to the adverse party a statement indicating whether or not the property was repaired, and if it was, whether the estimated repairs were made in full or in part, attaching a copy to the receipted bill showing the items of repair and the amount paid.

(4) A police, weather, wage loss, or traffic signal report, or standard United States government life expectancy table to the extent it is admissible under the Rules of Evidence, but without the need for formal proof of authentication or identification;

(5) A photograph, x-ray, drawing, map, blueprint or similar documentary evidence, to the extent it is admissible under the Rules of Evidence, but without the need for formal proof of authentication or identification;

(6) The written statement of any other witness, including the written report of an expert witness, and including a statement of

opinion which the witness would be allowed to express if testifying in person, if it is made by affidavit or by declaration under penalty of perjury;

(7) A document not specifically covered by any of the foregoing provisions but having equivalent circumstantial guarantees of trustworthiness, the admission of which would serve the policies and purposes expressed in Local Rule 1.1 and the interests of justice.

(e) *Opposing Party May Subpoena Author or Maker as Witness.* Any other party may subpoena the author or maker of a document admissible under this rule, at that party's expense, and examine the author or maker as if under cross examination.

RULE 5.4 ABSENCE OF PARTY AT HEARING [no local rule]

VI. AWARD

RULE 6.1 FORM AND CONTENT OF AWARD

(a) *Form.* The award shall be prepared on the form prescribed by the court.

(b) *Return of Exhibits.* When an award is filed, the arbitrator shall return all exhibits to the parties who offered them during the hearing.

RULE 6.2 FILING OF AWARD

A request by an arbitrator for an extension of time for the filing of an award under MAR 6.2 may be presented to the Director, ex parte. The Director may grant or deny the request, subject to review by the Presiding Judge. The arbitrator shall give the parties notice of any extension granted.

RULE 6.3 JUDGMENT ON AWARD

(a) *Presentation.* A judgment on an award shall be presented to the ex parte department, by any party, on notice in accordance with MAR 6.3.

VII. TRIAL DE NOVO

RULE 7.1 REQUEST FOR TRIAL DE NOVO—CALENDAR

Every case transferred to the arbitration calendar shall maintain its position on the trial calendar as if the case had not been transferred to arbitration unless in the discretion of the Presiding Judge the trial date is accelerated. A case that has been given a trial date will not lose that date by reason of being transferred to arbitration.

Amended Sept. 1, 1981.

RULE 7.2 PROCEDURE AT TRIAL

The clerk shall seal any award if a trial de novo is requested.

RULE 7.3 COSTS AND ATTORNEY FEES

MAR 7.3 shall apply only to costs and reasonable attorney's fees incurred since the filing of the request for a trial de novo.

Added Sept. 1, 1981.

VIII. GENERAL PROVISIONS

RULE 8.1 STIPULATIONS—EFFECT ON RELIEF GRANTED

If a case not otherwise subject to mandatory arbitration is transferred to arbitration by stipulation, the arbitrator may grant any relief which could have been granted if the case were determined by a judge.

RULE 8.2 LOCAL RULES [no local rule]

RULE 8.3 EFFECTIVE DATE

These rules become effective on October 1, 1980. With respect to civil cases pending on that date, if the case has not at that time received a trial date, or if the trial has been set for later than January 1, 1981, any party may serve and file a statement of arbitrability indicating that the case is subject to mandatory arbitration. If within 14 days no party files a response indicating the case is not subject to arbitration, the case will be transferred to the arbitration calendar. A case set for trial earlier than January 1, 1981, will be transferred to arbitration only on stipulation.

RULE 8.4 TITLE AND CITATION

These rules are known and cited as the King County Superior Court Mandatory Arbitration Rules. LMAR is the official abbreviation.

RULE 8.5 COMPENSATION OF ARBITRATOR

(a) *Generally.* Arbitrators shall be compensated in the same amount and manner as judges pro tempore of the superior court. Hearing time and reasonable preparation time are compensable.

(b) *Form.* When the award is filed, the arbitrator shall submit to the Director a request for payment on a form prescribed by the court. The Director shall determine the amount of compensation to

be paid. The decision of the Director will be reviewed by the Presiding Judge at the request of the arbitrator.

RULE 8.6 ADMINISTRATION

(a) The Presiding Judge shall designate a person to serve as Director of Arbitration. The Director, under the supervision of the Presiding Judge, shall supervise arbitration under these rules, and perform any additional duties which may be delegated by the Presiding Judge.

(b) There shall be an administrative committee composed of three judges chosen by the Presiding Judge and three members of the Washington State Bar Association, one each chosen by the Seattle-King County Bar Association, the Washington Association of Defense Counsel, and the Washington State Trial Lawyers' Association. The members of the committee shall serve for staggered three year terms and may be reappointed.

(c) The administrative committee shall have the power and duty to:

(1) Select its chairperson and provide for its procedures;

(2) Appoint the panel of arbitrators provided in Rule 3.1(a);

(3) Remove a person from a panel of arbitrators;

(4) Establish procedures for selecting an arbitrator not inconsistent with the Mandatory Arbitration Rules or these rules;

(5) Review the administration and operation of the arbitration program periodically and make recommendations as it deems appropriate to improve the program.

within ten days of receipt by them of the original list of ten names. In the event the parties fail to submit such a list within the time provided, the clerk shall make the selection of arbitrators at random from the original list of ten names;

(iv) The clerk shall promptly notify the person or persons whose names appear as the first choice or choices of the parties of their selection, or, if no choices have been made, the persons he has selected. If any person so selected is unable or unwilling to serve, the clerk shall notify the person whose name appears next on the list. If the clerk is unable to select an arbitrator or constitute a panel of arbitrators from the six selections, the process of selection under this Rule shall begin anew. When the requisite number of arbitrators has agreed to serve, the clerk shall promptly send written notice of the selections to each arbitrator and to the parties.

(b) **Disqualification.** No person shall serve as an arbitrator in any action in which any of the circumstances specified in 28 U.S.C. 455 exist or may in good faith be believed to exist.

(c) **Withdrawal by Arbitrator.** Any person whose name appears on the roster maintained in the clerk's office may ask at any time to have his name removed or, if selected to serve on a panel, decline to serve but remain on the roster.

(d) **Compensation and Reimbursement.** Arbitrators shall be paid $150 per day or portion of each day of hearing in which they participate serving as a single arbitrator or seventy-five dollars for each day or portion of a day if serving as a member of a panel of three. At the time when the arbitrators file their decision, each shall submit a voucher on the form prescribed by the clerk for payment by the Administrative Office of the United States Courts of compensation and out-of-pocket expenses necessarily incurred in the performance of the duties under this Rule. No reimbursement will be made for the cost of office or other space for the hearing.

