N E W S R E L E A S E

February 7, 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 Third Congressional District on Saturday, February 18, 1978, at the Sheraton Hotel, Lewis & Clark Room, 1000 N. E. Multnomah, Portland, 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. A previous announcement indicated that the meeting would be held at the Lloyd Center Auditorium. Please notice the change of place to the Sheraton Hotel.

COUNCIL ON COURT PROCEDURES

AGENDA

February 18, 1978

Sheraton Hotel
Portland, Oregon

1. Public statements

2. Reports of subcommittees

   A. Jurisdiction - process
   B. Trial procedure
   C. Discovery

      C1. Changes recommended for depositions - Garr King and Charles Paulson

      C2. Discovery and examination of experts - Richard Bodyfelt

      C3. Review of recently enacted discovery statutes - Laird Kirkpatrick

      C4. Interrogatories - Don McEwen, James O'Hanlon and Richard Bodyfelt

3. Consideration of suggestions at public meeting in Pendleton

   A. Initial appearance by notice
   B. Retention of motion practice
   C. Elimination of sanction of attorneys fees in discovery motions
   D. Criteria for consolidation of cases
   E. Third party practice
   F. Statute requiring pleadings to go to the jury

4. Uniform Class Action Act

5. Rule 15(c), relation back of amendments

6. Federal directed verdict and dismissal rules

7. Service of process on Sunday

8. Signature of pleadings

9. Law-equity revisions - Chapters 12, 14, 15, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34

10. New business

COUNCIL ON COURT PROCEDURES

PROCESS AND JURISDICTION SUBCOMMITTEE MEETING

FRIDAY, MARCH 3, 1978, 1:30 P. M.

JUDGE SLOPER'S COURTROOM

MARION COUNTY COURTHOUSE

SALEM, OREGON

Agenda

1. Review of existing jurisdiction and process statutes
2. Quasi-in-rem
3. Publication
4. Long Arm Statute

JUDGE VAL D. SLOPER

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of February 18, 1978

Sheraton Hotel, Portland, Oregon

Present:

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

Absent:

John M. Copenhaver
Alan F. Davis
Ross G. Davis
Lee Johnson

Chairman Don McEwen called the meeting to order at 9:45 a.m. in the Lewis & Clark Room, Sheraton Hotel, Portland, Oregon. An opportunity was provided for public statements, but none were received.

Minutes of the meeting held February 4, 1978, were unanimously approved as submitted.

The Chairman called for reports of the subcommittees. Val Sloper, chairman of the jurisdiction-process subcommittee, and William Dale, chairman of the trial procedure subcommittee, both stated that meetings had not been held.

Garr King, chairman of the discovery subcommittee, stated they had been able to meet several times and indicated that the deposition statute had been thoroughly reviewed. He said that recommendations might be made regarding specific authorizations for video taping of depositions and simplifying the procedure for obtaining out-of-state depositions.

Laird Kirkpatrick reviewed changes in discovery statutes in the last Legislature. He stated that the Oregon State Bar Committee had successfully sponsored legislation to conform Oregon's procedure for production and inspection to Federal Rule 34 and to modify the request for admissions procedure. The scope of discovery in Oregon was also modified to conform with the Federal scope of discovery under Rule 26 (b) (1). He also said that a separate non-Bar sponsored bill had passed relating to the discovery of insurance limits. He indicated that the major element of Oregon procedure differing from the Federal rules was the lack of interrogatories.

Richard Bodyfelt, member of the discovery subcommittee, had prepared a proposed rule for mandatory exchange of experts' reports. Mr. Bodyfelt summarized the substance of the proposal, stating in conclusion that he didn't feel the Bar is under any handicap working under the present framework, and that consideration of the rule could be entertained if it is the consensus of the Council that one is necessary. Discussion followed, after which James Garrett made a motion, seconded by Wendell Gronso, that the Council reject the proposal summarized by Richard Bodyfelt. Laird Kirkpatrick suggested that the Council defer a final vote until the Executive Director had an opportunity to research the matters presented. James Garrett withdrew his motion.

Three briefs relating to interrogatories were distributed, one favoring interrogatories, by Chairman Don McEwen, one against interrogatories, by James O'Hanlon, and one presenting a proposed intermediate interrogatory rule, by Richard Bodyfelt. Each of these persons gave an oral presentation of their views.

Discussion followed the above presentations. Val Sloper suggested that the Council postpone a decision until after the next meeting in Eugene. Chairman Don McEwen stated that any further suggestions would be entertained at that time and action taken subsequent thereto.

