N E W S R E L E A S E

January 9, 1978
From December 1977 issue of Oregon State Bar Bulletin

NEW COUNCIL ON COURT PROCEDURES GETS UNDERWAY

EUGENE -- Appointments to the new Council on Court Procedures, created by the 1977 Legislature, have been completed, an organizational session held, and a series of public meetings scheduled.

Council Chairman Donald W. McEwen, a practicing attorney from Portland, explained that no comprehensive review of the laws relating to civil procedure has been made since 1862 when the Field Code provisions, originally adopted in 1854, were codified as a part of the Deady Code. "The Legislature from time to time has enacted statutes relating to pleading, procedure and practice in civil cases," said McEwen, "but has not undertaken a comprehensive review of procedure." He said that members of the judiciary, the Bar, and the law schools have, particularly in the past several years, emphasized the need for such a review. As a result the 1977 Legislative Assembly enacted Chapter 890, Laws 1977, Creating the Council on Court Procedures.

As provided in the Act, the Council consists of:

- one judge of the Supreme Court, chosen by it (Berkeley Lent);

- one judge of the Court of Appeals, chosen by it (Lee Johnson);

- six judges of the Circuit Court chosen by the executive committee of its association (John M. Copenhaver, William M. Dale, Jr., Alan F. Davis, Val D. Sloper, Wendell H. Tompkins and William W. Wells);

- two judges of the District Court chosen by the executive committee of its association (Anthony L. Casciato and L. A. Cushing);

- twelve members of the Oregon State Bar appointed by the board of governors (E. Richard Bodyfelt, Donald W. McEwen, Charles P. A. Paulson, Sidney A.

Brockley, James O. Garrett, Wendell E. Gronso, Gene C. Rose, Garr M. King, James B. O'Hanlon, Darst B. Atherly, Roger B. Todd and Laird C. Kirkpatrick);

- one public member appointed by the Supreme Court (Mrs. Harriet M. Krauss, Corvallis). Mrs. Krauss is currently teaching in the Computer Science Department, Oregon State University, and also is enrolled in the PhD program in Computer Science at OSU.

The Act provides that of the twelve members appointed by the Bar's board of governors, at least two members shall be from each of the state's four congressional districts; and that the board, in making the appointments, include members of the Bar active in civil trial practice, and one person who by profession is involved in legal teaching or research.

Members of the Council will serve for terms of four years, and are eligible for reappointment to one additional term. In accordance with the Act, half of the initial appointments were for two-year periods in order to obtain staggered expiration dates and insure continuity. Members receive no compensation for their services, and only receive actual and necessary travel and other expenses incurred in performance of their official duties.

McEwen noted that the Council is directed by the Act "to promulgate rules governing pleading, practice and procedure in all civil proceedings in all courts of the state. The rules promulgated may not abridge, enlarge, or modify the substantive rights of any litigant." These rules do not include rules of appellate procedure or rules of evidence.

The Act further directs the Council "to submit to the Legislature at the beginning of each Legislative Assembly all rules which it adopts from time to

time, and any amendments thereto, together with a list of the statutes superseded thereby." McEwen pointed out that Rules so promulgated go into effect 90 days after the close of the legislative session, unless the Legislature provides an earlier effective date. The Legislature may by statute amend, repeal or supplement any of the rules.

Rules promulgated by the Council will be arranged, indexed, printed, published and annotated in the Oregon Revised Statutes by the Legislative Council. * * * *

The Council on Court Procedures will hold public meetings in each congressional district of the state of Oregon at the times and places hereinafter set forth:

FIRST CONGRESSIONAL DISTRICT

A meeting of the Council will be held on Saturday, January 21, 1978, in the Multnomah County Commissioners' Board Room, 6th Floor, Multnomah County Courthouse, Portland, Oregon, commencing at 9:30 a.m.

SECOND CONGRESSIONAL DISTRICT

A meeting of the Council willbe held on Saturday, February 4, 1978, in the Umatilla County Courthouse, Pendleton, Oregon, commencing at 9:30 a.m.

THIRD CONGRESSIONAL DISTRICT

A meeting of the Council will be held on Saturday, February 18, 1978, in the Lloyd Center Auditorium, Lloyd Center, Portland, Oregon, commencing at 9:30 a.m.

FOURTH CONGRESSIONAL DISTRICT

A meeting of the Council will be held on Saturday, March 4, 1978, in Harris Hall, Lane County Courthouse Complex, Eugene, Oregon, commencing at 9:30 a.m.

The aforesaid regular meetings of the Council will be public meetings as provided in ORS 192.610 et seq. These regular meetings will be conducted pursuant to the provisions of subsection (2), section (4), chapter 890, Oregon Laws 1977.

In addition to the aforesaid regular meetings of the Council, the Council will hold regular meetings as public meetings on the first Saturday of each month, beginning in April, 1978, through and including September, 1978, in the Courtroom of The Honorable William M. Dale, Room 318, Multnomah County Courthouse, Portland, Oregon, commencing at 9:30 a.m.

At all meetings of the Council it will receive and accept information, written or oral, relating to pleading, practice and procedure in civil proceedings in all courts of the state.

The offices of the Council are located in the Law Center Building on the University of Oregon campus in Eugene, Oregon. Any suggestions or requests for information should be directed to the Executive Director at that address.

A G E N D A

COUNCIL ON COURT PROCEDURES

January 21, 1978

Portland, Oregon

1. Public statements regarding civil procedure revision

2. Consideration of council priorities and agenda for future meetings

3. Discussion of possible pleading changes not involving notice pleading

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of January 21, 1978

Multnomah County Courthouse, Portland, Oregon

Present:	Darst B. Atherly	Laird Kirkpatrick
	E. Richard Bodyfelt	Harriet Meadow Krauss
	Sidney A. Brockley	Berkeley Lent
	Anthony L. Casciato	Donald W. McEwen
	John M. Copenhaver	James B. O'Hanlon
	William M. Dale, Jr.	Roger B. Todd
	Alan F. Davis	Wendell H. Tompkins
	Garr M. King	William W. Wells
Absent:	Laurence A. Cushing	Charles P. A. Paulson
	James O. Garrett	Gene C. Rose
	Wendell E. Gronso	Val D. Sloper
	Lee Johnson	

Chairman Don McEwen called the meeting to order at 9:45 a.m. in the County Commissioners' Meeting Room at the Multnomah County Courthouse, Portland, Oregon. Since the meeting was scheduled to provide an opportunity for public statements, the Chairman first made a brief statement of the purpose of the Council and actions taken to date and provided an opportunity for public statements. None were received. A press release containing a notice of this meeting, as well as later scheduled public meetings, had been previously sent to the Associated Press, United Press International, and fourteen newspapers throughout the state.

