A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Friday, November 3, 1978

County Commissioners Meeting Room (Rm. 602)

Multnomah County Courthouse

Portland, Oregon

A business meeting will follow the public hearing beginning at 9:30 a.m., Friday, November 3, 1978, in the County Commissioners Meeting Room (Rm. 602), Multnomah County Courthouse, Portland, Oregon. If the public testimony takes all day, the meeting will be held on Saturday, November 4, 1978, at 9:30 a.m.

Business:

1. Interrogatories

2. Questions raised in staff memorandum dated October 30, 1978

3. Future meetings

4. Approval of minutes of last two meetings

5. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held November 3, 1978

County Commissioners Meeting Room

Multnomah County Courthouse

Portland, Oregon

Present:	Darst B. Atherly	Laird Kirkpatrick
	E. Richard Bodyfelt	Harriet Meadow Krauss
	Anthony L. Casciato	Berkeley Lent
	John M. Copenhaver	Donald W. McEwen
	Wm. M. Dale, Jr.	James B. O'Hanlon
	Carl Burnham, Jr.	Charles P.A. Paulson
	Wendell E. Gronso	Val D. Sloper
	William L. Jackson	Wendell M. Tompkins
	Lee Johnson	William W. Wells
	Garr M. King	
Absent:	Sidney A. Brockley	
	Ross G. Davis	
	James O. Garrett	
	Randolph Slocum	

Chairman Don McEwen called the meeting to order at 9:30 a.m. in the County Commissioners Meeting Room of the Multnomah County Courthouse. Copies of letters received from the Honorable Edwin E. Allen, M. Clifford Looney, George Corey, and Norman K. Winslow were furnished to the Council.

Testimony relating to the tentative draft of rules dated September 15, 1978, was received as follows:

S. Ward Greene, Lake Oswego, Oregon, objected to the limitations upon admissions in Rule 45 B. He stated that requiring a motion and court order to have an admission established created a trap for the party requesting admissions. He said allowing a party to avoid an admission on the grounds of "mistake, inadvertance and excusable neglect" was too vague and would allow a party to avoid an admission by failure to respond too easily; the party seeking to avoid the admission should be required to show grounds for a denial. He also objected to payment of costs on the motion. Mr. Greene suggested that the rule be changed to require a notice of admission to the non-responding party, which would give the non-responding party 30 days to move for relief from the admission. Mr. Greene also supported the adoption of interrogatories. He said depositions were too expensive and time-consuming for small cases. He objected to the limitation in number and scope and suggested interrogatories be available to inquire into the facts of a transaction.

Mr. Burl Green, Portland, stated that he was speaking on behalf of a subcommittee of the trial practice section of the Oregon State Bar which had been appointed by the section chairman. The subcommittee consisted of Mr. Green, Chairman, David Landis, Robert James, Jere Webb, Randall B. Kester, and William E. Brickley. He stated that the committee had the following suggestions:

(1) No rule allowing interrogatories be adopted.

(2) Rule 36 B.(4), relating to expert witness discovery, not be adopted. He stated that the subcommittee had not had time to consider the proposed revision to Rule 36 B.(4) being considered by the Council.

(3) That Rule 40, allowing deposition by written questions, would provide another way of introducing interrogatories, and suggested that Rule 40 should be limited.

(4) They objected to the wording of Rule 57 B.(5)(b), relating to examination of jurors, on the grounds that it could be used by a judge to limit voir dire by attorneys.

(5) They objected to Rule 53, relating to consolidation, on the grounds that it allowed the trial judge to consolidate on his or her own initiative. Consolidation should be limited to upon motion of a party, as is the case with the present ORS section.

(6) They objected to Rule 9 C., which would allow a judge to order that answers containing a cross-claim be served on the plaintiff rather than the defendant against whom the cross-claim was asserted.

(7) The subcommittee did not understand the purpose of the five-day limitation to file documents in Rule 9 F. and suggested it could present a procedural trap.

Mr. William M. Morrison, Portland, suggested that the Council do everything possible to reduce the cost of litigation and that too much reliance on the federal rules would increase costs. He said the introduction of these rules would lead to notice pleading and increase costs.