Consideration of suggestions at the public meeting in Pendleton were then reviewed. As to initial appearance by notice, the Executive Director was asked to find out whether there is a proposed rule which would constitute a general appearance. The Executive Director said he would mail out a revision of Chapter 13 in which he would incorporate such a rule.

Chairman Don McEwen stated there have been no suggestions to eliminate motion practice. After discussion there was no motion to eliminate the sanction of attorneys fees in discovery motions.

At the present time, there is no plan to change any rules on consolidation of cases.

Chairman Don McEwen reminded the Council that at the Pendleton meeting, Mr. William Cramer, who spoke on behalf of the Harney County Bar Association, had urged that the Council abolish third party practice. William Dale pointed out that his committee had been assigned that problem.

A discussion followed about whether pleadings should go to the jury. William Dale said he didn't think it was a problem for the judge to define the issues to be presented to the jury.

The Council decided to defer consideration of the Uniform Class Action Act and Rule 15(c), relation back of amendments.

The Council discussed the possibility of adopting the Federal rule on dismissals and directed verdicts. The Council decided to defer action until after the last public meeting in Eugene.

The Executive Director stated that the Council had already decided to repeal ORS 16.830, prohibiting service of process on Sunday, but that a motion should be made to adopt a statute affirmatively authorizing such service as proposed in Section 2 of the Oregon State Bar Committee Bill. Sid Brockley made a motion to that effect, which was seconded by Mr. Bodyfelt and unanimously passed.

The Chairman pointed out that a motion was needed on signing of pleadings. The Executive Director proposed that the Council adopt the rule set out on Pages 3 and 4 of the memorandum entitled, BACKGROUND INFORMATION ON REPEAL OF PLEADING VERIFICATION. He stated that the Council had repealed verification of pleadings but that there was no rule substituted for signing pleadings. Richard Bodyfelt moved that the proposed rule be adopted, seconded by Sid Brockley, and it was unanimously passed.

The Executive Director requested that, if anyone had any problems with the law-equity revisions for Chapters 12, 14, 15, 23, 24, and 26 through 33, they should notify him.

Chairman Don McEwen stated that the Executive Director had requested assistance from a subcommittee on pleading. The Chairman appointed Laird Kirkpatrick, James Garrett and Darst Atherly to the subcommittee on pleadings.

The next scheduled meeting will be held on Saturday, March 4, 1978, commencing at 9:30 a.m., in Harris Hall, Lane County Courthouse Complex, Eugene, Oregon. Thereafter, the next scheduled meeting will be held on Saturday, April 1, 1978, commencing at 9:30 a.m., in Judge Dale's Chambers, Multnomah County Courthouse, Portland, Oregon. The Chairman announced that subsequent meetings would be arranged at the April 1 meeting.

The meeting was adjourned at 11:38 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

PROPOSAL FOR MANDATORY EXCHANGE OF EXPERT'S REPORTS

Prepared by E. Richard Bodyfelt,
Member of the Discovery Subcommittee
of the Oregon Council on Court Procedures

PROPOSED RULE

(1) Upon the request of any party, any other party shall deliver a written report of any person the other party reasonably expects to call as an expert witness at trial. The report shall be accompanied by a statement prepared and signed by the expert, the other party, or the other party's attorney, stating the areas in which it is claimed the witness is qualified to testify as an expert, the facts by reason of which it is claimed the witness is an expert, and the subject matter upon which the expert is expected to testify. The report prepared by the expert shall set forth the substance of the facts and the opinions to which the expert will testify and a summary of the grounds for each opinion. The report and statement shall be delivered within a reasonable time after the request is made, and in no event less than thirty days prior to commencement of trial.

(2) Unless the court upon motion finds that manifest injustice would result, the party requesting the report shall pay the reasonable costs and expenses, including expert witness fees, necessary to prepare the report.

(3) If a party fails to timely comply with a request for expert's reports, or if the expert fails or refuses to make a report, and unless the court finds that manifest injustice would result, the

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court shall require the expert to appear for a deposition or exclude the expert's testimony if offered at trial. If an expert witness is deposed under this subsection of this Rule, the party requesting the expert's report shall not be required to pay expert witness fees for the expert witness' attendance at or preparation for the deposition.

(4) Nothing contained in this Rule shall be deemed to be a limitation of one party's right to take the deposition of another party's expert if otherwise allowed by law.

(5) As used herein, the terms "expert" and "expert witness" include any person who is expected to testify at trial in an expert capacity, and regardless of whether the witness is also a party, an employee, agent or representative of a party, or has been specifically retained or employed.