500-5. **Hearings.**

(a) **Hearing Date.** The clerk shall set a date for hearing not less than 20 nor more than 120 days after the clerk has been informed of the parties' ranking in accordance with Rule 500-4(a) (or of the clerk's random selection in accordance with Rule 500-4(a)(iii)).

This date shall not be continued except for extreme and unanticipated emergencies as established in writing and approved by the judge assigned to the case. Discovery shall terminate twenty days prior to the hearing.

(b) **Default of Party.** Subject to the provisions of subparagraph (a) above, the hearing shall proceed on the noticed date. Absence of a party shall not be a ground for continuance but damages shall be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrators.

(c) **Conduct of Hearing.** The arbitrator is authorized to administer oaths and affirmations and all testimony shall be given under oath or affirmation. Each party shall have the right to cross-examine witnesses except as herein provided. In receiving evidence, the arbitrator shall be guided by the Federal Rules of Evidence, but shall not thereby be precluded from receiving evidence which he considers to be relevant and trustworthy and which is not privileged. A party desiring to offer a document otherwise subject to hearsay objections at the hearing may serve a copy on the adverse party not less than ten days in advance of the hearing indicating his intention to offer it as an exhibit. Unless the adverse party gives written notice in advance of the hearing of intent to cross-examine the author of the document, any hearsay objection to the document shall be deemed waived. Attendance of witnesses and production of documents may be compelled in accordance with Rule 45, Federal Rules of Civil Procedure.

(d) **Transcript or Recording.** A party may cause a transcript or recording to be made of the proceedings at its expense but shall, at the request of the opposing party, make a copy available to the party at no charge, unless the parties have otherwise agreed. In the absence of agreement of the parties and except as provided in Rule 500-7(b) relating to impeachment, no transcript of the proceedings shall be admissible in evidence at any subsequent de novo trial of the action.

(e) **Place of Hearing.** Hearings shall be held at any location within the Northern District of California designated by the arbitrators. Hearings may be held in any courtroom or other room in any federal courthouse or office building made available to the arbitrators by the clerk's office. When no such room is available, the hearing shall be held at any other suitable location selected by

the arbitrator. In making the selection, the arbitrator shall consider the convenience of the panel, the parties and the witnesses.

(f) **Time of Hearing.** Unless the parties agree otherwise, hearings shall be held during normal business hours.

(g) **Optional Waiver of Trial De Novo; Voluntary Arbitration.** At any time prior to the commencement of the hearing, the parties may by written stipulation approved by order of the assigned judge waive the right to a trial de novo following the award and proceed as in voluntary arbitration. In the event of such a stipulation, the provisions of state and federal law governing review of awards rendered in voluntary arbitration shall govern.

(h) **Authority of Arbitrator.** The arbitrator shall be authorized to make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing before him. Any two members of a panel shall constitute a quorum, but (unless the parties stipulate otherwise) the concurrence of a majority of the entire panel shall be required for any action or decision by the panel.

(i) **Ex Parte Communication.** There shall be no ex parte communication between an arbitrator and any counsel or party on any matter touching the action except for purposes of scheduling or continuing the hearing.

500-6. **Award and Judgment.**

(a) **Filing of Award.** The arbitrator shall file the award with the clerk's office promptly following the close of the hearing and in any event not more than ten days following the close of the hearing. The clerk shall serve copies on the parties.

(b) **Form of Award.** The award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money and other relief if any awarded. It shall be in writing and (unless the parties stipulate otherwise) be signed by the arbitrator or by at least two members of a panel. No member shall participate in the award without having attended the hearing.

(c) **Entry of Judgment on Award.** Promptly upon the filing of the award with the clerk, the clerk shall enter judgment thereon in

RULE 609

ARBITRATION AWARD AND JUDGMENT

(a) Issuance of Award. The arbitrator shall issue his award within fifteen (15) days of the date of the closing of the hearing or the receipt of posthearing briefs, whichever is later.

(b) Award Procedure. The arbitrator shall submit the award and the written record to the clerk, who shall file the same under seal. The award shall dispose of all monetary claims presented to the arbitrator and shall be signed by the arbitrator. The arbitrator is not required to issue an opinion explaining the award. The clerk shall mail a copy of the award to the parties and copies of both the award and the written record to the Private Adjudication Center, such records to be held in confidence by the Center.

(c) Judgment upon Award. Unless the parties, within thirty (30) days after the filing of the award, file a stipulation of dismissal or a party files a demand for trial de novo in accordance with Rule 610, the award shall be unsealed and incorporated within a judgment of the court. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect, as a consent judgment of this court in any civil action.

RULE 610

TRIAL DE NOVO

(a) Thirty Day Limit. Within thirty (30) days after the filing of the sealed arbitration award, any party may file with the court a written demand for trial de novo.

(b) Return to Court Calendar. Upon such a demand for a trial de novo, the action shall be placed upon the court's trial calendar. The arbitration award shall remain under seal until final judgment is entered or the case is dismissed.

(c) Conference With Arbitrator. Within fifteen (15) days after the filing of a demand for trial de novo, the parties or counsel shall confer with the arbitrator who conducted the arbitration hearing. The arbitrator shall frankly discuss with the parties the strengths and weaknesses of their cases. The parties or counsel shall thereafter, within thirty (30) days after the demand for trial de novo, inform the court by letter whether prospects for settlement appear to be excellent, good, fair, poor, or remote.

(d) Evidence From the Arbitration Hearing. At the trial of the action, the court shall not admit evidence that there has been an arbitration proceeding or that an arbitration award has been entered. Recorded testimony given at an arbitration hearing may be used for the same purposes as any deposition under the Federal Rules of Civil Procedure.

(e) Taxation of Arbitration Expense as a Cost. If, after trial before the district court, the party who demanded trial de novo does not obtain a judgment which, exclusive of interest and costs, is more favorable than the award of the arbitrator, the clerk shall tax as a cost against such party the fees and expenses paid to the arbitrator. The cost collected by the clerk under this rule shall be paid to the Treasury of the United States.

RULE 611

EVALUATION OF ARBITRATION RULES

(a) Purpose of Evaluation. These arbitration rules are experimental rules. In order to assess their impact upon the court, the bar, and litigants, it is essential that the rules be evaluated at a reasonably early time so that their performance can be compared with their stated purpose.

(b) Research Committee. The Chief Judge shall appoint at least three members of the bar and at least two representatives of the Private Adjudication Center to a Research Committee. The Chief Judge may appoint such other members as he deems advisable. The Chief Judge and the clerk shall serve as ex officio members of the committee.

(c) Research Techniques. The Research Committee shall be responsible for developing research tools and techniques in order to evaluate the operation of these rules. For the purpose of creating a control group for statistical comparisons, the clerk may exempt cases, on a random basis, from reference to arbitration. If litigant or counsel surveys are conducted, the Research Committee shall afford the information obtained such confidentiality as it shall deem appropriate. The Research Committee may compile statistical information based upon arbitration awards.