The Council then discussed future areas of concern for the Council and an appropriate method of future procedure. The Chairman suggested that at least a complete review of the areas of discovery and pleading should be undertaken. Laird Kirkpatrick also suggested consideration of the areas of process and jurisdiction and joinder. The Chairman suggested also a possible revision of statutes relating to trial procedure.

The Council discussed the advisability of setting up subcommittees to deal with specific areas. Most comments favored subcommittees, and the Chairman proceeded to appoint the following subcommittees:

1. Discovery

Chairman:	Garr M. King
Members:	Laird Kirkpatrick
	E. Richard Bodyfelt
	James B. O'Hanlon
	Donald W. McEwen
	CHarles P. A. Paulson

2. Trial Procedure

Chairman: William M. Dale, Jr.
Members: John M. Copenhaver
Alan F. Davis
Anthony L. Casciato
L. A. Cushing
Val D. Sloper
Wendell H. Tompkins
William W. Wells

3. Service of Process - Jurisdiction

Chairman: Val D. Sloper
Members: Berkeley Lent
Lee Johnson
Wendell H. Tompkins
Darst Atherly
James O. Garrett
Harriet Krauss

The Chairman also suggested that the subcommittee on trial procedure consider the areas of third party practice and summary judgment.

The Chairman announced that the public meeting scheduled at Lloyd Center, Portland, Oregon, on Saturday, February 18, 1978, at 9:30 a.m., would have to be moved to a different location due to scheduling conflicts at the Lloyd Center. The Chairman announced that the public meeting would be held at the Sheraton Hotel and notice of the exact location would be given to committee members and the public before the meeting.

Laird Kirkpatrick suggested that the Council take some action on the matters referred by the Oregon State Bar Procedure and Practice Committee and contained in the memorandum which Laird Kirkpatrick distributed at the last meeting.

The Executive Director was asked to send copies of the Kirkpatrick memorandum to all committee members. The Council took the following action on the matters presented by the Kirkpatrick memorandum:

A. Proposals referred by the Oregon State Bar committee at the 1977 convention:

1. Motions to dismiss in equity without waiving the right to present evidence.

Debated whether the decision to eliminate procedural distinction between law and equity obviated the problem and decided that under the proposed law-equity revision of Chapter 17 submitted to the Council, the problem was eliminated. Judge Lent called the Council's attention to the problem faced by the Supreme Court when a lawyer in a non-jury

case does not make a motion to dismiss and wishes to assert lack of sufficient evidence as a basis for appeal. Judge Tompkins also raised a question as to the necessity of submitting a verdict form to a jury when a verdict is to be directed.

2. Adopting Federal Rules of Civil Procedure 15(c) which allows relation back of amended pleadings for purposes of the Statute of Limitations.

Decided to consider at a later date with more background information and presentation by interested committee members.

3. Repeal of ORS 16.830 which prohibits service of process on Sunday.

On motion of Sid Brockley, seconded by Judge Dale, voted to repeal ORS 16.830.

4. Adoption of Federal Rule of Civil Procedure 22 regarding interpleader.

Decided to consider at a later date with more background information and presentation by interested Council members.

5. Repealing ORS 15.090 which permits the service of a copy of a complaint in a suit in equity on only one defendant.

Decided that this would be settled by the elimination of procedural distinction between law and equity.

6. Provide that third party claims and summary judgments will be allowed in suits as well as actions.

Decided that this would be settled by the elimination of procedural distinctions between law and equity.

PB. Oregon State Bar sponsored procedural legislation that did not pass the legislature:

1. Repeal of requirement of verification of pleadings.

On motion by Judge Wells, seconded by Judge Lent, unanimously voted to repeal statute requiring verification of pleadings. On motion of Dick Bodyfelt, seconded by Darst Atherly, unanimously voted to repeal the requirement of verification of objections to cost bills. The Executive Director was asked to provide a suitable draft of a rule requiring signature of pleadings by attorneys and providing for penalties for false pleading.

2. Authorization of written interrogatories.

Referred to subcommittee on discovery.

3. Establishment of a uniform Statute of Limitations.

Decided not to consider.

C. Changes that may be constitutionally required:

1. Modification of the jurisdictional statutes to conform with the recent United States Supreme Court decision of Shaffer vs. Heitner, 97 S. Ct. 2569, 1977.

Referred to process and jurisdiction subcommittee.

2. Modification of the new trial statute, ORS 17.610, to conform with Article VII of the Oregon Constitution.

Referred to trial subcommittee.

3. Revision of ORS 15.120 to conform with the requirements of Mullane vs. Hanover Bank and Trust Company.

Referred to process and jurisdiction subcommittee.

D. Additional suggestions:

1. Merger of law and equity.

Previously decided.

2. Adoption of a statutory procedure for pretrial conferences.

Deferred action.

3. Revision of the statutes governing compulsory joinder of parties.

Referred to trial subcommittee.

4. Revisions in the class action procedures.

Deferred action.

5. Revision of the procedures for pleading and proving attorneys fees.

Deferred action.

6. Allowing alternative, hypothetical or inconsistent pleading.

Deferred action pending report of Executive Director.

7. Assessment of attorneys fees against parties filing frivolous motions.

Deferred action pending report of Executive Director.

8. Modification of the grounds for a motion to strike.

Deferred action pending report of Executive Director.

9. Revision of the requirements for a motion to make more definite and certain.

Deferred action pending report of Executive Director.

10. Revision of the statutes governing service of process.

Referred to process and jurisdiction subcommittee.

11. Adding provisions defining the permissible scope of discovery of expert witnesses.

Referred to discovery subcommittee.

12. Statutory authority for courts to drop or add parties upon the motion of any party or upon their own motion.

Deferred action pending report of Executive Director.

13. Extension of the Oregon long arm statute.

Referred to process and jurisdiction subcommittee.

14. Modification of the procedures regarding amendment of pleadings.

Deferred action pending report of Executive Director.

15. Requiring that all challenges to a pleading be made at one time.

Deferred action pending report of Executive Director.

16. Revision of the statutory procedures for writs of review.

Deferred action.