COMMENTS BY E. RICHARD BODYFELT (PROPONENT)

This proposed Rule plagiarizes to a large extent ORS 44.620 and 44.630 (regarding medical reports) and FRCP Rule 26(4) (interrogatories to another party regarding that other party's experts). As of the time this Rule is proposed, Oregon does not have interrogatory procedures. Although the report and opinions of an opponent's expert probably fall within the broad ambit of ORS 41.635 (scope and disclosure), such information and materials have generally been wrapped in a shroud of work product privilege. To the extent that this Rule is adopted, of course, there would necessarily be some yielding of the scope and extent of the work

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product privilege insofar as it applies to expert reports and opinions. It is felt that this Rule would facilitate open discovery, avoid surprise, encourage (actually, require) exchange of information, and perhaps produce earlier settlements.

The Rule is specifically and expressly applicable both to "in-house" and "outside" experts, and thus anticipates and avoids the propensity by some courts to distinguish between in-house and outside experts under FRCP Rule 26. See, e.g., Virginia Electric & Pow. Co. v. Sun Shipbuilding and D. D. Co., 68 F R D 397 (E D Virginia 1975).

The Rule specifically provides that the party requesting the report shall pay the reasonable costs and expenses, including expert witness fees, necessary to prepare the report. In this regard, it is intended that the only costs allowed would be those necessary to reduce to written form a report on the expert's work. It is not intended that the requesting party be required to pay the cost of the expert's analyses, testing, research, etc., necessary to arrive at his opinions. It is anticipated that the cost would include necessary reproduction costs, costs of photographs included in the report, and a presumably limited time required on the expert's part to write the report.

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It should be noted that under this Rule, actually two things are required, a statement prepared and signed by the expert, the party, or the party's attorney, and an expert report. It is felt that the statement could be as easily, and perhaps more cheaply, prepared by a party or, particularly, the party's attorney. It is

likely that the attorney knows as well, if not more so, the reasons why the witness is purportedly qualified, the areas in which he is expected to be qualified, and the subject matter of the expert's testimony.

It should be noted also that in one respect, the proposed Rule goes beyond ORS 44.630 (sanctions for failure to comply with request to produce medical reports) in that the Rule provides, upon a limited exception, that the court shall impose sanctions, as opposed to providing that the court may impose sanctions. It is felt that these additional sanctions, of a compulsory nature, will more likely carry out the intended purpose of this Rule. If the expert is deposed under subsection (3) of the Rule, the party who filed the request for an expert's report is not required to pay expert witness fees for the expert's preparation for or attendance at the deposition. It is felt that if the opposing party, or the expert, is intractible in the response to the request for an expert report, the requesting party should not be penalized by such charges.

It is somewhat difficult to suggest the time within which the report must be provided. The words used are "within a reasonable time" and "in no event, less than thirty days prior to commencement of trial." It was not felt that if a request was filed at the threshold of the case, or midway through the case, the request necessarily should be complied with within some arbitrary number of days. It is entirely possible that at the time the request is made, the other party has not retained an expert, or if he has, is in no position to finalize the expert's report. If the report is delivered within thirty days

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prior to trial, in most instances this would be adequate time. Presumably, the trial court would have inherent power to reduce or enlarge the days before trial within which the reports had to be filed, if particular circumstances, such as the complexity or difficulty of the case, warranted it.

Subparagraph (4) is inserted to preserve inviolate the right to take another party's expert's deposition under circumstances where not even the work product privilege shields the witness. An expert may have knowledge of certain facts, which knowledge another party is entitled to discover irrespective of the work product privilege. This might occur where the expert has examined a piece of evidence which has been lost or altered, or where the expert is an employee of a party and has knowledge of certain facts which establish a duty or breach thereof.

E. Richard Bodyfelt
February, 1978

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INTERROGATORIES

The merits and demerits of interrogatories have been extensively debated by the discovery subcommittee. The procedure provides an inexpensive method of obtaining simple facts and background for other discovery, but is easily subject to abuse and if abused, can be burdensome. The purpose of this memorandum is to survey the interrogatory rules in other jurisdictions to determine if any effective controls have been developed. Two proposals were included in the Dick Bodyfelt memorandum; the ABA approach, which simply limits the number of interrogatories to 30 without defining an interrogatory, and the Oregon state Bar bill, which is similar to the federal rule and relies upon protective orders.