(d) Report of the Research Committee. Thirty (30) months after the effective date of these rules, the Research Committee shall file a report with the clerk's office. The report shall be drawn by committee members other than judicial officers and

demand for trial de novo pursuant to Section 7 shall become part of the final judgment with the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal.

Section 7. Trial De Novo.

(a) Within thirty (30) days after the arbitration award is entered on the docket, any party may demand a trial de novo in the district court. Written notification of such a demand shall be served by the moving party upon all counsel of record or other parties. Withdrawal of a demand for a trial de novo shall not reinstate the arbitrators' award and the case shall proceed as if it had not been arbitrated.

(b) Upon demand for a trial de novo and the payment to the clerk required by paragraph (d), infra, the action shall be placed on the calendar of the court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(c) At the trial de novo, the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, except that testimony given at an arbitration hearing may be used for impeachment at a trial de novo.

(d) Upon making a demand for trial de novo, the moving party shall, unless permitted to proceed in forma pauperis, deposit with the clerk of court an amount equal to the arbitration

fees of $75.00 for each arbitrator as provided in Section 2. The sum so deposited shall be returned to the party demanding a trial de novo in the event that party obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. In the event that the party demanding a trial de novo does not obtain a more favorable result, the sum so deposited shall be paid to the Treasury of the United States.

SENATE
JUDICIARY COMMITTEE

Washington State Senate
49th Legislature

435 John A. Cherberg Building
Olympia, Washington 98504
(206) 786-7462

MEMORANDUM

DATE: March 7, 1986

TO: Members, Senate Judiciary Committee

FROM: Dick Armstrong, Cliff Petersen

SUBJECT: ESSB 4630 -- House Version

This is the version that passed

The House of Representative has passed its version of ESSB 4630 -- Tort Reform. Set forth below is a summary of its provisions.

1. ACCELERATED PHYSICIAN-PATIENT PRIVILEGE

Within 90 days of filing action, claimant must elect whether or not to waive privilege. If not waived, claimant may not put physical or mental condition in issue at trial. If waived, then waived as to all physicians or conditions subject to limitations imposed by court rules. Sec. 101

2. ATTORNEYS FEES

In any tort action, a party may petition the court to determine the reasonableness of that party's attorneys' fees. Secs. 201 and 202

3. LIMITATION ON NONECONOMIC DAMAGES

A judgment for noneconomic damages may not exceed the average annual wage in the state multiplied by 0.43 multiplied by the life expectancy of the claimant. A claimant's life expectancy is set at least 15 years for purposes of the formula. The jury may not be informed of the limit on noneconomic damages. Sec 301

4. JOINT AND SEVERAL LIABILITY

Fault is apportioned among all entities which caused claimant's damages, including entities released by claimant, entities immune from liability, and entities with any other individual defense against the claimant. Judgment is entered against each defendant, except those who have been released, are immune, or have an individual defense, in an amount which represents the party's proportionate share of the claimants damages. Liability of each defendant is only for its own share of fault (i.e., several, but not joint liability) if the claimant was also at fault. The section does not apply to causes of action

relating to hazardous wastes or substances or solid waste disposal sites, or to certain business torts and market-share liability claims. Secs. 401 and 402

5. PERIODIC PAYMENT

Provides for periodic payment of an award for future economic damages of at least $100,000 upon the request of a party. Each party submits a proposal which the court may adopt or modify to best provide for the needs of the claimant. If payments are not made in a timely fashion, a court may order that the outstanding payments be paid in a lump sum. Payments for future earnings are not reduced or terminated because of the death of the judgment creditor. Medical expenses cease. Sec. 801

6. HEALTH CARE ACTION STATUTE OF LIMITATIONS

Modifies current law which tolls medical malpractice statute of limitations until the injured person turns 18. Provides that all malpractice actions must be brought within three years of the negligent act or within one year of discovery, whichever is later, but no longer than eight years after the negligent act or omission. For purposes of when the action should have been discovered, the knowledge of a custodial parent or guardian is imputed to a child. Sec. 502

7. INSURANCE PROVISIONS

Provides a credit to policy holders on premiums paid where the Insurance Commissioner determines a credit should be given based on sound actuarial credibility. Gives the Commissioner authority to require a market assistance plan to assist persons who are having a difficult time getting insurance. Insurance report to the Legislature by 1991. Secs. 906-909

8. CIVIL IMMUNITY

Qualified civil immunity for officers and members of boards and directors of nonprofit corporations, and hospital boards. Liable only for acts of gross negligence. Secs. 903 and 905

9. FELONY

Commission of felony is bar to suit if there is a causal relationship between the crime and the injury in time, place, or activity. Sec. 501

10. BUILDER LIMITATION

Builder limitation statute applies equally to private individuals and governmental entities. Sec. 701

11. INDEMNIFICATION AGREEMENTS

Parties may not contractually shift liability for their own negligence to others. Sec. 601

12. DUTIES IMPOSED BY LAW

Breach of duty imposed by statute, ordinance, or rule is not negligence per se but may be evidence of negligence. Exception for electrical, fire, or intoxication laws. Intoxication of a victim bars a suit if the intoxication contributed more than 50 percent of the claimant's injuries. Secs. 901 and 902

13. WORKERS COMPENSATION

Any workers' compensation lien against a third-party recovery is eliminated and benefits to the injured worker continue if fault is allocated to the claimant's employer or co-employee. Sec. 403

14. SCHOOL DIRECTORS

A member of a board of directors or a superintendent of a school district is immune from civil liability unless act or omission constitutes gross negligence. Sec. 904

15. EFFECTIVE DATE OF THE ACT

The act generally applies to actions filed on or after August 1, 1986.

DA:d6-6

TLW:mmc H-4931/86 3rd draft p--1 CR

ESSB 4630 - H Amd to H Comm Amd By Representatives Bristow and Ballard CR85B F H -4931

Tom Bristow
Tim Ballard

MAR 8

ADOPTED

0645

On page 2 of the amendment, after line 33, strike all material down through "affected." on page 30, line 15 and insert the following: ;1 PART ;7

"PART I

ACCELERATED PHYSICIAN-PATIENT PRIVILEGE

Sec. 101. Section 294, page 187, Laws of 1854 as last amended by section 1, chapter 56, Laws of 1982 and RCW 5.60.060 are each amended to read as follows:

(1) A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse if the marriage occurred subsequent to the filing of formal

~~the cause thereof~~)) except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) Within ninety days of filing an action for personal injuries or wrongful death, the claimant shall elect whether or not to waive the physician-patient privilege. If the claimant does not waive the physician-patient privilege, the claimant may not put his or her mental or physical condition or that of his or her decedent or beneficiaries in issue and may not waive the privilege later in the proceedings. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

(5) A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

PART II
ATTORNEYS' FEES

NEW SECTION. Sec. 201. A new section is added to chapter 4.24 RCW

aware of his or her right to petition the court under this section.