Donald H. Marmaduke, Portland, stated that liberal scope of discovery should be preserved and that the language of Rule 36 B.(1) allowing discovery of matters relevant to the claims or defenses of a party was too limited. He favored retaining the present language of relevant to the subject matter of the action. He stated that the language in the rule would require a party to assert an uncertain claim or defense to preserve the right of discovery. He stated that he did not believe that limiting the scope of discovery would avoid abuses. He stated that he favored some interrogatories and supported Rule 42 as proposed. He also suggested that the Council adopt a rule which required a party who secures a judgment to serve a conformed copy on other parties showing the date of entry so other

parties would be sure when their time to appeal or file a motion begins to run.

Michael Taylor, Multnomah County Legal Aid, stated that his organization would furnish written comments on the proposed rules. He said they favored interrogatories and felt the proposed rules might be too limited but that they supported the rule. He said counting each component of a question was too limited. He also said they supported use of non-stenographic depositions. He suggested that the rules were unclear in not providing how a deposition which was filed in recorded form could be transcribed.

Gary I. Grenley, Portland, stated that he supported Mr. Marmaduke's suggestions relating to the scope of discovery and that he supported interrogatories. He said that interrogatories could be limited in number, but the limitation should be more broadly defined. He suggested it would be easy to use up thirty interrogatories when asking for names, addresses, telephone numbers and employment of parties and suggested the numerical limit not be applied to such questions or that any numerical limit for interrogatories seeking material in the categories listed in the rule be eliminated with a court order required, after a showing of need, for interrogatories going to the merits.

A suggestion was received that service of summons by leaving it at a person's office should be limited to the situation where the person could not be found at home and that the rules should require mailing to the defendant's home when such service is made.

Robert Ringo, Corvallis, testified that he was the chairman of a committee appointed by the Oregon Trial Lawyers Association to review the new rules. He stated that he objected to the inability to take a voluntary dismissal without prejudice after an answer was filed, but understood the Council was considering returning the present 5-day before trial limit. He also objected to the elimination of the non-suit at the close of a plaintiff's case and felt that a plaintiff who failed to make out a case should be allowed another chance. He stated that interrogatories should be further considered by the bar and suggested they be deferred until the next biennium. He also stated that he did not see much distinction between Rules 40, depositions on written questions, and Rule 42, interrogatories, and that Rule 40 should not be adopted. Regarding Rule 36 B.(4), he did not approve the requirement that the opposing party pay the expert fees and expenses in preparing for a deposition. He said there would be no way to control the cost of preparation for the person taking the deposition. He also stated that the rules should preserve full voir dire by attorneys.

Walter J. Cosgrave, Portland, Chairman of the Oregon State Bar Trial Practice Section, stated that the most controversial issue was the matter of interrogatories. He suggested that the Council consider a rule which would allow interrogatories only upon court order after a showing of

good cause. He felt they should be limited in number at the outset (upon court order) but that perhaps a provision could be drafted into the rules which would permit more interrogatories in certain cases. He stated that perhaps there could be a standard governing when interrogatories should be allowed, which would prevent routine use of interrogatories but make them available if really needed.

Mark McClanahan, Portland, suggested it would be a mistake to eliminate a reply to an affirmative defense which did not contain new matter. He suggested that the person asserting the affirmative defense would need specific admissions and denials to narrow the issues. He recognized that the court could order a reply but suggested that Rule 13 B. should be more explicit. He said of a reply was not important it would not be expensive to prepare, but if it was important, it would be expensive to require a motion to secure it.

Walter Sweek, Portland, testified that he felt there had been insufficient time to allow comment on the proposed rules by the bar and that they should not be submitted to the legislature without full consideration by the bar.

Robert Wright, Veneta, stated he thought that Rule 21 was a step in the right direction but that it should be changed so that a motion to dismiss for failure to state a cause of action would be treated as a motion for summary judgment as was the case in federal court. He said the common law demurrer and summary judgment were duplicative. He also said the motion to make more definite and certain should be eliminated. He also opposed differing local court rules and said the rules of procedure should incorporate uniform local rules. He also stated the rules should require judges to notify attorneys of action taken on motions and demurrers.

Austin Crowe, Portland, gave the history of attempts to have interrogatories adopted by the legislature. He suggested that the time had come for interrogatories to be tried. He suggested that Rule 42 be adopted and then be re-examined at the end of two years.