The statutes and rules of forty-eight states were examined (Hawaii and South Carolina were not available). The only other state besides Oregon that does not have interrogatories is Connecticut. Forty-one states do not have any specific limitations on interrogatories. Thirteen states have some variation of the pre-1970 federal rule which expressly said that the number of interrogatories is not limited "except as justice requires to protect the party from annoyance, expense, embarrassment, harrassment, or oppression" (see Bar bill). Twenty-eight states have no reference to limiting interrogatories at all.

Six states do limit the number of interrogatories. Two of them, Rhode Island and Maine, are similar to the ABA proposal in that they limit interrogatories to 30 without any definition of interrogatories. For example, Rhode Island says:

A party shall not serve more than one set of interrogatories upon an adverse party nor shall the number of interrogatories exceed thirty (30) unless the court otherwise orders for good cause shown. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

Four states attach a number of limits and attempt some definition of what constitutes an interrogatory. The language from each state is as follows:

Minnesota

No party may serve more than a total of 50 interrogatories upon any other party unless permitted to do so by the court upon motion, notice and a showing of good cause. In computing the total number of interrogatories each subdivision of separate questions shall be counted as an interrogatory.

Massachusetts

No party shall serve on any other party as of right more than one set of interrogatories, unless the total number of all interrogatories in all sets combined does not exceed thirty, including interrogatories subsidiary or incidental to, or dependent upon, other interrogatories, and however the same may be grouped or combined. The court, on a showing of good cause, or upon agreement of the parties, may allow service of additional interrogatories.

Maryland

A party may not, without leave of court, serve upon the same party more than one set of interrogatories or more than thirty interrogatories (including interrogatories subsidiary or incidental to, or dependent upon other interrogatories, however grouped, combined or arranged)...

New Hampshire

A party may file more than one set of interrogatories to an adverse party, but the total number of interrogatories shall not exceed thirty, unless the Court otherwise orders for good cause shown after

> the proposed additional interrogatories have been filed. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined or arranged.

Iowa had a thirty-interrogatory limit until 1973 and abandoned it in favor of the new federal rule. The only federal court with a formal local rule limiting interrogatories appears to be the Northern District of Illinois:

> No party shall serve on any other party more than twenty (20) interrogatories in the aggregate without leave of court. Subparagraphs of any interrogatory shall relate directly to the subject matter of the interrogatory.

The Illinois local rule is inconsistent with the federal rule, and under Federal Rule 83 is probably invalid.

One state attempts to limit interrogatories by encouraging attorneys to control abuse. The Illinois rules contain the following provision:

> (b) Duty of Attorney. It is the duty of an attorney directing interrogatories to restrict them to the subject matter of the particular case, to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.

Three states, New Jersey, Florida and as of 1978, California, have a provision that requires the questions and answers to interrogatories to be on the same document. For example, the California language is as follows:

> (b)(2) The propounding document shall be addressed to one party only, and each page thereof shall be paginated and numbered consecutively, contain no more than 4 questions per page, contain no subdivision of questions, and provide reasonable space under each question for the answer.
>
> (c) The responding party shall respond to each question on the space provided in the original propounding document and if the space is insufficient shall append such additional pages as may be necessary for the continued response, paginate the same consecutively by alphabet, and insert the same immediately following the page which propounded the question. * * *

This approach is less designed to control abuse than to provide convenience for the court and parties in handling and filing interrogatories and avoid a shuffling back and forth between questions and answers.

SUMMARY

Interrogatories are popular in other jurisdictions and not limited in most states. If the Council decides to adopt limited interrogatories, the New Hampshire statute appears to contain the best limiting language. It has worked there in practice. See 9 New Hampshire Bar Journal 79 (1967). The procedure of having the answers and questions on the same document seems desirable but would not control abuse.

PROPOSED "INTERMEDIATE" RULE REGARDING INTERROGATORIES

Proposed by E. Richard Bodyfelt,
Member, Discovery Subcommittee of
the Oregon State Council on Court Procedures

PRELIMINARY COMMENT

There has been almost a constant see-saw battle, and occasionally open warfare, between the proponents and opponents of interrogatories under Oregon's procedural statutes. Efforts to persuade the Legislature to adopt interrogatory procedures have been singularly unsuccessful, although numerous in number. Many of the arguments, pro and con, have considerable merit. It is probably safe to generalize, however, by saying that the opposition to interrogatories is generally founded upon a concern for abuse. Perhaps these warring factions can both be accommodated by adopting an interrogatory procedure with certain built-in limitations and proscriptions against abuse. In fairness, your proponent must concede that if he had to choose between no interrogatory procedure at all and an unrestricted interrogatory procedure, he would opt for no interrogatories at all.