NEW SECTION. Sec. 202. Section 201 of this act applies to agreements for attorney's fees entered into after the effective date of this section.

PART III
LIMITATION ON NONECONOMIC DAMAGES

NEW SECTION. Sec. 301. A new section is added to chapter 4.56 RCW to read as follows:

(1) As used in this section, the following terms have the meanings indicated unless the context clearly requires otherwise.

(a) "Economic damages" means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.

(b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and

the jury shall not be informed of the limitation contained in subsection ( ) of this section.

PART IV
APPORTIONMENT OF DAMAGES

NEW SECTION. Sec. 401. A new section is added to chapter 4.22 RCW to read as follows:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, including the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities immune from liability to the claimant and entities with any other individual defense against the claimant. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or

...ifiable shape, color, or
mar...ng.

Sec. 402. Section 11, chapter 27, Laws of 1981 and RCW 4.22.030 are each amended to read as follows:

Except as otherwise provided in section 401 of this 1986 act, if more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several.

Sec. 403. Section 4, chapter 85, Laws of 1977 ex. sess. as last amended by section 5, chapter 218, Laws of 1984 and RCW 51.24.060 are each amended to read as follows:

(1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:

(a) The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the balance of

employee are determined under section 401 of this 1986 act to be at fault, (c) and (e) of this subsection do not apply and benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

(2) The recovery made shall be subject to a lien by the department and/or self-insurer for its share under this section.

(3) The department or self-insurer has sole discretion to compromise the amount of its lien. In deciding whether or to what extent to compromise its lien, the department or self-insurer shall consider at least the following:

(a) The likelihood of collection of the award or settlement as may be affected by insurance coverage, solvency, or other factors relating to the third person;

(b) Factual and legal issues of liability as between the injured worker or beneficiary and the third person. Such issues include but are not limited to possible contributory negligence and novel theories of liability; and

(c) Problems of proof faced in obtaining the award or settlement.

(4) In the case of an employer not qualifying as a self-insurer, the department shall make a retroactive adjustment to such employer's experience rating in which the third

interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of such worker or beneficiary mentioned in the warrant, the amount of the unpaid lien plus interest accrued and the date when the warrant was filed. The amount of such warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the injured worker or beneficiary against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department in the manner provided by law in the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee of five dollars, which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the injured worker

notice and order, any property which may be subject to the claim of the department, such property shall be delivered forthwith to the director or the director's authorized representative upon demand. If the party served and named in the notice and order fails to answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full amount claimed by the director in the notice together with costs. In the event that a notice to withhold and deliver is served upon an employer and the property found to be subject thereto is wages, the employer may assert in the answer to all exemptions provided for by chapter 7.33 RCW to which the wage earner may be entitled.

PART V
LIMITATION OF ACTIONS

NEW SECTION. Sec. 501. A new section is added to chapter 4.24 RCW to read as follows:

It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony, if the felony was causally related to the injury or death in time, place, or activity. However, nothing in this

of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative; based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic diagnostic purpose or effect.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years. Any action not commenced in accordance with this section shall be barred((~~: PROVIDED, That the limitations in~~

only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after the effective date of this 1986 section.

PART VII
BUILDER LIMITATION

Sec. 701. Section 2, chapter 43, Laws of 1955 and RCW 4.16.160 are each amended to read as follows:

The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That, except as provided in RCW 4.16.310, there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: AND FURTHER PROVIDED, That no previously existing statute of limitations shall be interposed as a defense to any action brought in the name or for the benefit of the state, although such

of action as set forth in RCW 4.16.300 brought in the name or for the benefit of the state which are made or commenced after the effective date of this 1986 section.

Sec. 703. Section 1, chapter 75, Laws of 1967 and RCW 4.16.300 are each amended to read as follows:

RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. This section is intended to benefit only those persons referenced herein and shall not apply to claims or causes of action against manufacturers.

PART VIII
PERIODIC PAYMENTS

NEW SECTION. Sec. 801. A new section is added to chapter 4.56 RCW to read as follows:

(1) In an action based on fault seeking damages for personal injury

and enter judgment accordingly.

(3) If the court enters a judgment for periodic payments and any security required by the judgment is not posted within thirty days, the court shall enter a judgment for the payment of future damages in a lump sum.

(4) If at any time following entry of judgment for periodic payments, a judgment debtor fails for any reason to make a payment in a timely fashion according to the terms of the judgment, the judgment creditor may petition the court for an order requiring payment by the judgment debtor of the outstanding payments in a lump sum. In calculating the amount of the lump sum judgment, the court shall total the remaining periodic payments due and owing to the judgment creditor converted to present value. The court may also require payment of interest on the outstanding judgment.

(5) Upon the death of the judgment creditor, the court which rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages. Money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor.

(6) Upon satisfaction of a periodic payment judgment, any

person injured or killed was under the influence of intoxicating liquor or any drug and that such condition contributed more than fifty percent to his or her injuries or death. If the amount of alcohol in a person's blood is shown by chemical analysis of his or her blood, breath, or other bodily substance to have been 0.10 percent or more by weight of alcohol in the blood, it is conclusive proof that the person was under the influence of intoxicating liquor.

NEW SECTION. Sec. 903. A new section is added to chapter 4.24 RCW to read as follows:

(1) Except as provided in subsection (2) of this section, a member of the board of directors or an officer of any nonprofit corporation is not civilly liable for any act or omission in the course and scope of his or her official capacity unless the act or omission constitutes gross negligence.

(2) Nothing in this section shall limit or modify in any manner the duties or liabilities of a director or officer of a corporation to the corporation or the corporation's shareholders.

NEW SECTION. Sec. 904. A new section is added to chapter 4.24 RCW to read as follows:

A member of the board of directors or a superintendent of any

writing casualty insurance in this state in either the admitted or nonadmitted market to provide casualty insurance for a class of insurance designated in writing to the plan by the commissioner.

The bylaws and method of operation of any market assistance plan shall be approved by the commissioner prior to its operation.

A market assistance plan shall have a minimum of twenty-five insurers willing to insure risks within the class designated by the commissioner. If twenty-five insurers do not voluntarily agree to participate, the commissioner may require casualty insurers to participate in a market assistance plan as a condition of continuing to do business in this state. The commissioner shall make such a requirement to fulfill the quota of at least twenty-five insurers. The commissioner shall make his or her designation on the basis of the insurer's premium volume of casualty insurance in this state.

NEW SECTION. Sec. 907. A new section is added to chapter 48.19 RCW to read as follows:

The commissioner shall, in reviewing a casualty rate filing, determine in accordance with sound and reliable actuarial principles whether this act requires an insurer to grant its policyholders a credit

availability of insurance coverage and the impact on the civil justice system.