David Landis, Portland, stated that he was a member of the Oregon State Bar Trial Practice Section Committee chaired by Mr. Green, and supported its recommendations. He stated that the two most controversial rules are Rule 42, relating to interrogatories, and 36 B.(4), relating to expert witnesses, and strongly recommended that the Council not submit rules on these subjects to the legislature at this time. He stated that he had briefly examined the proposed revision to Rule 36 B.(4), and opposed depositions of experts. He said the revision goes beyond Federal Rule 26 in allowing discovery of expert witnesses.

Thomas Cooney, Portland, stated that he opposed the adoption of interrogatories and the rule relating to discovery of expert witnesses. He said that these rules would increase the cost of litigation. He also opposed

changing the rule to allow a judge to consolidate cases on the judge's own initiative. He also suggested that under new federal drug and alcohol abuse regulations, hospital records for some persons could not be obtained by subpoena and this might be inconsistent with the proposed rules. He suggested the Council check with the Oregon Hospital Association.

Stamm F. Johnson, Portland, suggested that some type of transition period be established under which parties could proceed under the new or old rules; specifically, that any service of process under the old statutes remain valid for six months after the new rules are effective. He said this was necessary for cases in progress, to allow time for dissemination of information about the new rules and to allow time for any possible challenge to the constitutionality of the new rules. He also suggested that upon submission to the legislature, the repeal of prior statutes be done clearly, rather than by reference to ORS sections being superseded. He also said the legislature made a mistake in reinacting the substituted service provision at the dwelling house and did not make clear the person over the age of 14 years must be served at the dwelling house. He stated that investigative demands were not covered by the rules and should be considered and noted in Rule 8 A. He also suggested that Rule 8 C. should not say "any person" since persons who may serve process are limited. He also suggested that the process rule should be more detailed; it should distinguish between notice process and jurisdictional process; it should specify how various kinds of process should be served, including when the original and when a copy should be left with the person served; and what must be certified and the form of certification to be used. He finally suggested that a uniform standard of color codes for originals, service copies and file copies be adopted.

Mr. S. Ward Greene stated that he had forgotten to suggest that Rule 10 A. allow some additional time when service is by mail. He suggested the additional 3 days used in computing time for mailed documents in Federal Rule 6 (a) be incorporated; otherwise, problems are presented for a short time period when a document is mailed.

The Executive Director was asked to submit a memorandum listing specific suggestions received in public testimony and discussing possible revisions to be considered at the next meeting.

The Council then discussed Rule 42, which was the first item on the agenda. The proposal to make interrogatories available on court order was discussed. It was decided to wait until the December 2, 1978, meeting before taking further action. The Council discussed Rule 40, and it was suggested that a deposition on written questions was different than interrogatories. It was also pointed out that provisions allowing depositions on written questions existed in present Oregon procedure.

The Council then considered the questions raised in the staff memorandum of October 30, 1978:

1. Upon motion of Judge Johnson, seconded by Charles Paulson, the Council voted to leave the statutes relating to service of process on state

officials described in the memorandum to the process committee of September 27, 1978, without change but to consider modification of those statutes in light of Rules 4 and 7 during the next biennium. Judge Sloper opposed the motion.

On the question of whether to make other changes to conform to the process rules, it was decided to defer action until the next meeting. It was suggested that Council members carefully examine those changes set forth in Exhibits B and C of the staff memorandum dated August 23, 1978.

2. James O'Hanlon moved that Alternative A., amendment to Rule 54, as set out on Pages 1 and 2 of the October 30 memorandum, be adopted. The motion was seconded by Wendell Gronso. Laird Kirkpatrick moved, seconded by Judge Johnson, that the proposed Alternative A. be amended to provide that a plaintiff could dismiss when a counterclaim was pending, and the counterclaim could be continued as a separate case at the option of the defendant. The Council voted against the amendment, with Laird Kirkpatrick, Judge Johnson, Charles Paulson and Harriet Krauss voting in favor of the motion to amend. The Council voted in favor of the main motion, with Judge Casciato, James O'Hanlon, Mike King, Judge Tompkins, Judge Copenhaver and Judge Jackson voting against the motion.

3. Charles Paulson moved, seconded by Judge Jackson, that the proposed language for Rule 7 D.(2)(c) be approved with the addition that a copy of the summons and complaint be mailed to the defendant. The motion passed unanimously.