17. Abolition of the requirement that challenges to jurisdiction must be made by special appearance.

Referred to process and jurisdiction subcommittee.

18. Development of a separate body of expedited informal procedures for handling smaller claims.

Deferred action.

19. Requiring findings of fact by the judge in non-jury cases.

Referred to trial subcommittee.

The Council discussed the necessity of providing progress reports to the Bar by publication in the Bar Bulletin, and the Chairman indicated that he would provide a summary of action to date for the Bar Bulletin.

The minutes of the meeting held December 3, 1977, were unanimously approved as submitted.

The Executive Director was asked to provide a draft of Rules of Procedure for the Council as required by HB 2316 before the next meeting. The Executive Director asked the Council members to carefully examine the law-equity revisions to Chapters 17 and 18 submitted to the Council, and the Chairman indicated that these would be considered in depth at the next meeting.

It was indicated that the next scheduled meeting will be held on Saturday, February 4, 1978, in the Umatilla County Courthouse, Pendleton, Oregon, commencing at 9:30 A.M. Judge Wells announced that admission to the courthouse for this meeting should be through the door of the courthouse next to the parking lot. The Executive Director was asked to send a special notice of this meeting to eastern Oregon newspapers.

On motion of Judge Davis, seconded by Judge Dale, the meeting was adjourned at 11:45 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

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BACKGROUND INFORMATION RELATING TO REPEAL OF ORS 16830

The Council voted to repeal ORS 16.830 relating to service of process on Sunday. The Bar bill and commentary are attacked. As shown, simple repeal is not enough and the substitute rule should be adopted.

A BILL FOR
AN ACT

Relating to service of process on Sunday and holiday, repealing ORS 16.830 and creating new provisions.

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

Section 1. ORS 16.830 is repealed and Section 2 of this Act is enacted in lieu thereof.

Section 2. Any person may serve or execute any civil process on a Sunday or other legal holiday.

No limitation or prohibition stated in ORS 1.060 shall apply to such service or execution of any civil process on a Sunday or other legal holiday.

3. *Repeal of statute prohibiting service of process on Sunday (Exhibit C)*

ORS 16.830 states that if any person shall serve or execute any civil process on a Sunday, the service shall be void and the person subject to a fine. It is generally believed that religious beliefs are the reason for this statute. However, this statute, like Sunday "Blue Laws", would appear to have lost its validity in view of widespread employment and the opening of stores on Sunday. The existing law can work a hardship on a civil litigant who may want to serve a subpena on a witness on a Sunday when this might be one of the few days the witness would be available. Furthermore, a judgment creditor might need to levy execution on the judgment debtor's property, which might be removed from the state by the following Monday.

The definition of process has been a problem for the courts and the practicing lawyer. The service of a summons apparently is outside the prohibition of the existing statute, because a summons has been held not to be process. However, subpenas and judicial orders are process. The repeal alone of this statute might not enable a litigant to make service of civil process on a Sunday, because of the common law rule that no judicial act can be done on a Sunday. ORS 1.060 states that on any legal holiday no court may be open or transact any judicial business, with certain exceptions. ORS 187.010 defines legal holidays and includes Sundays in the definition.

The proposed Act will take precedence over the common law, make service of the civil process an exception to ORS 1.060, and allow service of civil process on a Sunday or other legal holiday.

DISMISSALS AND DIRECTED VERDICTS

Set out below are Federal Rules 41 and 50(a) with some modifications to fit Oregon practice. If adopted, this would replace the following statutes: ORS 18.210, 220, 230, 240, and 250. Note that ORS 12.220 is not replaced; whatever res judicata effect is given to a dismissal, the statute of limitations rule would remain the same.

Rule 41.

DISMISSAL OF ACTIONS

(a) *Voluntary Dismissal; Effect Thereof.*

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of ~~Rule 23(e), of Rule 66,~~ ORS 13.240, and of any statute of ~~the United States~~ this state, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim.

(1) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, ~~the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court~~ the defendant may proceed with the counterclaim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary Dismissal; Effect Thereof.*. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his

right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in ~~Rule 52(a).~~ ORS 17.431. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision ~~and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper vanue,~~ or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) *Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading or a motion for summary judgment by an opponent is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Costs of Previously-Dismissed Action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Rule 50.

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) *Motion for Directed Verdict: When Made; Effect.* Any party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) The first sentence provides for an involuntary dismissal for failure to prosecute and for disobedience of court rules. See ORS 18.230(c). ORS 18.260 provides the procedure for dismissal when no action has been taken for a year in a case. This rule would be retained, and it specifically provides for dismissals for failure to prosecute under other circumstances as the court may determine proper. As written, the rule would literally authorize dismissals for any violation of a rule no matter how minor. However, as a Constitutional matter, such dismissals are probably improper, at least with prejudice, except for serious and intentional rule violations. See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. vs. Brownell, 357 U.S. 197 (1958).

The second sentence provides for a motion to dismiss at the close of the plaintiff's case in a non-jury case. As originally drafted in 1938, the rule provided that a motion could be used in any case, non-jury or jury. The different standard of weighing sufficiency in a non-jury case, where the judge can determine credibility and weigh the evidence, created confusion where the motion to dismiss was used in a jury case. Therefore, in 1963 this rule was amended to limit the motion to dismiss to non-jury cases.

There is no provision for a motion to dismiss at the close of all the evidence, but at that point the court will decide the case anyway and the sufficiency of the evidence to support its decision will be subject to appellate review; therefore, no such motion seems necessary. Under present Oregon law, a trial judge can dismiss at the close of all the evidence in an equity suit without prejudice. This would no longer be possible in a non-jury case unless a motion to dismiss were made at the close of the plaintiff's case and the trial judge reserved ruling. The court, however, may grant a non-prejudicial voluntary dismissal to the plaintiff under 41 (a) (2) at any time, rather

than entering a judgment on the merits.

The rule specifically eliminates the problem of waiver of right to present evidence by making the motion.

The fourth sentence was modified to refer to the Oregon procedure for finding of facts in a non-jury case.