NEW SECTION. Sec. 910. Except as provided in sections 202 and 601 of this act and except for section 904 of this act, this act applies to all actions filed on or after August 1, 1986.

NEW SECTION. Sec. 911. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 912. Section 904 of this act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately."

ESSB 4630 - H Amd to H Comm Amd
By Representatives Bristow and Ballard

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seek a court order compelling answers to discovery questions.

Eve. Evening. The period immediately preceding an important event.

Even. Nothing due or owing on either side; neither a profit nor loss; *i.e.* breaking even.

Evening. The closing part of the day and beginning of the night; in a strict sense, from sunset till dark. In common speech, the latter part of the day and the earlier part of the night, until bedtime. The period between sunset or the evening meal and ordinary bedtime. See also **Nighttime.**

Evenings. In old English law, the delivery at evening or night of a certain portion of grass, or corn, etc., to a customary tenant, who performs the service of cutting, mowing, or reaping for his lord, given him as a gratuity or encouragement.

Event. The consequence of anything; the issue or outcome of an action as finally determined; that in which an action, operation, or series of operations, terminates. Noteworthy happening or occurrence. Something that happens.

Distinguished from an act in that an act is the product of the will whereas an event is an occurrence which takes place independent of the will such as an earthquake or flood.

See also **Fortuitous event.**

Eventus est qui ex causa sequitur; et dicitur eventus quia ex causis evenit (eventus est kway eks koza sekwetur, et dicetur eventus kwaya eks kozas evenit). An event is that which follows from the cause, and is called an "event" because it eventuates from causes.

Eventus varios res nova semper habet (eventus varyows reyz nowva semper heybet). A new matter always produces various events.

Evergreen contract. A contract which renews itself from year to year in lieu of notice by one of the parties to the contrary. Chemplex Co. v. Tauber Oil Co., D.C.Iowa, 309 F.Supp. 904, 908.

Every. Each one of all; all the separate individuals who constitute the whole, regarded one by one. The term is sometimes equivalent to "all", and sometimes to "each".

Every other thing. This phrase, as used in requiring employer to furnish safe place of employment and to do "every other thing" reasonably necessary to protect employees, relates to things of same kind that employer must necessarily do in making place safe.

Evesdroppers. See **Eavesdropping.**

Evict. In civil law, to recover anything from a person by virtue of the judgment of a court or judicial sentence. See **Eviction.**

Eviction. Dispossession by process of law; the act of depriving a person of the possession of land or rental property which he has held or leased. Act of turning a tenant out of possession, either by re-entry or legal proceedings, such as an action of ejectment. Deprivation of lessee of possession of premises or disturbance of lessee in beneficial enjoyment so as to cause tenant to abandon the premises (the latter being constructive conviction). Estes v. Gatliff, 291 Ky. 93, 163 S.W.2d 273, 276.

See also Actual eviction; Constructive eviction; Ejectment; Forcible entry and detainer; Notice to quit; Partial eviction; Retaliatory eviction; Total eviction.

Evidence. [redacted] proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention. Taylor v. Howard, 111 R.I. 527, 304 A.2d 891, 893.

Testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact. Calif. Evid.Code.

All the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. Any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion of the existence or nonexistence of some matter of fact. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. That which tends to produce conviction in the mind as to existence of a fact. The means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact.

As a part of procedure "evidence" signifies those rules of law whereby it is determined what testimony should be admitted and what should be rejected in each case, and what is the weight to be given to the testimony admitted. See **Evidence rules.**

For Presumption as evidence, see **Presumption;** Proof and evidence distinguished, see **Proof;** Testimony as synonymous or distinguishable, see **Testimony;** View as evidence, see **View.**

See also Admunicular evidence; Allunde; Autoptic evidence; Best evidence; Beyond a reasonable doubt; Circumstantial evidence; Competent evidence; Conclusive evidence; Conflicting evidence; Corroborating evidence; Cumulative evidence; Demeanor evidence; Demonstrative evidence; Derivative evidence; Direct evidence; Documentary evidence; Extrajudicial evidence; Extraneous evidence; Extrinsic evidence; Fabricated evidence; Fact; Fair preponderance of evidence; Hearsay; Illegally obtained evidence; Immaterial evidence; Incompetent evidence; Incriminating evidence; Inculpatory; Independent source rule; Indirect evidence; Indispensable evidence; Inference; Laying foundation; Legal evidence; Legally sufficient evidence; Limited admissibility; Material evidence; Mathematical evidence; Moral evidence; Narrative evidence; Newly-discovered evidence; Offer of proof; Opinion evidence; Oral evidence; Original document rule; Parol evidence rule; Partial evidence; Past recollection recorded; Perpetuating testimony; Physical fact rule; Positive evidence; Preliminary evidence; Preponderance; Presumption; Presumptive evidence; Prima facie evidence; Primary evidence; Prior inconsistent statements; Privileged evidence; Probable evidence; Probative evidence; Probative facts; Proof; Proper

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evidence; Real evidence; Reasonable inference rule; Rebuttal evidence; Relevant evidence; Satisfactory evidence; Scintilla of evidence; Secondary evidence; Second-hand evidence; State's evidence; Substantial evidence; Substantive evidence; Substitutionary evidence; Sufficiency of evidence; Traditionary evidence; View; Weight of evidence; Withholding of evidence.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Autoptic evidence. Type of evidence presented in court which consists of the thing itself and not the testimony accompanying its presentation. Articles offered in evidence which the judge or jury can see and inspect. Real evidence as contrasted with testimonial evidence: e.g. in contract action, the document purporting to be the contract itself, or the gun in a murder trial.

Character evidence. Evidence of a person's character or traits is admissible under certain conditions in a trial, though, as a general rule, evidence of character traits are not competent to prove that a person acted in conformity therewith on a particular occasion. Fed.Evid.R. 404.

Curative admissibility. See Curative.

Exculpatory evidence. A defendant in a criminal case is entitled to evidence in possession or control of the government if such evidence tends to indicate his innocence or tends to mitigate his criminality if he demands it and if the failure to disclose it results in a denial of a fair trial. U. S. v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342. Disclosure of evidence by the government is governed by Fed.R.Crim.P. 16.

Expert evidence. Testimony given in relation to some scientific, technical, or professional matter by experts, i.e., persons qualified to speak authoritatively by reason of their special training, skill, or familiarity with the subject. See also Expert witness.

Identification evidence. See Exemplars.

Illegally obtained evidence. See Exclusionary rule; Miranda Rule; Mapp v. Ohio; McNabb-Mallory Rule; Motion to suppress; Poisonous tree doctrine.

Incriminatory evidence. Evidence tending to show a person's involvement in a crime; incriminating evidence.

Irrelevant evidence. Evidence is irrelevant if it is not at related to the issues to be tried and if it has no logical tendency to prove the issues. See also *Relevant evidence, infra.*

Material evidence. See *Relevant evidence, infra.*

Oral evidence. See Testimony.

