N E W S R E L E A S E

January 26, 1978
From Council on Court Procedures, University of Oregon Law Center, Eugene, Oregon

EUGENE -- A public meeting of the Council on Court Procedures will be held in the Second Congressional District on Saturday, February 4, 1978, in the Umatilla County Courthouse, Pendleton, Oregon, commencing at 9:30 a.m. At this time, the Council will receive public comment and consider various suggested revisions to the Oregon pleading, practice and procedure rules.

COUNCIL ON COURT PROCEDURES

AGENDA

February 4, 1978

1. Public statements

2. Council Rules of Procedure

3. Interpleader - Rule 22

4. Relation back of amendments - Rule 15(c)

5. Report of subcommittees

   a. Discovery
   b. Trial procedure
   c. Process - Jurisdiction

6. Specific review of law-equity revisions, Chapters 17, 18, 11 and 13

7. New business

Complete

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of February 4, 1978

Umatilla County Courthouse, Pendleton, Oregon

Present:
Darst B. Atherly
E. Richard Bodyfelt
Anthony L. Casciato
John M. Copenhaver
William M. Dale, Jr.
James O. Garrett
Wendell E. Gronso
Laird Kirkpatrick
Harriet Meadow Krauss
Berkeley Lent
Donald W. McEwen
James B. O'Hanlon
Charles P. A. Paulson
Gene C. Rose
Val D. Sloper
Wendell H. Tompkins
William W. Wells

Absent:
Sidney A. Brockley
Alan F. Davis
Lee Johnson
Garr M. King
Roger B. Todd

The meeting was called to order at 9:45 a.m. and an opportunity was provided for public statements.

George Corey of Pendleton spoke and suggested that due to late referral of cases to attorneys, it was frequently necessary to file some type of motion to avoid default without full information about the case. He suggested that development of a notice of appearance procedure similar to that used in federal condemnation cases. Mr. Corey supported the abolition of the requirement of verification of pleadings. He favored the development of a procedure for written interrogatories with strict limitations to prevent abuse. He urged that parties still be required to plead facts constituting a cause of action and that notice pleading not be adopted and that a motion to strike sham and irrelevant pleadings be retained to prevent possible improper language from somehow reaching the jury. He suggested that the provision allowing attorneys fees in a motion to compel production and inspection be eliminated. Mr. Corey finally suggested that some procedure be developed to deal with the situation presented when a jury awards special damages but no general damages.

William Cramer of Burns spoke on behalf of the Harney County Bar Association. He stated that they were opposed to notice pleading; that they had no objection to abolishing the distinction between law and equity, except where it affected right to jury trial; that they strongly objected to compulsory consolidation of cases; that they objected to written interrogatories; and that they objected to the impleader and third-party practice. Mr. Cramer also stated that there had been lack of agreement over the question of whether pleadings should be submitted to the jury, but he personally favored submission of the pleadings to the jury because otherwise, the judge cannot adequately define the issues.

Alex Byler, Pendleton, spoke and stated that he supported the abolition of verification of pleadings. Mr. Byler also stated that there should be a written statement of issues given to the jury. He said that he did not like existing third-party practice because of the danger that a late impleader would give the third-party defendant inadequate time to prepare for trial and suggested that some time limitation on impleader be developed. He supported the introduction of a limited interrogatory procedure. He suggested that the Council try to create as many uniform rules of procedure for the entire state as possible and avoid the development of different local rules for different areas of the state. He stated that although there was no problem in his district, there should be stronger provisions to compel trial judges to render a prompt decision in the cases where they had reserved decision. He finally suggested that an abbreviated form of pretrial conference be adopted as follows:

(1) An early conference, unless the parties stipulated that it was unnecessary, establishing a time for discovery and allowing the attorneys in the court to discuss the case.

(2) A pretrial conference just prior to trial to refine and discuss the issues and prepare a statement of issues for submission to the jury. This conference would not result in a written pretrial order that would replace the pleadings and could be eliminated by order of the trial judge.