The last sentence in this subdivision is the most troublesome. It essentially makes all dismissals, either under this rule or not, dismissals with prejudice, when the court does not affirmatively state without prejudice, except jurisdiction venue and lack of an indispensable party. This is much stricter than the existing Oregon rule and would make the following dismissals with prejudice, even though they do not deal with the merits of the plaintiff's case: failure to plead over after a motion or demurrer, violation of a discovery rule, failure to comply with some condition precedent to the action, and lack of a real party in interest. This seems unduly harsh. The federal courts have avoided many of these results by giving a very expansive reading to the jurisdiction exception. It seems much easier to limit the reference to res judicata effect to only dismissals under this particular rule. The elimination of the portion of the federal rule referring to all other dismissals renders unnecessary the exceptions for jurisdiction venue and indispensable party and limits the res judicata effect of silence by the judge to those dismissals specifically provided for in Rule 41. All other dismissals would then be governed by existing statutes and case law. In a proper case coming under Rule 41, such as failure of proof by a plaintiff, where the judge feels that the plaintiff might succeed in another case, the court may make the involuntary dismissal without prejudice by an affirmative statement.

(c) This section conforms the dismissal rules in counterclaims, cross-claims and third-party claims to the rules for the plaintiff's complaint. The

present Oregon rule covers counterclaims and crossclaims but not third-party claims. ORS 18.230(2). In 1948, Section (a) (2) of the rule was amended to prevent voluntary dismissal after the defendant moved for a summary judgment as well as filing of an answer. Through a drafting mistake, this modification was not also added to subdivision (c) and the additional language corrects this.

II. Rule 50

In the federal practice the motion for directed verdict is the correct motion at the close of the plaintiff's case, and at any other time a test of sufficiency of evidence is desired in a jury case. Rule 50 (a) is not completely clear in specifying this. It does refer to a motion at the close of the opponent's evidence, and Rule 50(b) refers to a motion at the close of all the evidence. Since Rule 50 (a) only is under consideration and for purposes of clarity, the first sentence was added. The rule does not speak of plaintiffs and defendants and thus would apply to counterclaims, cross-claims and third-party claims.

The right to put on evidence after the motion is denied and non-waiver of jury trial, which are specified in the rule, are consistent with Oregon practice. The rule does away with the useless and potentially embarrassing exercise of submitting a verdict form to the jury after a directed verdict.

The major change from Oregon practice is that a dismissal for failure of evidence at the close of a plaintiff's case automatically carries res judicata effect under this rule, whereas under the existing non-suit statute, it does not. This seems reasonable, as in most cases, the plaintiff has had a full day in court. One problem that may arise, however, is a situation where the trial judge feels that a plaintiff might be able to make out a case if given another chance or for some other reason does not desire to disable the

plaintiff from filing another suit. On a motion to dismiss in a non-jury case, the judge has the option of specifying without prejudice. A judgment after a directed verdict, however, automatically is with prejudice. The solution suggested by the advisory committee which drafted the 1963 amendments to Rule 41, which limited the motion to dismiss to non-jury cases, was as follows:

> "* * *Hereafter the correct motion in jury-tried cases will be the motion for a directed verdict. This involves no change of substance. It should be noted that the court upon a motion for a directed verdict may in appropriate circumstances deny that motion and grant in- instead a new trial, or a voluntary dismissal without prejudice under Rule 41 (a) (2). See 6 Moore's Federal Practice ¶ 59.08[5] (2 ed. 1954); cf. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217, 67 S.Ct . 752, 91 L.Ed. 849 (1947)."

The Rule does not define a standard of sufficiency. The existing Oregon statute, ORS 18.240, is not too helpful, and the standard is well established by case law.

BACKGROUND INFORMATION ON FEDERAL RULE 22

INTERPLEADER

1. BAR PROPOSAL AND COMMENT

EXHIBIT E

A BILL FOR
AN ACT

Relating to interpleader; repealing ORS 13.120.

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

Section 1. ORS 13.120 is repealed and Section 2 of this Act is enacted in lieu thereof.

Section 2. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties otherwise permitted by statute.

5. *Interpleader (Exhibit E)*

Two forms of interpleader are presently available in Oregon: equitable interpleader which is a traditional equitable remedy, and statutory interpleader as provided for by ORS 13.120. Interpleader is a form of joinder permitting a party who does not know to which of several claimants he is liable, if at all, to bring the claimants into court and compel them to litigate their claims in a single action.

The effectiveness of the interpleader procedures available in Oregon is severely limited by four restrictions. First, the same thing, debt or duty must be claimed by all the interpleaded parties. Second, the claimants' titles or claims must be dependent on or derive from a common source. Third, the stakeholder seeking to obtain the benefit of interpleader must not have or claim any interest in the thing, debt, or duty. Fourth, the stakeholder must not have incurred any independent liability to any of the claimants. While the Oregon courts have been more lenient than most in finding these requirements satisfied, they still constitute a significant impediment to the use of interpleader.

Most other states have adopted more modern interpleader statutes that eliminate most or all of these four restrictions. Many of the state statutes are based upon Federal Rule of Civil Procedure 22. It is proposed that Oregon also adopt an interpleader statute based upon F.R.C.P. 22. Enactment of such a statute would remove the restrictions previously discussed. Although the statute is brief and couched in general terms, there exists a substantial body of federal case law and law from other states to aid the Oregon courts in their interpretation of the statute. Adoption of such a statute is believed to be necessary in order for Oregon to have a workable and effective interpleader procedure.

2. ADDITIONAL STAFF COMMENT

In addition to the proposed Federal Rule 22, the federal system also has a separate statutory procedure for interpleader in 28 U.S.C.A., secs. 1335, 1397 and 2361, as follows:

§ 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

§ 1397. Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

§ 2361. Process and procedure

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

The reason for the separate statutory procedure is to provide special liberal rules for subject matter jurisdiction, venue and service of process. Under statutory interpleader, only minimal diversity between any two claimants and $500.00 in controversy is required, as opposed to complete diversity between the plaintiff (stakeholder) and all claimants and $10,000.00 in controversy; venue is permissible where any claimant resides as opposed to where all plaintiffs or all defendants reside; and, process may be served on claimants anywhere in the United States, as opposed to within the state where the federal court is located.

Generally, the procedures under both the rule and the statute are the same. The reason for the separate statute is a case called New York Life Insurance Company vs. Dunlevy, 36 S.Ct. 613 (1916), where the United States Supreme Court appeared to say that the stakeholder could not use the property or debt that was the subject of the interpleader as a basis for quasi in rem jurisdiction. This severely limited the utility of interpleader in state courts because jurisdiction could only be achieved where all of the claimants could be served with process in the state. Use of federal courts was limited by the standard diversity and venue requirements in federal courts as well as the limitation of federal process within the state where the Federal District Court was located. The special interpleader statute was passed to provide special diversity jurisdiction and venue and allow service of process nationwide, thus providing at least one forum for interpleader where claimants were located in different states.