Original evidence. See Original; Original document rule.

Preponderance of the evidence. A standard of proof (used in many civil suits) which is met when a party's evidence on a fact indicates that it is "more likely than not" that the fact is as the party alleges it to be. See Fair preponderance of evidence.

Proffered evidence. Evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact. Calif. Evid.Code.

Relevant evidence. Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed.Evid.R. 401. Evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. Calif.Evid.Code. Evidence which bears a logical relationship to the issues in a trial or case.

Tangible evidence. Physical evidence; evidence that can be seen or touched, *e.g.*, documents, weapons. Testimonial evidence is evidence which can be heard, e.g., the statements made by anyone sitting in the witness box. See Demonstrative evidence.

Evidence by inspection. Such evidence as is addressed directly to the senses without intervention of testimony. Tangible; physical evidence. See Demonstrative evidence.

Evidence codes. Statutory provisions governing admissibility of evidence and burden of proof at hearings and trials. See also Evidence rules, *infra*.

Evidence completed. Exists where both sides have offered testimony and rested, or where plaintiff has rested and defendant has made motion for finding on plaintiff's case and stands on motion and declines to offer evidence. Merriam v. Sugrue, D.C.Mun.App., 41 A.2d 166, 167.

Evidence law of. The aggregate of rules and principles regulating the burden of proof, admissibility, relevancy, and weight and sufficiency of evidence in legal proceedings. See Evidence codes; Evidence rules.

Evidence of debt. A term applied to written instruments or securities for the payment of money, importing on their face the existence of a debt. See Bonds.

Evidence of insurability satisfactory to company. Evidence which would satisfy a reasonable person experienced in the life insurance business that insured was in an insurable condition. Bowie v. Bankers Life Co., C.C.A.Colo., 105 F.2d 506, 508.

Evidence of title. A deed or other document establishing the title to property, especially real estate.

Evidence reasonably tending to support verdict. Means evidence that is competent, relevant, and material, and which to rational and impartial mind naturally leads, or involuntarily tends to lead, to conclusion for which there is valid, just, and substantial reason. Kelly v. Oliver Farm Equipment Sales Co., 169 Okl. 269, 36 P.2d 986, 991.

burden, as on interstate commerce, means anything that imposes either a restrictive or onerous load upon such commerce.

Burden of going forward. The onus on a party to a case to refute or to explain as in the case of one who is charged with possession of stolen goods after the government has introduced evidence of the defendant's recent possession of such goods, the inference being that the defendant knew the goods to have been stolen. Barnes v. U. S., 412 U.S. 837, 846, n. 11, 93 S.Ct. 2357, 2363, 37 L.Ed.2d 380.

Burden of persuasion. The onus on the party with the burden of proof to convince the trier of fact of all elements of his case. In criminal case the burden of the government to produce evidence of all the necessary elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368.

Burden of producing evidence. The obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue. Calif.Evid.Code. Such burden is met when one with the burden of proof has introduced sufficient evidence to make out a prima facie case, though the cogency of the evidence may fall short of convincing the trier of fact to find for him. The burden of introducing some evidence on all the required elements of the crime or tort or contract to avoid the direction of a verdict against the party with the burden of proof. Stuart v. D. N. Kelley & Son, 331 Mass. 76, 117 N.E.2d 160.

Burden of proof. (Lat. *onus probandi.*) In the law of evidence, the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

Burden of proof is a term which describes two different concepts: first, the "burden of persuasion", which under traditional view never shifts from one party to the other at any stage of the proceeding, and second, the "burden of going forward with the evidence", which may shift back and forth between the parties as the trial progresses. Ambrose v. Wheatley, D.C.Del., 321 F.Supp. 1220, 1222.

The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. Calif.Evid.Code, § 115.

In a criminal case, all the elements of the crime must be proved by the government beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368.

Term has been used to mean either the necessity of establishing a fact, that is, the burden of persuasion, or the necessity of making a prima facie showing, that is, the burden of going forward. State Farm Life Ins. Co. v. Smith, 9 Ill.App.3d 942, 331 N.E.2d 273, 278.

"Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence. U.C.C. § 1-201(8).

See also Shifting the burden of proof.

Bureau /byúrow/. An office for the transaction of business. A name given to the several departments of the executive or administrative branch of government, or their divisions. A specialized administrative unit. Business establishment for exchanging information, making contacts, coordinating activities, etc.

Bureaucracy /byurókrəsiy/. An organization, such as an administrative agency or the army, with the following general traits: a chain of command with fewer people at the top than at the bottom; well defined positions and responsibilities; fairly inflexible rules and procedures; "red tape"; many forms to be filled out; and delegation of authority downward from level to level.

Bureau of Customs. Federal agency charged with responsibility of collecting importing duties for the Government.

Bureau of Land Management. The Bureau of Land Management was established July 16, 1946, by the consolidation of the General Land Office (created in 1812) and the Grazing Service (formed in 1934). The Bureau manages the national resource lands (some 450 million acres) and their resources. It also administers the mineral resources connected with acquired lands and the submerged lands of the Outer Continental Shelf (OCS).

Burford doctrine. Under "Burford Doctrine" of abstention, federal courts have refrained from interfering with complex state regulatory schemes. Clutchette v. Procunier, D.C.Cal., 328 F.Supp. 767, 772.

Burgage /bərgəj/. A name anciently given to a dwelling-house in a borough town.

Burgage-tenure. In English law, one of the three species of free socage holdings; a tenure whereby houses and lands which were formerly the site of houses, in an ancient borough, are held of some lord by a certain rent. There are a great many customs affecting these tenures, the most remarkable of which is the custom of Borough English. Such tenures have been abolished.

Burgator /bərgéydər/. One who breaks into houses or inclosed places, as distinguished from one who committed robbery in the open country.

Burgbote /bərgbowt/. In old English law, a term applied to a contribution towards the repair of castles or walls of defense, or of a borough.

Burgenses /bərjénsiyz/. In old English law, inhabitants of a *burgus* or borough; burgesses.

Burgeristh /bərgərisθ/. A word used in D. lesday, signifying a breach of the peace in a town.

Burgess /bərjəs/. In English law, an inhabitant or freeman of a borough or town; a person duly and legally admitted a member of a municipal corporation. A magistrate of a borough. An elector or voter; a person legally qualified to vote at elections. The

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Clausum /klózəm/. Lat. Close, closed up, sealed. Inclosed, as a parcel of land. A writ was either *clausum* (close) or *apertum* (open). Grants were said to be by *literæ patentæ* (open grant) or *literæ clausæ* (close grant). 2 Bl.Comm. 346. Occurring in the phrase *quare clausum fregit* it denotes in this sense only realty in which the plaintiff has some exclusive interest, whether for a limited or unlimited time or for special or for general purposes.