The Council then briefly discussed third party practice. It was suggested that the ability to implead at a late date delayed trials and was prejudicial to the original plaintiff in delaying disposition of his or her case. Other Council members pointed out that under the existing impleader statute, the impleader cannot be filed later than ten days after answer without court permission and that the court has power to order separate trials of the original case and the third-party case. It was further suggested that problems which were being encountered in third-party practice resulted from failure of trial judges to use the existing control mechanisms to prevent abuse.

William Storie, Pendleton, spoke and stated that he supported a limited pretrial conference and an interrogatory procedure with appropriate limitations to prevent abuse. He also said that since the summary judgment statute referred to interrogatories as a basis for summary judgment, you could argue that interrogatories were, in fact, authorized in Oregon. He finally suggested that problems with the jury being unable to remember the claimed amount of special damages could be eliminated by typing the amount of special damages claimed on the verdict form before it was given to the jury.

The Council then considered the Rules of Procedure to be adopted for the Council pursuant to Section (2)(1)(b) of House Bill 2316. The Chairman moved that the terms provided for officers be limited to one year. The motion was seconded by Judge Dale. The motion was defeated with Judge Dale and the Chairman voting in favor of the motion. It was suggested that the words, "personally by telephone or by mail", be delected from lines 5 and 6 of the first paragraph of Section I. A motion was made by James Garrett and seconded by Judge Sloper to adopt the Rules of Procedure as revised, and the motion passed unanimously. Laird Kirkpatrick then nominated Judge Dale

as Vice Chairman and Judge Copenhaver seconded the nomination. The nominations were closed and Judge Dale was unanimously elected Vice Chairman. Judge Tompkins then nominated James O'Hanlon as Treasurer, and the motion was seconded by Judge Casciato. The nominations were then closed, and Jim O'Hanlon was unanimously elected Treasurer.

Darst Atherly then presented the argument in favor of the adoption of Rule 22, the Federal interpleader. Darst Atherly moved that Rule 22 be adopted to replace the existing interpleader statute, ORS 13.120. The motion was seconded by Laird Kirkpatrick. The motion was passed with Judge Tompkins voting against the motion.

Richard Bodyfelt then discussed Federal Rule 15(c) covering relation back of causes of action. There was some debate whether the first sentence of the rule changed existing Oregon law. Richard Bodyfelt maintained that it did not and stated that he was not sure the second sentence was needed. Judge Lent then stated that the Supreme Court had recently decided a case and had another case pending dealing with the definition of cause of action that might have some bearing on the debate. At the suggestion of the Chairman, action on Rule 15(c) was deferred until the next meeting awaiting the report of Judge Lent.

Reports were then received from the subcommittees. The Chairman reported that the discovery subcommittee had met and would submit a report at the next meeting. Judge Dale and Judge Sloper reported that their subcommittees had not yet met but would do so before the next meeting. The Executive Director asked that he be notified of any subcommittee meetings and stated that he would try to attend.

The Council then considered the specific law - equity revisions to Chapters 11, 13, 17 and 18. The Executive Director pointed that the most significant revisions would be: replacement of ORS 11.010 and 020 with a statement that there shall be one form of action; a new definition of right to jury trial in ORS 17.033; a new provision for advisory jury and stipulation for jury trial in ORS 17.040; the provision relating to order of trial in ORS 17.205; the provisions relating to motion for new trial and review of findings of fact in ORS 17.435, 441 and 610; and the provision relating to dismissal in equity cases and non-suits in ORS 18.210 and 220. There was some discussion of a possible term that could be used for all cases other than "civil action" but no change was made. It was suggested that the sentence, "The elimination of procedural distinctions between actions at law and suits in equity shall not affect the right to jury trial", be added to the revised ORS 17.033. The Council also eliminated the last sentence of the revised ORS 17.040 related to submission of a case where there is no right to jury trial for a binding jury verdict on stipulation of the parties. The Council also elected to defer action on revision of ORS 18.210 and 220 pending consideration of the federal rules relating to dismissals and directed verdicts as a replacement for the existing Oregon statutes on dismissals and non-suits. The Executive Director was asked to submit copies of the appropriate federal rules with comment. It was also suggested that the revised language of ORS 17.205 was awkward and existing 17.205 (1) be retained and that ORS 17.431 (1) still contained the words, "whether at law, in equity or otherwise", which should be eliminated. With the modifications indicated above, the specific revisions were accepted as submitted.