Generally, the four limitations listed in the Bar comment are based on the writings of Pomeroy. See Pomeroy, Equity Jurisprudence, (5th ed. 1941), p. 1322. There is no good reason for the limitations and, in fact, it has been suggested that Pomeroy was mistaken in interpresting the existing case law. See Hazard and Moskowitz, An Historical and Critical Analysis of Interpleader, 52 Cal.L.Rev. 706, 708 (1964). Both the federal rule and the statutes explicitly abolish the first two limitations and Rule 22 also abolishes the third limitation. The last restriction is not expressly abolished by Rule 22; it could be invoked in a situation where one of the claimants asserts that the basis of its claim is such that it is entitled to recover whatever the disposition of the claims of the other claimants. The drafters of Rule 22 apparently felt that this last limitation was merely a special application of the common origin limitation, but some federal courts have applied the restriction. The current trend in the federal cases is to say that this restriction has also been abolished. See Wright, Federal Courts, sec. 74, p. 363-364. Any question as to the continued existence of the independent liability restriction could be eliminated by adding the following language to the second sentence of section 2 of the rule, "..., or that the plaintiff has incurred independent liability to any claimant."

The rule does not explicitly require that the stakeholder deposit the money or property that is the subject of the interpleader or post a bond; the statute in 28 U.S.C.A., sec. 1335, does set up this requirement. Under the rule, a court can, using general equitable powers, receive a deposit and discharge the stakeholder but it also seems reasonable to require a deposit or bond. This could be done by incorporating the statutory language into the rule.

The rule also allows the defendant, who is exposed to multiple liability, to obtain interpleader by way of crossclaim or counterclaim. This seems a reasonable provision and avoids the necessity for another separate suit where one of the claimants files before the interpleader is filed.

Finally, the Council could consider referring the question of jurisdiction in the interpleader cases to the process and jurisdiction subcommittee. Despite the Dunlevy case, supra, if the subject matter of the interpleader provides a reasonable basis for minimum contacts with the claimants, it should be possible to provide for service of process outside the state on an in rem or quasi in rem theory. See Shaffer vs. Heitner, 97 S.Ct. 2569 (1977).

BACKGROUND INFORMATION ON RULE 15(c)
RELATION BACK OF PLEADINGS

1. BAR PROPOSAL AND COMMENT

EXHIBIT B

A BILL FOR
AN ACT

Relating to amendments to pleadings; creating new provisions.

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

Section 1. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

2. *Relation Back of Amended Pleadings for Purposes of the Statute of Limitations (Exhibit B)*

Oregon has a relatively liberal rule regarding relation back of amended pleadings when a new cause of action is stated in the amended pleading, but a relatively strict rule regarding relation back when a new defendant is added to the amended pleadings. Oregon generally allows relation back if the new cause of action arose out of the same facts as alleged in the original complaint. *Brackhahn v. Nordling*, 269 Or 667, 526 P2d 221 (1974). However, if the amended complaint adds a new party rather than a new claim, a much stricter rule is applied. In *Maslov v. Manning*, 239 Or 393, 397 P2d 833 (1964), the Oregon Supreme Court held that an amended pleading will not relate back for purposes of the statute of limitations when a new defendant is named in the amended complaint even when the new defendant was aware that it was the party intended to be named in the original complaint. Therefore, if a plaintiff mistakenly names the defendant and does not correct the error prior to the running of the statute of limitations, the action may be barred against that defendant, even though the defendant was aware of the mistake and was placed on notice of the litigation prior to the running of the statute of limitations. In *Maslov*, the court indicated that the primary determinant of whether an amended complaint relates back is whether the new defendant is a different economic entity than the defendant named in the original complaint. The proposed legislation instead adopts the criteria of whether "the party brought in by the amendment (1) has received such notice of the institution of the action that he would not be prejudiced in maintaining his defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him".

The proposed legislation is identical to Federal Rule of Civil Procedure 15(c). The first sentence of the legislation would basically codify existing case law. The second part of the proposed legislation would modify the rule announced in the *Maslov* case.

2. ADDITIONAL STAFF COMMENT

The principal purposes of the statute of limitations are to protect the defendant from stale claims and provide a date of security for defendant where no more claims can be asserted out of a given transaction. It should be noted that the relation back provided in the second sentence of Rule 15(c) occurs only where a pleading is amended by adding a new defendant and the added party actually knows the action was pending within the statutory period and but for a mistake of identity would have been brought against him. The rule does not allow every amendment changing parties to relate back, but only those where there was actual notice to the new defendant within the statute of limitations period and within such period the new defendant should have realized that it was the proper defendant. See Martz vs. Miller Bros. Company, 244 F. Supp. 246 (D. C. Del. 1965); Note, Federal Rule of Civil Procedure 15(c), 57 Minn.L.Rev., 83, 101 (1972). Since the new defendant has the notice of the actual pendency of the action within the statutory period, the purposes of the statute of limitations are fulfilled.

Generally, it is possible to file an action within the statute of limitations and serve process within sixty days of filing and have the service relate back to the filing date for purposes of satisfying the statute of limitations, ORS 12020. Rule 15(c) requires actual notice within the limitations period. Thus, if a plaintiff files one day before the expiration of the statutory period and names the wrong defendant, and process is served after the statutory period has expired, there is no relation back even though process was actually served on the right defendant; the correct defendant has not received actual notice within the limitations period. This has led at least one court to suggest that the statute might be amended in some way

to extend the time a new defendant could receive notice. The exact language suggested, however, is somewhat confusing (add the words, "and serving him with notice of the action", after "within the period provided by law for commencing the action"). See Martz vs. Miller Bros., supra, at 254 n. 21. It would be easier to simply say "within the period provided by law for commencing the action against him, or within 60 days thereafter".

One question that has come up in the federal courts under the rule is what actually constitutes notice to the new party. Most of the federal courts have agreed that where a defendant was actually served with process but the wrong name used or where there is a close identity of interest between the new and the old defendant (parent and subsidiary corporations, interlocking boards of directors, etc.), there is proper notice from service of process. The courts have also agreed that merely having knowledge that the accident or incident that is the subject of the suit occurred does not provide the notice contemplated by the rule. The problem area has been where there is some type of informal but actual notice of the pendency of the suit. It probably is a subject that is better left to court interpretation rather than an attempt to modify the language. See Note, Federal Rule of Civil Procedure 15(c), supra, 96-100.