4. Judge Johnson moved, seconded by Charles Paulson, that the proposed revision to Rule 9 D. restoring proof of service, set forth on Page 4 of the October 30 memorandum, be accepted. The motion passed unanimously.

5. Judge Dale moved that the provision in Rule 36 B.(4) requiring the identification of expert witnesses and regulating discovery of expert witnesses be deleted from the rules and that the rules not contain any provision authorizing discovery from expert witnesses. The motion was seconded by Charles Paulson. The motion failed, with Judge Dale, Charles Paulson, Wendell Gronso, James O'Hanlon, and Judge Tompkins voting in favor of the motion. Carl Burnham then voted to amend the proposed language of Rule 36 B.(4) set forth on Page 5 of the October 30, 1978, memorandum by deleting the words, "...in preparing for and...", from the next to the last line of 36 B.(4)(a). The motion was seconded by Judge Sloper and passed, with Darst Atherly, James O'Hanlon and Judge Tompkins voting against the motion. Judge Johnson then moved that the proposed version of Rule 36 B.(4) be amended by eliminating the words, "and stating the areas in which it is claimed the witness is qualified to testify as an expert, the qualifications of the witness to testify as an expert", from the first sentence of 36 B.(4)(a). The motion was seconded by Wendell Gronso and passed, with Don McEwen, Judge Sloper, Laird Kirkpatrick, and Darst Atherly voting against the motion. Judge Wells then moved, seconded by Judge Sloper,

that the proposed revision of Rule 36 B.(4) be adopted as amended. The motion passed, with Wendell Gronso, James O'Hanlon, Charles Paulson, and Judge Tompkins voting against the motion.

6. The Council then considered the proposed redraft of Rule 57, submitted as Appendix A. to the October 30, 1978 memorandum. Charles Paulson moved to amend the proposed language by deleting the words, "except such juror's interest as a member of or citizen or taxpayer of a county or incorporated city", from 57 D.(1)(f). The motion was seconded by Darst Atherly and passed, with Judge Tompkins opposing. Judge Sloper moved, seconded by Laird Kirkpatrick, to delete subsection D.(2) from the proposed redraft, and the motion passed unanimously. Judge Dale moved to restore the words "the event of the" between "in" and "action" in paragraph D.(1)(f). The motion was not seconded. Judge Sloper moved that the last three lines of subsection D.(4) be eliminated. The motion passed, with Wendell Gronso, Laird Kirkpatrick, James O'Hanlon, and Darst Atherly voting against the motion. The Executive Director was asked to submit a redraft incorporating the changes for Council consideration at the next meeting. Judge Wells suggested that the language in paragraph D.(1)(b) referring to "attorney and client" be clarified. It was also suggested that subsection D.(2) be modified to give the trial judge some discretion to allow additional challenges or allocate challenges when there are multiple clients. The Executive Director asked if the Council favored leaving section A. in the redraft. By a show of hands, a majority of the Council indicated that the section should be retained, with Judge Dale and Wendell Gronso indicating opposition.

The Council discussed the proposed modifications to Rule 59 H. set out on Page 9 of the October 30 memorandum but decided to defer action on that proposal and the balance of the issues in that memorandum until the next meeting.

The next meeting of the Council will be held Saturday, November 18, 1978, at 9:30 a.m., in the conference room of Souther, Spalding, Kinsey, Williamson and Schwabe, 1200 Standard Plaza, 1100 S.W. Sixth Avenue, Portland.

The meeting adjourned at 4:45 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: FRED MERRILL

RE: Questions for November 3, 1978, Meeting

DATE: October 30, 1978

The following questions were carried over from the October 21, 1978, meeting:

1. Service of process on state officials. Enclosed is a copy of the memorandum dated September 27, 1978, given to the Process Committee relating to alternatives for disposition of the twenty-six statutes providing for service of process on state officials. You should also refer to the memorandum from the Process Committee to you dated August 23, 1978, which spells out the first alternative.

If you decide to accept an alternative which does not contemplate incorporating the statutes into Rule 4, you should consider Rule 4 J., which already incorporates ORS 59.155, and decide whether this should be put back in the form of a statute. There is also the question of whether any action need be taken on the statutes set out in Exhibits B and C of the August 23rd memorandum. I would suggest the Council change ORS 35.255, 97.900, 105.230, 109.330 and 226.590, 52.140, 52.150, 52.160, 174.160, 174.170, 305.130 and 520.175, and eliminate 29.040, and authorize the cross reference changes.