Judge Lent then suggested that minutes from the last meeting incorrectly stated that the Council had voted to repeal the verification of cost bills when the vote had actually been to repeal the verification of objections to cost bills. Judge Lent then moved that the minutes be revised to correctly reflect that the Council had only voted to remove verification of objections to cost bills and that the minutes be accepted as revised. Judge Dale seconded the motion and it was passed unanimously.

The next scheduled meeting will be held Saturday, February 18, 1978, at the Sheraton Hotel, Lewis & Clark Room, 1000 N. E. Multnomah, Portland, Oregon, commencing at 9:30 a.m.

The meeting was adjourned at 12:15 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

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PLEADING REVISION

BASIC APPROACH

This memorandum is designed to provide background information for a proposed revision of existing ORS Chapter 16. The problems of drafting good pleading rules have been clearly described by two of the drafters of the New York Civil Practice Law and Rules (CPLR) as follows:

> "I. THE DRAFTER'S DILEMMA[1]
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> Written pleadings are virtually unique among the writings required by our procedure. Communication of information alone and compliance with simple formalities are not enough. The theory, at least of the codes, is that pleadings erect a structure upon which will depend the trial or other disposition of the case as well as the record to be preserved. The heart of a pleading, so the theory goes, is the description of occurrences in the form of a recitation of 'material' or 'ultimate' facts asserted in the context of the substantive law and in a manner that will define and isolate disputes about questions of fact and law. It follows that only those particulars of the occurrences which are 'material' under the substantive law should be stated, and that they should be described in a form permitting distillation of a limited number of definite yes-or-no propositions from two inconsistent descriptions.
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> A specific and precise rule designed to elicit pleadings that meet these qualifications is difficult to draft because of large differences in the substantive law applicable to individual cases. But even if it were possible by rule to dictate the exact contents and structure of pleadings in all cases, there remains serious doubt of the efficacy of a strict rule. Even a competent draftsman may find it a formidable task to walk the fact-pleading tightrope between 'conclusion' and 'evidence' in truthfully describing an occurrence which implies a complete and valid rule of substantive law, and a strict rule requires that he do this without anticipating defenses while separately stating and numbering his definite and certain allegations.
>
> Moreover, enforcement of high and strict standards of pleading has been demonstrated to be a practical impossibility. Adept pleaders are reluctant to reveal their position in too precise a form early in the litigation--often because it is not then clear what evidence will be produced at the trial--and inept pleaders may be unable to do so. It is generally conceded that the outcome of a case ought not to depend upon technical deficiencies in draftsmanship, whether or not intended. Thus, amendments are freely granted and leave to replead has become the routine disposition of

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1. Weinstein and Distler, Drafting Pleading Rules, 57 Col.L.Rev. 518-519

motions to compel pleadings to measure up to rigid standards. Such repeated motions do little more than waste the efforts of both the court and the litigants. As a practical matter the moving party is usually well aware of the substance of the amendment that will result from a motion. Since a motion will serve to educate his opponent, when courts do not penalize merely technical deficiency, a prudent attorney will only attack a pleading to gain delay or to test his belief that his opponent's technical deficiency reflects a substantive lack that will dispose of the case. The former motive cannot be condoned; the latter is a disguised attack on the merits and creates an artificial distinction in procedure between pleading an essential, but untrue allegation and wholly failing to plead it.

If a strict rule of pleading is thus unworkable, a flexible rule has equally serious objections. Since flexible pleadings--in the sense both of general rules and of non-technical enforcement--cannot precisely define and limit issues, other pre-trial procedures must be relied upon. Yet, flexibility itself creates problems in the utilization of such procedures. For example, free discovery may be unnecessarily costly--indeed, it is subject to abuse as an instrument of harassment and bad faith--unless the court is able to determine the relevancy of proposed inquiry. The minimal standard for pleadings would seem to be determined by this limitation and by considerations of fairness in facilitating preparation for trial or serious settlement negotiations by the parties to the dispute.