One amendment problem not clearly addressed by the rule is the addition of a plaintiff. If a change is made on the plaintiff's side because of the indispensable party rule or the real party in interest rule or to change capacity or simply to add an additional party to a claim after the statutory period has run, a defendant could assert the limitations defense against the

new plaintiff. The second sentence of the rule refers only to "changing the party against whom a claim is asserted". In terms of the purposes of the statute of limitations, allowing relation back in this situation would make sense because as long as the change in the plaintiff's side results in exactly the same claim being asserted against a defendant, that defendant is not being prejudiced by the change. Courts facing this problem have generally reached this result and the first sentence of the rule could be interpreted to cover the situation. Where the new plaintiff seeks to assert a new and independent claim of its own, however, relation back has generally not been applied. See James & Hazard, Civil Procedure, Sec. 5.7, p. 167-18.

BACKGROUND INFORMATION ON REPEAL OF

PLEADING VERIFICATION

The Council voted to repeal the requirement that pleadings and cost bills be verified. The Executive Director was asked to furnish a suggested rule relating to signing of pleadings by attorneys. Set out below are the 1966 Bar bill and Federal Rule 11:

A BILL FOR
AN ACT

Relating to elimination of verification of pleadings; amending ORS 16.070, 30.350 and 30.610; and repealing ORS 16.080.

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

Section 1. ORS 16.070 is amended to read:

16.070 (1) Every pleading shall be subscribed by the party [if he is a resident of the state,] or by a resident attorney of the state. [and, except a demurrer, shall also be verified by the party, his agent or attorney, to the effect that he believes it to be true. The verification must be made by the affidavit of the party, or] except that if there are several parties united in interest and pleading together, the pleading must be subscribed by at least one of such parties [, if such party is within the county and capable of making the affidavit; otherwise, the affidavit may be made by the agent or attorney of the party. The affidavit may also be made by the agent or attorney if the action or defense is founded on a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney, or if all the material allegations of the pleading are within the personal knowledge of the agent or attorney. When the affidavit is made by the agent or attorney, it must set forth the reason of his making it] *or his resident attorney.* When a corporation is a party, *and if the attorney does not sign the pleading,* the [verification] *subscription* may be made by any officer thereof upon whom service of a summons might be made [,]; and when the state or any officer thereof in its behalf is a party, the [verification] *subscription, if not made by the attorney,* may be made by any person to whom all the material allegations of the pleading are known. *Verification on pleadings shall not be required. The subscription on a pleading constitutes a certificate by the person signing that he has read the pleading, that to the best of his knowledge, information and belief there is a good ground to support it and that it is not interposed for delay.*

(2) Any pleading not duly [verified and] subscribed may, on motion of the adverse party, be stricken out of the case.

Section 2. ORS 30.350 is amended to read:

30.350. In the actions and suits described in ORS 30.310 and 30.315 to 30.330, the pleadings of the public corporation shall be [verified] *subscribed* by any of the officers representing it in its corporate capacity, in the same manner as if such officer was a party, or by the agent or attorney thereof, as in ordinary actions or suits.

Section 3. ORS 30.610 is amended to read:

30.610. The actions provided for in ORS 30.510 to 30.640 shall be commenced and prosecuted by the district attorney of the district [where] *in which* the same are triable. When the action is upon the relation of a private party, as allowed in ORS 30.510, the pleadings on behalf of the state shall be [verified] *subscribed* by the relator as if he were the plaintiff, or otherwise as provided in ORS 16.070. [: in]. *In* all other cases the pleadings shall be [verified] *subscribed* by the district attorney in like manner or otherwise as provided in ORS 16.070. When an action can only be commenced by leave, as provided in ORS 30.580, the leave shall be granted when it appears by affidavit that the acts or omissions specified in that section have been done or suffered by the corporation. When an action is commenced on the information of a private person, as allowed in ORS 30.510, having an interest in the question, such person, for all the purposes of the action, and as to the effect of any judgment that may be given therein, shall be deemed a coplaintiff with the state.

Section 4. ORS 16.080 is repealed.

Rule 11.

SIGNING OF PLEADINGS

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

The Bar bill is more specific relating to pleadings filed by corporations and the state. Rule 11 is more specific relating to the consequences of falsely filing a pleading. Although Rule 11 is more specific in describing the grounds for striking the pleading, the amended section 2 of ORS 16.070 in the Bar bill is sufficient authority to strike the pleading; and, although the Rule 11 provision relating to attorney discipline may be desirable to remind attorneys of the ethical duty, authority to discipline an attorney for filing a false pleading already exists under the Code of Professional Responsibility adopted by the Supreme Court and the Council may not have authority to promulgate disciplinary rules for attorneys. It is suggested that the Bar bill be used with modifications.

ORS 16.070 is somewhat unclear relating to public entities. There is a separate verification provision in ORS 30.350 for some actions by and against governmental units. The Bar bill modifies 30.350 by providing for attorney signature, but a separate statute for governmental units seems unnecessary and poses a potential for drafting mistakes and omissions. For example, when the

statutes were amended in 1965 to provide for governmental antitrust actions, this was codified as ORS 30.312, but the verification provision in ORS 30.350 is not made applicable to that section. There may be other actions involving public corporations not covered by ORS 30.350. Also, statutes make reference to actions by or against the state or any branch, department, aency, board or commission of the state (see ORS 30.260) but ORS 16.070 refers only to the state and ORS 30.350 refers only to public corporations. It is suggested that it would be easier to expand the definitions of state in 16.070 to include all subdivisions of the state, and of corporations to include any public corporation.

Actions in the name of the state require a special rule relating to signing pleadings. This is covered in the Bar bill modification to ORS 30.610. This special provision should be retained but it could be interpreted to allow only a party, and not his attorney, to sign when the action is prosecuted by a private relator. This could be easily clarified by adding the words, "or his resident attorney", after the words, "subscribed by the relator", in the second sentence.