What is set forth below are two suggested alternative approaches to interrogatories-with-limitations. They are not set forth in order of any established preference by your proponent.

FIRST ALTERNATIVE PROPOSED INTERROGATORY RULE WITH LIMITATIONS

(1) [Adopt FRCP Rule 33 in its entirety, making appropriate

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substitutes where Rule 33 is cross-referenced to other Rules, that is, substituting appropriate Oregon Revised Statute sections for the cross-reference Rules.]

(2) Add the following to the Rule:

> "Each interrogatory shall consist of a single question. Without leave of court, the number of interrogatories shall not exceed thirty in number. Leave of court, upon motion for good cause shown, shall be required to serve in excess of thirty interrogatories."

COMMENTS BY PROPONENT REGARDING FIRST ALTERNATIVE

In some respects, this rule if adopted might be known as the "Judge Burns Rule." Attached to this proposal is a January 5, 1978, letter from Judge Burns, to Jerry Banks, discussing his "Twenty Question Rule." Also attached to this proposal is a proposed amended FRCP Rule being proposed by the ABA Special Litigation Section's Committee for the Study of Discovery Abuse. Adoption of the ABA Committee's proposal would be substantially the same as that proposed above, however the reader's attention is called to the italicized addition to subpart (c) of FRCP Rule 33. It seems to make little difference whether a limitation is 20 or 30, or some other number. It necessarily must be arbitrary. Provision is made under these proposals to permit more interrogatories to be propounded than the arbitrarily-set number upon good cause shown.

SECOND ALTERNATIVE PROPOSED INTERROGATORY RULE WITH LIMITATIONS

It is simply proposed that this Council adopt what the Oregon State Bar's Committee on Procedure and Practice proposed in

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its 1974 Annual Committee Report as Exhibit "D". A copy of Exhibit "D" is attached to this proposal.

COMMENTS BY PROPONENT REGARDING SECOND ALTERNATIVE

This proposal follows an entirely different approach, but has the same objective in mind. It eliminates the arbitrariness of a set number of interrogatories. It provides that the attorney's signature to objections constitutes a certification by the attorney that in his opinion the objections are well founded and have not been interposed for purposes of delay. In the event that any interrogatories are objected to, the party serving the interrogatories has the burden of showing good cause why the interrogatories should be answered. Presumably, this would discourage interrogatory proponents from filing, willy-nilly, "cook-book" or "mechanical monster" interrogatories. Even if they were served, the proponent would almost certainly be discouraged from attempting to carry the burden of showing good cause why burdensome interrogatories should be answered. In determining whether the interrogatories, or any one or more of them, should be answered over objection, the trial court should take into consideration the size and complexity of the case, access to other, more reasonable, quicker or less expensive discovery tools, and bear in mind that the objective of any discovery procedure is the pursuit of discovery reasonably necessary at the lowest possible expense to the litigants and to the public. The Procedure and Practice Committee's 1974 proposal was approved by the Oregon State Bar at the 1974 Bend convention, but the proposed legislation was

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rejected by the Legislature.

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February, 1978

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND 97205

CHAMBERS OF

JUDGE JAMES M. BURNS

January 5, 1978

Mr. Roland F. Banks, Jr.
Attorney at Law
1200 Standard Plaza
Portland, Oregon 97204

Re: "The 20 Q. Rule"

Dear Jerry:

You have requested that I send you a letter concerning my personal "Twenty Question" rule so you may pass it along to the members of your Ninth Circuit Conference Committee on discovery matters. It stems from a similar rule instituted several years ago by Judge Howard Turrentine of the Southern District of California. He told me at the time he had used it and found it to be sensible, flexible and workable.

Of course, it is simply a response to the problem generated by the abuse of the interrogatory process by some lawyers and by the toleration of such abuse by some judges. The upshot has been (as a combined result of such abuse and toleration) that some litigation has become enormously expensive even to the point of being prohibitive for some plaintiffs or some defendants, or both. Such abuse and toleration flies flatly in the face of the specific language of Rule 1 to provide not only for the just and speedy but also for the inexpensive determination of causes.

My rule is that any party who makes a showing of good cause may have more than 20 interrogatories. Typically, in patent and anti-trust (and some securities) cases a set of interrogatories near the beginning of the case of perhaps as many as 40 or 50 makes sense. In those cases written interrogatories as to particular aspects of the case are less expensive than other types of discovery such as oral depositions, motions to produce, and the like. In the run-of-the-mill case, however, I have found that lawyers are easily able to live with the 20 interrogatories limit. Among other things, I urge lawyers, when I advise them of this rule, to see if

informal exchange of documents, plus some reasonable amount of oral depositions at the outset of the case, will not make written interrogatories either totally or substantially unnecessary. My rule also tends to reduce formal motions to produce or requests for admissions.