Clausum fregit /klózəm fríyjət/. L. Lat. (He broke the close.) In pleading and practice, technical words formerly used in certain actions of trespass, and still retained in the phrase *quare clausum fregit* (q.v.).

Clausum paschæ /klózəm pæskiy/. In English law, the morrow of the utas, or eight days of Easter; the end of Easter; the Sunday after Easter-day.

Clausura /klozhúrə/. In old English law, an inclosure. *Clausura heiciæ*, the inclosure of a hedge.

Clavia /kléyviyə/. In old English law, a club or mace; tenure *per serjeantiam claviæ*, by the serjeanty of the club or mace.

Clawa. A close, or small inclosure.

Clayton Act. A Federal law enacted in 1914 as amendment to the Sherman Antitrust Act dealing with antitrust regulations and unfair trade practices. 15 U.S.C.A. §§ 12-27. The Act prohibits price discrimination, tying and exclusive dealing contracts, mergers, and interlocking directorates, where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

Clean. Irreproachable; innocent of fraud or wrongdoing; free from defect in form or substance; free from exceptions or reservations. It is a very elastic adjective, however, and is particularly dependent upon context.

Clean Air Acts. Federal and state environmental statutes enacted to regulate and control air pollution.

Clean bill. Bill of exchange without documents attached.

Clean bill of health. One certifying that no contagious or infectious disease exists, or certifying as to healthy conditions generally without exception or reservation. See *Bill* (*Maritime law*).

Clean bill of lading. One without exception or reservation as to the place or manner of stowage of the goods, and importing that the goods are to be or have been safely and properly stowed under deck. One which contains nothing in the margin qualifying the words in the bill of lading itself.

[illegible]

Clean hands doctrine. Under "clean hands" doctrine, equity will not grant relief to a party, who, as actor, seeks to set judicial machinery in motion and obtain some remedy, if such party in his prior conduct has violated conscience or good faith or other equitable principle. Franklin v. Franklin, 365 Mo. 442, 283 S.W.2d 483, 486.

Clear. Obvious; beyond reasonable doubt; perspicuous; plain. Free from all limitation, qualification, question or shortcoming. Free from incumbrance, obstruction, burden, limitation, etc. Plain, evident, free from doubt or conjecture, unequivocal, also unincumbered. Free from deductions or drawbacks.

Clearance. In maritime law, the right of a ship to leave port. The act of clearing or leaving port. The certificate issued by the collector of a port evidencing the power of the ship to leave port. In contract for exhibition of motion pictures, the interval of time between conclusion of exhibition in one theater and commencement of exhibition at another theater. Waxmann v. Columbia Pictures Corporation, D.C.Pa., 40 F.Su.p. 103, 111.

Clearance card. A letter given to an employee by his employer, at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment.

Clearance certificate. Issued to ship's captain showing that customs requirements have been made.

Clear and convincing proof. Generally, this phrase and its numerous variations mean proof beyond a reasonable, i.e., a well-founded doubt. Some cases give a less rigorous, but somewhat uncertain, meaning, viz., more than a preponderance but less than is required in a criminal case.

Proof which should leave no reasonable doubt in the mind of the trier of the facts concerning the truth of the matters in issue. In Interest of Jones, 34 Ill.App.3d 603, 340 N.E.2d 269, 274.

That measure or degree of proof which will produce in mind of trier of facts a firm belief or conviction as to allegations sought to be established; it is intermediate, being more than mere preponderance, but not to extent of such certainty as is required beyond reasonable doubt as in criminal cases. Fred C. Walker Agency, Inc. v. Lucas, 215 Va. 535, 211 S.E.2d 88, 92.

See also Beyond a reasonable doubt; Burden of proof; Clear evidence or proof.

Clear and present danger doctrine. Doctrine in constitutional law, first formulated in Schenck v. U. S., 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470, providing that governmental restrictions on freedoms of speech and press will be upheld if necessary to prevent grave and immediate danger to interests which government may lawfully protect.

Speech which incites to unlawful action falls outside the protection of the First Amendment where

sary for its commission, while attempt is direct movement toward commission after preparations are made. State v. Quick, 199 S.C. 256, 19 S.E.2d 101, 103. See also Aid and abet.

Prepare. To provide with necessary means; to make ready; to provide with what is appropriate or necessary.

Prepayment penalty. A penalty under a note, mortgage, or deed of trust, imposed when the loan is paid before its due date. Consideration to terminate loan at borrower's election before maturity.

Prepayments. Deferred charges. Assets representing expenditures for future benefits. Rent and insurance premiums paid in advance are usually classified as current prepayments.

Prepense. Forethought; preconceived; premeditated.

Preponderance of evidence. Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Braud v. Kinchen, La.App., 310 So.2d 857, 859. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability. The word "preponderance" means something more than "weight"; it denotes a superiority of weight, or outweighing. The words are not synonymous, but substantially different. There is generally a "weight" of evidence on each side in case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

That amount of evidence necessary for the plaintiff to win in a civil case. It is that degree of proof which is more probable than not.

Preponderance of evidence may not be determined by the number of witnesses, but by the greater weight of all evidence, which does not necessarily mean the greater number of witnesses, but opportunity for knowledge, information possessed, and manner of testifying determines the weight of testimony.

Prerogative /prərógədav/. An exclusive or peculiar right or privilege. The special power, privilege, immunity, right or advantage vested in an official person, either generally, or in respect to the things of his office, or in an official body, as a court or legislature.

Prerogative court. In old English law, a court established for the trial of all testamentary causes, where the deceased left *bona notabilia* within two different dioceses; in which case the probate of wills belonged to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons were originally cognizable herein, before a judge appointed by the archbishop, called the "judge of the prerogative court," from whom an appeal lay to the privy council. The jurisdiction of these courts became obsolete with the transfer of the testamentary jurisdiction of the ecclesiastical courts to the Chancery Division of the High Court.

Prerogative law. That part of the common law of England which is more particularly applicable to the king.

Prerogative writs. In English law, the name was given to certain judicial writs issued by the courts only upon proper cause shown, never as a mere matter of right, the theory being that they involved a direct interference by the government with the liberty and property of the subject, and therefore were justified only as an exercise of the extraordinary power (prerogative) of the crown. In America, issuance is now generally regulated by statute, and such are generally referred to as extraordinary writs or remedies.

Such writs have been abolished in the federal and most state courts with the adoption of Rules of Civil Procedure. The relief formerly available by such writs is now available by appropriate action or motion under the Rules of Civil Procedure. See Rule 81. These writs are the writs of mandamus, procedendo, prohibition, quo warranto, habeas corpus, and certiorari.

Pres /prey/. L. Fr. Near. *Cy pres*, so near; as near. See Cy pres.

Presbyter /prézbadar/. Lat. In civil and ecclesiastical law, an elder; a presbyter; a priest.