The suggested rule would then read as follows:

Section 1, ORS 16.070 is amended to read:

16.070 (1) Every pleading shall be subscribed by the party [if he is a resident of the state,] or by a resident attorney of the state, [and, except a demurrer, shall also be verified by the party, his agent or attorney, to the effect that he believes it to be true. The verification must be made by the affidavit of the party, or] except that if there are several parties united in interest and pleading together, the pleading must be subscribed by at least one of such parties [, if such party is within the county and capable of making the affidavit; otherwise, the affidavit may be made by the agent or attorney of the party. The affidavit may also be made by the agent or attorney if the action or defense is founded on a

written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney, or if all the material allegations of the pleading are within the personal knowledge of the agent or attorney. When the affidavit is made the agent or attorney, it must set forth the reason of his making it] or his resident attorney. When a corporation, including a public corporation, is a party, and if the attorney does not sign the pleading, the [verification] subscription may be made by any officer thereof upon whom service of a summons might be made [,]; and when the state or any branch, department, agency, board or commission of the state or any officer thereof in its behalf is a party, the [verification] subscription, if not made by the attorney, may be made by any person to whom all the material allegations of the pleading are known. Verification on pleadings shall not be required. The subscription on a pleading constitutes a certificate by the person signing that he has read the pleading, that to the best of his knowledge, information and belief there is a good ground to support it and that it is not interposed for delay.

(2) Any pleading not duly [verified and] subscribed may, on motion of the adverse party, be stricken out of the case.

Section 2, ORS 30.610 is amended to read:

30.610. The actions provided for in ORS 30.510 to 30.640 shall be commenced and prosecuted by the district attorney of the district [where] in which the same are triable. When the action is upon the relation of a private party, as allowed in ORS 30.510, the pleadings on behalf of the state shall be [verified] subscribed by the relator or his resident attorney, as if he were the plaintiff, or otherwise as provided in ORS 16.070. [, in]. In all other cases the pleadings shall be [verified] subscribed by the district attorney in like manner or otherwise as provided in ORS 16.070. When an action can only be commenced by leave, as provided in ORS 30.580, the leave shall be granted when it appears by affidavit that the acts or omissions specified in that section have been done or suffered by the corporation. When an action is commenced on the information of a private person, as allowed in ORS 30.510, having an interest in the question, such person, for all the purposes of the action, and as to the effect of any judgment that may be given therein, shall be deemed a coplaintiff with the state.

Section 3. ORS 16.080 and 16.350 are repealed.

The requirement of the verification of cost bills is easily eliminated as follows:

20.210 Taxation; statement of disbursements; objections. Costs and disbursements shall be taxed and allowed by the court or judge thereof in which the action, suit or proceeding is pending. No disbursements shall be allowed to any party unless he serves on such adverse parties as are entitled to notice by law, or rule of the court, and files with the clerk of such court within 10 days after the rendition of the judgment or decree, a statement showing with reasonable certainty the items of all disbursements, including fees of officers and the number of miles of travel and number of days' attendance claimed for each witness, if any. ~~The statement must be verified, except as to fees of officers~~. Where notice to the adverse party is required, proof of service must be indorsed on or attached to the statement. A disbursement which a party is entitled to recover must be taxed whether the same has been paid or not by such party. The statement of disbursements thus filed and costs shall be entered as of course by the clerk as a part of the judgment or decree in favor of the party entitled to costs and disbursements, unless the adverse party within five days from the expiration of the time allowed to file such statement shall file his verified objections thereto, stating the particulars of such objections. Questions of law and of fact, denials of any or all of the items charged in the statement, and allegations of new matter, may be joined and included in the objections, and these shall be deemed controverted and denied by the party filing the statement without further pleading. The statement of disbursements, and the objections thereto, constitute the only pleadings required on the question, and they shall be subject to amendment like pleadings in other cases.

[Amended by 1959 c.638 §7]

VERIFICATION OF

OBJECTIONS TO COST BILLS

This is the correct change for ORS 20.210 as per the corrected minutes for the January 21, 1978, meeting.

TAXATION AND COLLECTION

20.210 Taxation; statement of disbursements; objections. Costs and disbursements shall be taxed and allowed by the court or judge thereof in which the action, suit or proceeding is pending. No disbursements shall be allowed to any party unless he serves on such adverse parties as are entitled to notice by law, or rule of the court, and files with the clerk of such court within 10 days after the rendition of the judgment or decree, a statement showing with reasonable certainty the items of all disbursements, including fees of officers and the number of miles of travel and number of days' attendance claimed for each witness, if any. The statement must be verified, except as to fees of officers. Where notice to the adverse party is required, proof of service must be indorsed on or attached to the statement. A disbursement which a party is entitled to recover must be taxed whether the same has been paid or not by such party. The statement of disbursements thus filed and costs shall be entered as of course by the clerk as a part of the judgment or decree in favor of the party entitled to costs and disbursements, unless the adverse party within five days from the expiration of the time allowed to file such statement shall file his ~~verified~~ objections thereto, stating the particulars of such objections. Questions of law and of fact, denials of any or all of the items charged in the statement, and allegations of new matter, may be joined and included in the objections, and these shall be deemed controverted and denied by the party filing the statement without further pleading. The statement of disbursements, and the objections thereto, constitute the only pleadings required on the question, and they shall be subject to amendment like pleadings in other cases.

[Amended by 1959 c.638 §7]

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TELEPHONE
AREA CODE 503
276-3331

December 21, 1977

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

Dear Mr. Merrill:

Please include, among the agenda of proposed changes to the Oregon Rules of Civil Procedure, the possibility of service of summons by mail. It appears that such service is permitted in California, California Code of Civil Procedure §415.10 to 415.30, and Oklahoma, 12 Oklahoma Statutes §1547.

Very truly yours,

COREY, BYLER & REW

By: Peter H. Wells
Peter H. Wells

PHW:jm

January 4, 1977

Mr. Peter H. Wells
Corey, Byler & Rew
Attorneys at Law
222 S. E. Dorion Avenue
P. O. Box 218
Pendleton, Oregon 97801

Dear Mr. Wells:

Thank you for your letter of December 21, 1977, relating to service of summons by mail. I am hoping at the next meeting the council will decide which areas it will be considering at future meetings. I am sure at some point the entire area of service of process will be considered, and at that time I will submit your suggestion of service of summons by mail to the council. I will try to notify you as to the date of that meeting.

Very truly yours,

Fredric R. Merrill
Executive Director
Oregon Council on Court Procedures

FRM:gh

January 24, 1978

Mr. Peter H. Wells
Attorney at Law
222 S. E. Dorion Avenue
P. O. Box 218
Pendleton, Oregon 97801

Dear Mr. Wells:

The Council has set up a special subcommittee on process and procedure. The chairman of that is Judge Sloper. I am referring your suggestion on to him.