Of course, there are exceptions. When exceptional circumstances occur, usually a very short conference with the lawyers (not more than 15 or 30 minutes) will be sufficient to resolve any matters which the lawyers themselves cannot. I remember in particular a recent case involving a personal injury (products liability) case. There were either four or five sets of defendants, with the usual type of indemnity over situation. In that case, the plaintiff flung in a fairly sizeable number (I don't recall exactly, but I think it was probably about 100). At that point I notified all concerned of my own 20 question rule. Plaintiff's counsel went back to the drawing board and emerged with a new set of about 50 or 55. They had done their work well. With minor exceptions, none of the defendants had any particular problems with this revised set. Overall, my experience has been that except in the very unusual case, such as the type mentioned above, the 20 question rule operates very well.

For a variety of reasons, I have not made any strenuous effort amongst the other judges on the court to have the 20 question rule adopted as a rule of the court, though some of the judges use it in some cases.

As to the general question of whether the 20 question rule should be adopted in light of the alternate proposal you and your committee are considering, I don't have any particular thoughts on that question. I haven't seen the precise wording of the proposed rule which you mention. However, if the proposed rule operates generally along the lines you have described, I would imagine it would render unnecessary my own 20 question rule. Until such proposed rule, however, comes into being (either through amendment of the federal rules or in any particular district through local rules), I think my 20 question rule is a sound one. I intend to stick to it.

A side benefit of my rule is that by invoking it and discussing its application in particular cases, I have helped remind myself and the lawyers of our mutual obligation to keep an eye out for ways to make discovery useful at the lowest possible expense to client and public.

You are, if you think it will be useful, free to make copies of this letter and circulate it to other members of your committee. I am sure you will emphasize to them at your next meeting that these views are mine alone. I do not speak for any of the other judges here on this matter. I am reasonably satisfied, however, that one or more of the judges here share some of my specific views. I am also satisfied all share my general views along with you and other members of the bar here that we have got to work harder to cut down the expense of discovery in lawsuits.

With kind regards, I remain

Sincerely yours,

James M. Burns

JMB/i

RULE 32

USE OF DEPOSITIONS IN COURT PROCEEDINGS

No change.

RULE 33

INTERROGATORIES TO PARTIES

(a) Availability; Procedures for Use. Any party may serve *as a matter of right* upon any other party written interrogatories *not to exceed thirty (30) in number* to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. *Each interrogatory shall consist of a single question.* Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. *Leave of court, to be granted upon a showing of necessity, shall be required to serve in excess of thirty (30) interrogatories.*

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after

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the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. *The specification pro-*

vided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

Committee Comments

No single rule was perceived by the Bar at large responding to the Committee's questionnaire as engendering more discovery abuse than Rule 33 on interrogatories. Numerous solutions to perceived problems were considered. In the final analysis the Committee determined that an initial numerical limitation on interrogatories filed as a matter of right was the soundest approach to limiting interrogatory abuse and to enhancing better use of interrogatories as a discovery mechanism.

The selection of 30 initial interrogatories was based on direct Committee experience with existing practice in certain jurisdictions. The 30 interrogatories permitted as of right are to be computed by counting each distinct question as one of the 30 even if it is labeled a subpart or subsection.

The Committee would, however, recommend to courts that interrogatories inquiring as to the names and locations of witnesses or the existence, location and custodians of documents or physical evidence each be construed as one interrogatory. Greater leniency is recommended in these areas because they are well suited to non-abusive exploration by interrogatory.

The addition to subsection (c) is designed to eliminate the mechanical response of an invitation to "look at all my documents." The Rule as proposed makes clear that the responding party has the duty to specify precisely, by category and location, which

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documents apply to which question. Further, such answers being given under oath are intended to eliminate subsequent evasive use of additional documents at trial on issues confronted by the interrogatory request.

RULE 34

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

* * *

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be

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.

EXHIBIT D
A BILL FOR
AN ACT

Relating to interrogatories and discovery procedures.

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

Section 1. (1) Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(2) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The attorney's signature shall constitute a certification by the attorney that, in his opinion, said objections are well founded and that they have not been interposed for purposes of delay. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time.