2. Voluntary dismissals. The Council asked for several alternative versions of Rule 54 that would allow a claimant to take voluntary non-prejudicial dismissal up to five days before trial.

ALTERNATIVE A.

"A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E., and of any statute of this state, an action or proceeding may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and

serving such motion on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) 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 or proceeding against the same parties on or including the same claim.

* * * *

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 (a) of subsection (1) of section A. of this rule shall be filed and served not less than five days prior to the day of trial."

This alternative incorporates the existing provisions of ORS 18.230.

ALTERNATIVE B.

"A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E., and of any statute of this state, an action or proceeding may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and serving such notice on defendant not less than five days prior to the day of trial if no counterclaim has been pleaded and no summary judgment motion seeking summary judgment in favor of an adverse party

is pending or no summary judgment adverse to the plaintiff has been filed, or (b) 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 or proceeding against the same parties on or including the same claim.

* * * *

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 (a) of subsection (1) of section A. of this rule is only available if no summary judgment motion seeking judgment in favor of an adverse party is pending and no summary judgment adverse to the claimant has been filed."

Alternative B. is designed to restrict the ability to avoid a summary judgment by voluntary dismissal. Simply terminating the right to a voluntary dismissal upon the filing of a summary judgment motion would not work because a defendant could cut off the dismissal right with a frivolous motion. The last clause of the suggested language would prevent a plaintiff who suffers a partial summary judgment from taking a non-prejudicial dismissal after the court grants the motion and more than five days prior to trial.

The only other rule similar to the suggested revision which I could find is Florida Rule 1.420, which generally restricts the dismissal to "before hearing on motion for summary judgment, or if none is served or if such motion is denied, before retirement of the jury."

In view of the last sentence giving the plaintiff only

one non-prejudicial voluntary dismissal, the summary judgment refinement may not be necessary.

3. Office service. This is the revised version of Rule 7 D.(2)(c) as directed at the last meeting:

> "D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a certified copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge."

4. Proof of service. This is the suggested revision to Rule 9 restoring proof of service for all papers subsequent to the summons:

> "D. Filing; proof of service. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. Except as otherwise provided in Rules 8 and 9, proof of service of all papers required or permitted to be served may be by written acknowledgment of service, by affidavit of the person making service, or by certificate of an attorney. Such proof of service may be made upon the papers served or as a separate endorsement."

This would retain the proof of service requirement of ORS 16.780 using simpler language. The one question that might be considered would be whether we should simply allow a certificate in all cases, i.e., "or by certificate of the person making service or of an attorney."

We also should modify the summons forms in Rule 7 C.(3)(a), (b) and (c) as follows:

> "It must be in proper form and have proof of service on the plaintiff (defendant) or such

plaintiff's (defendant's) attorney to show that the other side has been given a copy of it."

This is the language in the existing statutes.

5. Expert witnesses. The following is a revision of the trial expert rule as suggested by the Council:

"B.(4)(a) Subject to the provisions of Rule 44, upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney, giving the name and address of any person the other party reasonably expects to call as an expert witness at trial, and stating the areas in which it is claimed the witness is qualified to testify as an expert, the qualifications of the witness to testify as an expert, and the subject matter upon which the expert is expected to testify. Unless the court otherwise orders, such expert witnesses may be deposed as to their opinions at the expense of the deposing party and at a time and place convenient for the expert. Discovery by deposition from such expert witnesses shall not be prohibited on the grounds of unfairness, work product or privilege held by the party expecting to call such expert witnesses. The deposing party shall pay to the expert the reasonable fees and expenses of the expert in preparing for and appearing and giving testimony at the deposition.

B.(4)(b) A party who has furnished a statement in response to paragraph (a) of this subsection and who decides to call additional expert witnesses at trial not included in such statement is under a duty to supplement the statement by immediately providing the information required by paragraph (a) of this subsection for such additional expert witnesses.

B.4(c) If a party fails to comply with the duty to furnish or supplement a statement as provided by paragraphs (a) or (b) of this subsection, the court may exclude the expert's testimony if offered at trial.

B.4(d) As used herein, the term, "expert witness", includes 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 the party, or has been specifically retained or employed.

B.4(e) Nothing contained in this subsection shall be deemed to be a limitation of one party's right to obtain discovery of another party's expert not covered under this rule, if otherwise authorized by law."