In short, the draftsman of a rule of pleading is faced with a dilemma. On the one hand, a rule which sets strict standards, emphasizing the importance of pleadings, does not achieve the expected results and is difficult to enforce and wasteful of court energy. On the other hand, a rule which provides flexible standards, minimizing written pleadings, places burdens upon pre-trial procedures but may inadequately control them and is wasteful of litigants' energy in preparation for trial. Neither extreme represents an acceptable solution, although each has advantages. A reexamination of the pleading problem, made in historical perspective, indicates that each new reform to a large extent reflects a shift from one horn of the dilemma to the other."

The Council has opted for the horn of the dilemma presented by strict or fact pleading. Once this decision is made, however, it does not automatically follow that no changes can be made in the pleading system. It should be possible to retain fact pleading and still eliminate some of the problems of excessive delay and expense at the pleading stage. Because the Field Code was originally drafted by lawyers and interpreted by judges both schooled in the

excessively technical common law pleading system, many essentially unnecessary and confusing rules and requirements were developed. The approach is referred to as "baroque" by Louisell and Hazard:

> "The baroque style did not merely require the pleader to make a rather detailed disclosure of his case. It required him to state his case in grandiloquent and orotund language. The courts adhering to the style refused to countenance, in Holme's memorable phrase, 'a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert.'"[2]

The Oregon court long ago abandoned the baroque style but pleading rules are rarely the subject of appeal or legislative attention and many of the baroque rules have not been overruled.

The basic approach followed in revision of Chapter 16 is an attempt to retain fact pleading and yet simplify the pleading system. This memorandum will discuss apparent problems; whether they are capable of resolution by rule making and possible rules that could be adopted.

Theory of the Pleadings

The notice provided by the code pleading provision requiring assertion of facts constituting a cause of action should be exactly that; the facts upon which a party intends to rely. Under the common law forms of action, by choosing a particular writ or form of action, a party could not recover under any other form of action. Each form of action generally represented a separate legal theory and the pleading would be tested in terms of conformance to that theory.

By rejecting the forms of action, the drafters of the Field Code intended to allow recovery under any legal theory that would fit the facts alleged and proved. Early judges, trained in common law pleading, ignored this and continued

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2. Louisell and Hazard, Pleading and Procedure, 108

to pass on pleadings in terms of one legal theory that the judges decided was invoked by that pleading. This has generally been called the "theory of the pleadings doctrine" and flourished most strongly in New York and Indiana. The pure applications of the theory of the pleadings doctrine were as follows:

(a) rulings on demurrers where a court would take a pleading as invoking the most obvious theory, i.e., contract, and hold the pleading defective if it failed to allege all necessary elements to meet that theory even though sufficient elements were alleged to state a good cause of action under some other theory, i.e., quasi-contract.

(b) rulings that when a pleading contained elements sufficient to meet two possible theories, i.e., negligence and strict liability, a party would be required to prove facts necessary to support the most obvious theory (negligence) or suffer a directed verdict even though sufficient facts were proven to allow recovery under the less apparent theory (strict liability).

(c) rulings prohibiting any pleading amendment that changed the theory of recovery.

These rulings seem directly contrary to the intent of the code pleading system and are based upon a desire to have pleading give notice of legal theories as well as facts relied upon by a party.

In most cases the Oregon court avoided the theory of the pleadings approach and the state is generally classified as one that does not follow the doctrine. For example, even though ORS 16.390 prohibits amendments changing a cause of action, this has been liberally interpreted to allow amendment invoking a different theory as long as the pleadings relate to the same

transaction or occurrence as the original pleading. Elliot v. Mosgrove, 162 Or. 507 (1939). There are some cases and rules in Oregon that appear to be based upon variations of the theory of the pleadings doctrine. It is of course necessary to consider the theories invoked by a pleading for purposes of application of statutes of limitations and determining jurisdiction over the subject matter, but this does not mean that a pleading should be treated as if it could only invoke one theory. There is also a separate rule that a party cannot assert a legal theory on appeal that was not presented to the trial court, but this is easily confused with a requirement that a party must plead a particular theory in the trial court or it cannot be asserted at trial. There are also theory of the pleadings overtones in some decisions relating to departures in replies, variance rules, consistency in pleading facts and necessity of election among theories. There is no necessity in code pleading that a party plead only one theory and then be stuck with it but some older opinions at least suggest this as a reason for decision.