Section 2. Interrogatories may be used to inquire into any matter which may be inquired into in the taking of a deposition of a party pursuant to ORS 45.151 et seq., subject to the provisions of ORS 45.181. The answer may be used at the trial or upon the hearing of a motion or an interlocutory proceeding to the extent permitted by the rules of evidence.

Section 3. Answers and objections to interrogatories propounded pursuant to this Act shall identify and quote each interrogatory in full immediately preceding the statement of any answer or objection thereto.

Section 4. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Section 5. The court, on motion of any party, may make such protective orders as justice may require. The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, harassment or oppression. The provisions of ORS 45.181 are applicable for the protection of parties from whom answers to interrogatories are sought.

Section 6. In the event that any interrogatory is objected to, the

party serving the interrogatory shall have the burden of showing good cause why the interrogatory should be answered.

EXHIBIT E
A BILL FOR
AN ACT

Relating to admissions of facts or genuineness of documents or physical objects; and repealing ORS 41.625.

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

Section 1. ORS 41.625 is repealed and section 2 of this Act is enacted in lieu thereof.

Section 2. (1) After commencement of a proceeding, a party may serve upon any other party a request for the admission by the latter of the truth of relevant facts specified in the request or the genuineness of any relevant documents or physical objects described in and exhibited with the request. If a plaintiff desires to serve a request within 20 days after service of summons, leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished.

(2) The party to whom the request is directed shall serve upon the party requesting admission a sworn statement, either admitting the facts or genuineness requested or denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny such matters, or objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper, in whole or in part.

(3) All objections made to requests must be signed by the attorney for the party making the objections; and such signature shall constitute a certification by the attorney that, in his opinion, said objections are well founded and that they have not been interposed for purposes of delay.

(4) Admissions, denials and objections to requests for admissions shall identify and quote each request for admission in full immediately preceding the statement of any admission, denial or objection thereto and shall be served and filed within 30 days after service of the request.

(5) Any admission made by a party pursuant to such request is for the purpose of the pending proceeding only, and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

(6) In the event that any request is objected to, the party serving the request shall have the burden of showing good cause why the request should be admitted or denied.

EXHIBIT F
A BILL FOR
AN ACT

Relating to summary judgment.

OBJECTIONS TO ANY INTERROGATORIES

A. Are interrogatories necessary?

1. The state courts have been in existence for way over 100 years and have functioned adequately and competently without any form of interrogatories.
2. Any information desired by a party can be obtained by deposition or motions to produce or inspect.
3. Having interrogatories in the federal court has not materially increased the proficiency of that judicial system.

B. Are interrogatories desired or wanted by the members of the Oregon Bar?

1. Although no survey has been made, my conclusion upon talking with people is that most lawyers do not want interrogatories in the state court system.
2. Even the lawyers who practice extensively in the federal court feel that the information shown by interrogatories can be obtained by other means.
3. I am also informed that sole practitioners generally are against interrogatories.

C. Interrogatories in the federal court are flagrantly abused.

1. It is not uncommon to have a set of 100 to 200 interrogatories to be answered within 30 days.

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2. The time involved in answering such interrogatories is extensive.

3. Sanctions have not been adequate in coping with this abuse.

4. The American Bar Association has recognized this abuse and is now attempting to limit interrogatories to 30 in number.

D. Interrogatories are extremely costly and time consuming.

1. Interrogatories increase the lawyer's time involved in handling a case tremendously.

2. The cost of litigation materially increases.

3. Such cost is way out of proportion to any benefit to the litigants.

E. Limited interrogatories no solution.

1. One or two interrogatories can be burdensome and oppressive if they are extremely broad and require all pertinent information.

2. Even such interrogatories are costly and require court appearances regarding objections.

3. Authorizing interrogatories will in effect inaugurate the federal rules in state courts completely.

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F. Practical application

1. Interrogatories will be filed in every case and used as a sword or shield to thwart the application of justice.

2. Interrogatories will be filed even in cases filed in the district court and in all domestic relations proceedings.

3. Substantially increase the cost of litigation.

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February 18, 1978

INTERROGATORIES TO PARTIES

Enlargement of discovery techniques to include interrogatories to parties similar to Rule 33 of the Federal Rules of Civil Procedure has been proposed by the Committee on Procedure and Practice innumerable times. The Committee's recommendations in the form of proposed legislation was approved by the Bar at convention on at least two occasions. The Bar failed to secure enactment as a result of criticism which was primarily emotional.

The purpose of interrogatories, like other discovery, is to enable parties to prepare for trial, ascertain the facts, narrow the issues, determine what evidence must be presented at trial, and to reduce the possibility of surprise.