This proposal limits the required statement by a party as requested by the Council and then provides for discovery from such identified persons by depositions only. For a deposition of an identified expert, the rule would then eliminate the work product, unfairness and privilege objections available under the existing Oregon cases, but for any other form of discovery, such objections would still be available. The rule should cure the main problem of giving a party some warning of potential experts and method of securing information necessary for cross examination. The provision is similar to that in the New Jersey rules.

The proposed rule contains no specific provisions as to timing. An attorney who delays decision on trial experts must supplement immediately upon decision as to his experts and a continuance could protect the requesting party. Also, an attorney who intentionally conceals the identity of experts risks the sanction of not being able to call such experts as a witness if the court is convinced that the names were improperly withheld.

The redraft covers most of the problems raised relating to the existing draft but still does not exclude the witness who is primarily an occurrence witness but may apply some expert knowledge to the facts, i.e., the farmer example given at the meeting. I could not come up with any language that would adequately distinguish between "true experts" and people who are applying some specialized knowledge but are primarily lay witnesses. I did, however, change the sanction requirement

to "...a court may exclude the expert's testimony." The courts should apply the rule reasonably and not apply the sanction to an attorney who reasonably does not consider a witness incidentally applying some specialized knowledge as an expert.

6. Juror rule. Appendix A. contains a redraft of Rule 57. Section A. allows a method of challenge to jury selection procedures. Rather than introduce the uncertain and archaic common law challenge to the array, it provides a simple procedure that is limited to questioning compliance with selection procedures before trial. It is taken from section 12 of the Uniform Jury Selection Act which is modeled after 28 USCA 1867. The procedure is limited to questioning jury selection methods and a litigant could not challenge the jury panel on the grounds that the panel actually drawn turns out to be not representative of the county or any other objection, such as adverse publicity. For example, see Payne v. Russ Vento Chevrolet, Inc., 528 P.2d 935 (Col. App. 1974). The requirement of a sworn statement is designed to eliminate frivolous challenges. The requirement that deviation from procedure be "substantial" allows the court to refuse relief for technical defects that could not affect the make up of the jury panel. Finally, the matter must be raised promptly and, in any event, prior to voir dire, and the procedure should not interfere with the conduct of a trial.

Section B. of the proposed rule is unchanged, although the reference to selecting jurors from the bystanders is not a highly desirable procedure, but some method of proceeding when the panel is exhausted must be provided.

Note that the order of the rule has been revised somewhat to follow a logical sequence. Section C. has been moved up before the challenges. The first sentence came from the prior peremptory challenge section and the second sentence from a separate section.

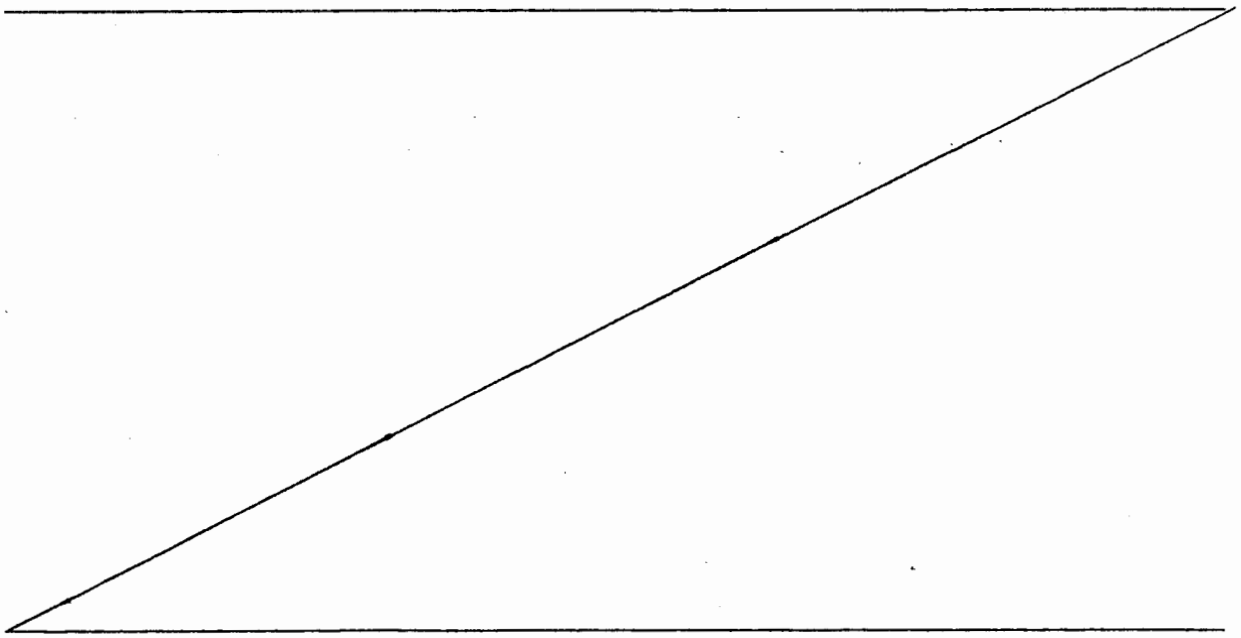
In Section D., although the language is changed slightly, the grounds for challenge for cause are the same in most cases. Soundness of mind and no prior jury service within a year are part of the qualifications for jury service and are encompassed by D.(1)(a). In D.(1)(b) the reference to mental or physical defects is clearer than the existing language. In D.(1)(f), I