The question for the Council is whether any pleading rule should or could be developed to deal with the theory of the pleadings doctrine. Under systems which have moved from fact to notice pleading, it is generally assumed that the de-emphasis of pleading destroys the last remnants of theory of the pleadings and no specific rule is directed to the problem. In Oregon, since the most troublesome manifestations of the doctrine have never been adopted and the applications of theory of the pleadings exist only in relation to some other specific rule, it is suggested that no general rule is required and the subject be considered in relation to specific rules governing replies, amendments, variance and consistency.

References

1. Albersworth, The Theory of Code Pleading, 10 Cal. L.Rev. 202 (1922)
2. James, Civil Procedure, 90-92
3. Comment C3013:9 to New York CPLR SEc. 3013, McKinney's Consolidated Laws of New York

MINUTES OF MEETING OF FEBRUARY 1, 1978
DISCOVERY SUBCOMMITTEE - COUNCIL ON COURT PROCEDURE

The first meeting of the Discovery Subcommittee was held February 1, 1978. The following areas were discussed:

1. Interrogatories. Don McEwen, Dick Bodyfelt and Jim O'Hanlon will study and report on the pros and cons of a general or limited interrogatory statute. The subcommittee will consider their reports at a meeting to be held the week of February 13th, and if possible a report to the Council will be made at the February 18th meeting.

2. Deposition Statutes. Depositions are covered generally in ORS Ch 45. Chuck Paulson and Mike King will review the deposition statute and propose necessary changes.

3. Recently Enacted Discovery Statutes. A review of these statutes should be made to determine the advisability of retaining, changing or generally cleaning up the statutes. Some of the bills submitted by the bar were changed by the legislature in various respects. This project was assigned to Laird Kirkpatrick. He was requested to make this review and circulate before the next meeting a list and discussion of the potential problem areas.

4. Examination and Discovery of Experts. Dick Bodyfelt will review this and submit a proposed bill to the discovery subcommittee.

5. Organization of discovery provisions in one chapter. Presently sections relating to discovery are found in ORS Ch 41, 44, 45, and there are miscellaneous discovery provisions elsewhere in the code. All general discovery statutes should be organized in a chapter which would specify the scope of discovery, specific discovery methods, and sanctions. This section should only contain the statutes relating to general discovery and not attempt to include discovery provisions relating specifically to other sections of the code, such as decedent's estates and workmen's compensation hearings.

6. There was a general discussion of whether there are any additional discovery tools which should be considered. It was the general consensus that the discovery tools available are adequate.

Respectfully submitted,

Garr M. King

cc: Donald W. McEwen, Esq.
Richard E. Bodyfelt, Esq.
James B. O'Hanlon, Esq.
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February 2, 1978

Fredric R. Merrill
Executive Director
Court Procedures Committee
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Gentlemen:

The Harney County Bar Association met recently and discussed a number of the recent changes in Oregon procedural law, and also some of the proposed changes. All but one of our members was present. Those present unanimously agreed as follows:

1. We have no objection to abolishing procedural differences between law and equity, except for those differences necessitated by the existence and proper handling of a jury.

2. We do not approve of the compulsory consolidation of cases which have some vague relationship.

3. We strongly object to the federal court device of written interrogatories. We are convinced that if approved, this will add enormously to the costs of litigation.

4. Those of us who have been exposed to the third party joinder statute passed a couple of years ago, hope that it will be repealed. We believe that it makes for confusing dissipation of the issues, adds to the costs of litigation, and is unfair particularly to the plaintiff.

5. At least some of us dislike the new procedure which keeps the pleadings from the jury, and in effect, requires the court to define the issue. We suggest the issue has never been easy to define, and that it is hard to expect a court, in the heat of the trial, to do a good job. The potential exists of some big mistakes.

Very truly yours,

President
Harney County Bar Association