Interrogatories are an extremely effective way to obtain simple facts, and also to obtain information needed in order to make effective use of other discovery procedures. As examples, interrogatories are a simple, inexpensive method of ascertaining the existence of documents, their identity, witnesses and their addresses. In appropriate cases they may be used to secure admissions of parties. They may also be used in aid of execution and other process resorted to to enforce collection of judgments.

The scope of admissible discovery with interrogatories can be limited to the same limits permissible in depositions or other discovery. If desirable, the scope may be limited to prevent the use of interrogatories to ascertain a party's legal theory.

The argument is frequently made that interrogatories have a place only in the large or substantial case. At our last

meeting, experienced trial attorneys in smaller communities called the Council's attention to their need for interrogatories in minor cases that did not involve significant or substantial sums.

Interrogatories need not cast an undue burden on the party required to answer them. Certainly they should not be permitted to be uused so as to force one to prepare his opponent's case. They of course should be limited so that the party answering the same is only required to furnish information that is available to him and that can be provided without undue labor and expense. It is sufficient if the party answering the interrogatory provides relevant facts, or facts within the permissible scope which are readily available to him. Obviously no one should be required to enter into independent research to acquire information solely for the purpose of answering his opponent's interrogatories.

The opposition to interrogatories in our state courts is in reality premised upon a single and limited foundation. In a word, it is "abuse." Certainly there have been abuses in the use of interrogatories in the United States District Court. The abuse flows from the indiscriminate use and the prolixity of the questions. Indiscriminate use of anything is undesirable. Rule 33 imposes no limitation upon the number of interrogatories that may be propounded, or the number of sets of interrogatories which may be propounded. TThe party to whom the interrogatories are aaddressed may always in appropriate cases seek to be protected from the annoyance, expense, and oppression of too many questions or too many sets of interrogatories.

The usual suggestion to cope with indiscriminate use is to provide a fixed and rigid limitation, i.e., a limitation of the number of questions and to a single set. Undoubtedly in the great bulk of cases such a limitation does not significantly interfere with the effective use of interrogatories. However, there are a substantial number of cases wherein effective use of interrogatories cannot be limited to some arbitrary number, and in some cases to a single set.

I will attempt to provide an illustration or example of a hypothetical case wherein effective use of interrogatories will establish a great many facts simply, expeditiously, and without the expenditure of a substantial amount of time and money which would of necessity be expended if the parties had to resort to depositions. A plaintiff in a product liability case claims defects in both the design and the manufacture of a piece of equipment. Plaintiff's counsel is aware only of the identity of the equipment, the manufacturer, and that a number of people saw the accident. His client is unable to supply additional details. He is aware that the manufacturer of the product made a thorough investigation. By the effective use of interrogatories plaintiff's counsel should be able to ascertain the following without taking any depositions:

(a) The names and addresses of the witnesses;

(b) The date of manufacture, the date of sale to any wholesaler, and possibly the date of the retail sale in question;

(c) The identity of any third party who manufactured

any parts, accessories, or assemblies incorporated into the equipment;

(d) The identity of documents relating to design, manufacture, quality control, and testing;

(e) The identity of the engineers or others responsible for the design;

(f) Whether or not similar failures had previously occurred, and the manufacturer's knowledge thereof;

(g) The names and addresses of any experts or others who have made a study to determine the cause of the accident;

(h) The location of any parts or assemblies which may have been removed from the machine, any tests made thereof, and the identity of persons making the tests and of any reports made reflecting the results thereof.

Undoubtedly numerous other facts may be relevant and material in many products liability cases which could be discovered by the use of such interrogatories. The obvious savings in the foregoing discovery technique as contrasted with the taking of a host of depositions is apparent. The savings are equally available to both parties.

Let me close with the observation that the argument against the use of interrogatories in our state courts is premised solely upon abuse. The argument is an indictment of our profession and of the judiciary. That some members of the Bar will make abuses in the use of interrogatories is obvious. I have here an example, 176 interrogatories, many with numerous sub-parts, propounded by plaintiff in a civil rights action involving an incident which

at the time of trial was established did not extend in excess of four minutes from beginning to end. The interrogatories were served the day following the filing of defendants' answer. Surely the answer to the ultimate question here cannot be that we cannot enlarge our discovery procedures to permit the use of this simple device which can provide substantial economies in the cost of litigation, solely because some members of the Bar are abusive in their use thereof, and because some judges have abdicated their judicial responsibility under the claim of being too busy to make rulings upon objections and motions for protective orders. That response is a confession of shortcomings of the profession and judiciary we do not need to make.