changed "interest in the event of the action" to "interest in the action" and the exception for citizens and taxpayers was added. There are some old cases making a taxpayer subject to challenge for interest when a county is a party. See Wheeler v. Cobb and Mitchell, 121 Or422 (1927). In some cases this would frustrate justice by making it impossible to select a jury without a change of venue. See Elliott v. Wallowa County, 57 Or 237 (1910).

The distinctions between general and particular challenges and implied and actual bias are eliminated as unnecessary. The language of D.(2) replaces all of the archaic and unnecessary language relating to trial of the challenge for cause.

The language in D.(4) is quite complicated but probably should be left alone unless the Council wishes to change the method of exercising peremptory challenges. The last sentence was changed to give the court discretion in the unusual case where there are numerous parties on one side not likely to agree on challenges.

The remainder of the rule is unchanged.



7. Exceptions. The following is a suggested redraft of Rule 49 H.

> "Necessity of noting exception on error in statement of issues or instruction; all other exceptions automatic. No statement of issues submitted to the jury pursuant to subsection C.(2) of this rule and no instruction given to a jury shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury. Any point of exception shall be particularly stated and taken down by the reporter or delivered in writing to the judge. It shall be unnecessary to note an exception in court to any other ruling made. All adverse rulings, including failure to give a requested instruction or a requested statement of issues, except those contained in instructions and statements of issues, given shall import an exception in favor of the party against whom the ruling was made."

As requested, I checked the cases on this section. An exception is a protest and notice of nonacquiescence with the ruling of a court. The only time an exception is still required is to a requested instruction; the purposes is to provide a mechanism to call error to the trial judge's attention and allow correction before the jury verdict. State v. Laundy, 103 Or 443 (1922). ORS 17.155 requires a particular method of preserving a record of the exception. The court has also repeatedly required that the exception be made with particularity and point out the precise problem with the instruction given. State v. Pucket, 144 Or 332 (1933); Miller v. Lillard, 228 Or 202 (1961). Describing the method of recording and particularity seem to be important components of the rule and I added the second sentence which is based upon ORS 17.515(1) but drops reference to the judge's minute book.

I also added a specific reference to requested statements of issues as suggested at the last meeting. The reference to instruction in the existing statute is not limited to the charge

but applies to any directions given to the jury by the judge during the trial. State v. Anderson, 207 Or 675 (1956); Tanner v. Fowells, 243 Or 624 (1966). There are no cases yet on statements of issues and it seemed safer to add a specific reference. The only question would be whether a requested statement of issues not given is the same as a requested instruction in terms of calling error to the attention of the court.