Very truly yours,

Fredric R. Merrill
Executive Director

FRM:gh

cc: Hon. Val D. Sloper (Encl.)

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530
Telephone: 202-739-3722

Address Reply to the
Division Indicated
and Refer to Initials and Number

JMH:amh

JAN 8 1978

Laird C. Kirkpatrick
School of Law
University of Oregon
Eugene, Oregon 97403

Re: Council on Court Procedures

Dear Laird:

I was delighted to read of your appointment to the Counsel on Court Procedures in the December Oregon State Bar Bulletin. Oregon pleading, practice and procedure is certainly due for a comprehensive review and overhaul, and I wish you well in that endeavor. If I can be of any assistance to the project, please do not hesitate to ask.

Because there has been an ongoing effort to adopt the Federal Rules of Civil Procedure as Oregon's State Rules, I thought I might offer the following general comments for consideration by the council. The comments are my own and are not intended to represent the views of the Department of Justice.

I am a member of the Oregon State Bar currently living in Washington, D. C. I practice law for the Civil Division, Aviation Unit, of the United States Department of Justice. My job is to defend the Federal Government in negligence suits arising out of airplane accidents. As a consequence of this work, I have been fortunate enough to observe the practical operation of the Federal Rules of Civil Procedure in many different federal jurisdictions. I hope a few of my observations may be of some assistance to you.

1. Civil Pleading and Practice Are Administered By Men, Not Rules.

In a state with pleading and practice rules as archaic as those of Oregon, it is easy to jump to the conclusion that wholesale adoption of the federal rules will eliminate the problems associated with civil pre-trial practice. But beware. I suggest that the real problem is that our system is administered by judges and lawyers who are human. The parochial interests of litigants tend to undercut the noble objectives of the Federal Rules.

For example, take Rule 16, Federal Rules of Civil Procedure. No one can doubt that it makes so much more sense to formulate and narrow the issues, to disclose witnesses and exhibits by means of a pre-trial order, than to hassle over a complaint, drafted before any discovery has occurred. And when properly administered and when lawyers try to make it work (usually with some necessary arm-twisting by the judge), Rule 16 is a gem. Yet as often as not I have seen subterfuge used to defeat its purpose. For example, a pre-trial order containing twenty-five factual contentions, twenty-four of which, while specious, are designed to hide the thrust of the case, is no great improvement over the present system. Similarly, a pre-trial order containing a single factual contention, so vague as to permit a party to advance any theory at trial, is not my idea of progress, either. A witness list of 750 names and twenty-five experts is not likely to give opponents a fair opportunity to prepare for trial.

In short, I view the rule itself as almost neutral, neither good nor bad but only as good as the bar and the court are determined to make it. This is equally true of other rules, particularly those relating to discovery.

2. <u>The Federal Rules On Discovery Are Great For Big, Expensive Cases Or Clients, But May Make It Impossible For The Average Person To Go To Court</u>.

As an abstract principle, who can oppose the concept that free and open discovery will reduce surprise in the courtroom, promote settlement, and achieve more just results in litigation? Not I. In handling aviation cases for the federal government I attempt to make use of all the discovery tools available under the Federal Rules. They're great. As soon as I receive a complaint, I go to our sets of interrogatories Our office has drafted specialized forms for aviation wrongful

death, aviation personal injury, and aviation property and hull damage. A sample of our pre-1970 forms is enclosed. Each set is about 50 pages long, and with editing, tailoring, and adding particular questions for each case, the marvelous mag card machine can crank it out in no time at all. I don't even have any guilt about foisting them on opposing counsel. When answered (perhaps only after a motion to compel), I can begin to evaluate the case and to know when (and whether) to take depositions.

There is a catch, however. The smallest case in my files has a judgment value of about $300,000.00. When my section chief decided I was ready to try my first case, he gave me a wrongful death case with a judgment value of $350,000.00. He couldn't help it; monetarily it was one of the smallest cases in our office. In that context, we not only can afford to use all discovery tools available, we can't afford not to.

Of course, federal practice generally tends to attract cases of larger value, and the federal discovery rules, while perhaps pricing federal court out of reach of the ordinary citizen, are well suited to the type of civil litigation handled therein.

The simple fact is that while liberal discovery sounds nice, and even works, it assumes that money is no object. I am concerned at the potential use of federal discovery practices, chiefly written interrogatories, requests for admission and production, by large clients or law firms to gain leverage and to maximize their economic advantage in litigation over the average or less fortunate private citizen. I wonder whether such discovery procedures are as appropriate for the contested property settlement or child custody case, or the $500.00 auto property damage case.

Can these discovery methods be made available where cases (or clients) are big enough to afford them, while eliminating the potential for abuse? I do not know. One possible suggestion would be to take guidance from the federal establishment of a judicial panel on multi-district litigation, but for a totally different objective. Permit a panel of judges to establish criteria and to denominate certain cases as "complex litigation," in which pleading, venue and discovery rules could be specially tailored to the particular needs of such cases.

3. What The Federal Rules Hath Given, The Local Court Rules Often Hath Taken Away.

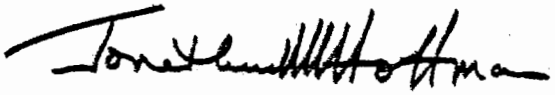
The federal discovery rules have apparantly increased the time spent by judges in supervising pre-trial matters. Some courts have gotten to the point where they lack the time to hear pre-trial discovery motions and such motions are actively discouraged.

I am enclosing a local rule from the Eastern District of California. The practical effect of such a rule is that a party who objects to an interrogatory, gives an evasive or incomplete answer, or directs a witness not to answer a deposition question has about one chance in a hundred of ever getting his wrist slapped by the court. Lawyers quickly learn to disclose nothing, since the discovering party will never get into court to compel a more complete answer. The federal rules have thus opened discovery up to the point that local courts have reacted, and have in effect taken us back to square one. If federal-style discovery is to be established in Oregon, I would hope we could curtail such local court rules and/or hire more judges.

That's all for now. I am no fan of code pleading, and I hope you will come up with a comprehensive revision of the present system. I only caution that the federal rules are no panacea.

Could you send me copies of any specific proposed procedural reforms? If I can be of any further assistance, please let me know.

Very truly yours,



JONATHAN M. HOFFMAN
Trial Attorney
Aviation Unit, Civil Division

Enclosure