Presbyterianism. One of the principal systems of church polity known as the "Christian Protestant Church", occupying an intermediate position between episcopacy and congregationalism. A religious faith or doctrine, based on the Westminster Confession of Faith and the Larger and Shorter Catechisms.

Presbyterium. That part of the church where divine offices are performed; formerly applied to the choir or chancel, because it was the place appropriated to the bishop, priest, and other clergy, while the laity were confined to the body of the church.

Prescribable /praskráybabal/. That to which a right may be acquired by prescription.

Prescribe. To assert a right or title to the enjoyment of a thing, on the ground of having hitherto had the uninterrupted and immemorial enjoyment of it.

To lay down authoritatively as a guide, direction, or rule; to impose as a peremptory order; to dictate; to point, to direct; to give as a guide, direction, or rule of action; to give law. To direct; define; mark out.

In a medical sense "prescribe" means to direct, designate, or order use of a particular remedy, therapy, medicine, or drug.

Prescription. A direction of remedy or remedies for a disease, illness, or injury and the manner of using them. Also, a formula for the preparation of a drug or medicine.

Prescription is a peremptory and perpetual bar to every species of action, real or personal, when creditor has been silent for a certain time without urging his claim. Jones v. Butler, La.App., 346 So.2d 791, 791.

Acquisition of a personal right to use a way, water light and air by reason of continuous usage. See also Prescriptive easement.

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Fair pleader. See Beau pleader.

Fair preponderance of evidence. Evidence sufficient to create in the minds of the triers of fact the conviction that the party upon whom is the burden has established its case. The greater and weightier evidence, the more convincing evidence. Belmont Hotel v. New Jersey Title Guaranty & Trust Co., 22 N.J.Misc. 261, 37 A.2d 681, 682. Such a superiority of evidence on one side that the fact of its outweighing the evidence on the other side can be perceived if the whole evidence is fairly considered. Such evidence as when weighed with that which is offered to oppose it, has more convincing power in the minds of the jury. The term conveys the idea of something more than a preponderance. The term is not a technical term, but simply means that evidence which outweighs that which is offered to oppose it, and does not necessarily mean the greater number of witnesses.

Fair rent. A reasonable rent. Shapiro v. Goldstein, 113 Misc. 256, 185 N.Y.S. 234.

Fair return on investment. A net return upon fair value of property. State ex rel. City of St. Louis v. Public Service Commission, 341 Mo. 920, 110 S.W.2d 749, 778. A "fair return" is to be largely measured by usual returns in like investments in the same vicinity over the same period of time. Natural Gas Pipeline Co. of America v. Federal Power Commission, C.C.A.Ill., 120 F.2d 625, 633, 634. Reasonable profit on sale or holding of investment assets. A fair return on value of property used and useful in carrying on the enterprise, performing the service or supplying the thing for which the rates are paid. Labin v. Finkelstein, 82 N.Y.S.2d 329, 335. Term is generally used in reference to setting of rates for public utilities.

Fair sale. In foreclosure and other judicial proceedings, this means a sale conducted with fairness and impartiality as respects the rights and interests of the parties affected. A sale at a price sufficient to warrant confirmation or approval when it is required.

Fair trade laws. State statutes which permit manufacturers or distributors of namebrand goods to fix minimum retail prices. Following a series of court decisions striking down such statutes, Congress in 1976 repealed such statutes.

Fair trial. A hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial consideration of evidence and facts as a whole. A basic constitutional guarantee contained implicitly in the Due Process Clause of Fourteenth Amendment, U.S. Constitution.

A legal trial or one conducted in all material things in substantial conformity to law. Stacey v. State, 79 Okl.Cr. 417, 155 P.2d 736, 739. A trial which insures substantial justice. A trial without prejudice to the accused. An orderly trial before an impartial jury and judge whose neutrality is indifferent to every factor in trial but that of administering justice. One conducted according to due course of law. A trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm. In such trial the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror. Goldstein v. U. S., C.C.A.Mo., 63 F.2d 609, 613. An adequate hearing and an impartial tribunal, free from any interest, bias, or prejudice. The Reno, C.C.A.N.Y., 61 F.2d 966, 968. See also Fair and impartial trial.

Fair use doctrine. "Fair use" is privilege in other than owner of copyright to use copyrighted material in reasonable manner without consent, notwithstanding monopoly granted to the owner. Meeropol v. Nizer, D.C.N.Y., 361 F.Supp. 1063, 1067. Section 107 of the Copyright Act sets forth factors to be considered in determining whether the use made in any particular case is "fair use."

Fair value. Present market value; such sum as the property will sell for to a purchaser desiring to buy, the owner wishing to sell; such a price as a capable and diligent business man could presently obtain from the property after conferring with those accustomed to buy such property; the amount the property would bring at a sale on exec[illegible] shown to have been in all respects fair and [illegible]sonable; the fair market value of the property [illegible] between one who wants to purcha[illegible] and one who wants to sell the property. Where no definite market value can be established and expert testimony must be relied on, fair valuation is the amount which the property ought to give to a going concern as a fair return, if sold to some one who is willing to purchase under ordinary selling conditions. In determining "fair valuation" of property, court should consider all elements entering into the intrinsic value, as well as the selling value, and also the earning power of the property. In re Gibson Hotels, D.C.W.Va., 24 F.Supp. 859, 863. In determining depreciation, "fair value" implies consideration of all factors material in negotiating sale and purchase of property, such as wear, decay, deterioration, obsolescence, inadequacy, and redundancy. Idaho Power Co. v. Thompson, D.C.Idaho, 19 F.2d 547, 566. Price which a seller, willing but not compelled to sell, would take, and a purchaser, willing but not compelled to buy, would pay. Price which buyers of the class which would be interested in buying property would be justified in paying for it. In re Crane's Estate, 344 Pa. 141, 23 A.2d 651, 655.

Within provision of business corporation act for determination of fair value of dissenting stockholder's shares, "fair value" means intrinsic value. Santee Oil Co., Inc. v. Cox, 265 S.C. 270, 217 S.E.2d 781, 783. Among elements to be considered in arriving at "fair value" or "fair cash value" of stock of a stockholder who dissents from a sale of corporate assets are its market value, net asset value, investment value, and earning capacity. Lucas v. Pembroke Water Co., 205 Va. 84, 135 S.E.2d 147, 150.

"Actual value," "market value," "fair value," and the like, are commonly used as convertible terms. See also Fair market value.

Fait /fēyt/. L. Fr. Anything done. A deed; act; fact. A deed lawfully executed.

Fait accompli. Factor deed accomplished, presumably irreversible.

Fait enrolle /fēyt ənrówl/. A deed enrolled, as a bargain and sale of freeholds.

Faith. Confidence; credit; reliance. Thus, an act may be said to be done "on the faith" of certain representations.

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