There is one problem raised by the cases which the suggested language does not cover. The Supreme Court held several times that, even if no exception was taken to an instruction actually given, a requested instruction not given on the same point would preserve the point of law for appeal. Ira v. Columbia, 226 Or 566 (1961); Crow v. Junior Bootshops, 241 Or 135 (1965). In the Crow case, the court had instructed the jury that contributory negligence would mitigate damages but not bar recovery. The defendant did not except to the instruction given but did submit a requested instruction that correctly stated the law. The court held the defendant could appeal from the failure to give the requested instruction. However, in Holland v. Sisters of Saint Joseph, Seeley, 270 Or 129 (1974), the court gave an instruction in a malpractice case that defined a duty to inform by reference to a community standard and the plaintiff did not except. The plaintiff had submitted a definition of the duty to inform in different language which did not make reference to community standard. In its opinion, the court cited the Crow case and said it would review the point even though plaintiff had cited the giving of the erroneous instruction as error, not the failure to give the requested instruction. On rehearing, the court reversed itself and said Crow was distinguishable because the requested instruction in that case called the trial court's attention to the fact that an erroneous instruction was being given, whereas in the Holland case: "...there was nothing in the requested instruction which clearly and directly called to the attention of the trial court that it was error to advise the jury..." (p. 141). Judge McAllister concurred saying that Crow should be overruled:

> "A rule requiring a trial judge to scrutinize each requested instruction and to treat each one as a potential exception to the instructions

> given will place an intolerable burden on the trial judges. It will permit counsel to conceal potential exceptions in a sheaf of requested instructions instead of requiring him to inform the court directly, precisely and openly of his objections to the instructions which had been given in his case."

In another case in the same volume of the reports the court said in dicta (no written instruction was actually requested): "We have held that the request of another instruction on the same subject is not a substitute for failure to take such an exception." Porter v. Headings, 287 Or 281 (1974).

The Oregon Court of Appeals, however, seems to view the matter slightly differently. In Becker v. Beaverton School Dist., 25 Or App 879 (1976), the defendant requested an instruction on comparative negligence and the trial court requested on assumption of risk without mentioning comparative negligence. No exception was taken, but the court reviewed the failure to give the requested instruction. It said the requested instruction clearly called to the attention of the trial judge the claimed error (actually the court said it was not error) and said this "will be the case whenever an instruction is requested on a topic on which the court actually gives no instruction at all." (p. 884).

I did not change the rule draft to try to deal with the cases. I cannot figure out exactly what the applicable rule is supposed to be. Also, the cases cited also are related to appellate procedure. The exception rule is apparently put in our rules because it specifies what should be done as part of trial procedure and the taking of an exception might preserve a right to new trial. We cannot, however, control what the appellate court will consider as error, and thus no language we draft should clear up the Holland case. Finally, our rule is not notably different from ORS 17.510. We did add the language, "including failure to give a requested instruction or a requested statement of issues", in the last sentence but this does not say anything about the necessary relationship between the requested instruction and the instruction actually given.

8. Custody of jury. The following is a suggested redraft of Rule 59 C.(5):

> "C.(5) Custody of and communications with jury. After hearing the charge, the jury shall retire for deliberation. When they retire, they must be kept together in some convenient place, under the charge of an officer, until they agree upon their verdict or are discharged by the court. The court, however, shall have the authority to allow the jury to adjourn their deliberations temporarily under the terms and conditions specified by the court, provided the jury remains together under the charge of an officer. Unless by order of the court, the officer must not suffer any communication to be made to them, or make any personally, except to ask them if they are agreed upon a verdict, and the officer must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon. Before any officer takes charge of a jury, this section shall be read to the officer who shall be then sworn to follow its provisions to the utmost of such officer's ability."

The language is a clearer version of ORS 17.305 taken from California Code of Civil Procedure Sec. 613. The second sentence is entirely new and was added to cover the court allowing the jury to adjourn for food or rest.

9. Dismissal in lieu of directed verdict. The following is the redraft of Rule 60 requested by the Council:

> "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

of any parties alleging a right to possession and assessment of the value of the property."

The following are several new questions that have been raised at CLE sessions or by Council members:

(1) ORS 46.180 not only provides for six-person juries in district courts, but also requires a written application for jury and notice to the adverse party. This would be a specific rule overriding Rule 51 and make the situation for jury waiver different in district court than in circuit court. Do you wish this result, or should Rule 51 supersede ORS 46.181?

(2) Does the Council want any official comments? The existing comments are specifically described as staff comments and not official adopted. Some people have requested official comments which are more extensive than the existing comments.

Official adoption of comments by the Council might be useful to attorneys and judges but would be risky as any comments expanding or clarifying the rules would then in a sense be rules. It is also possible that official adoption of rules might require approval of the legislature. I took a quick look at the rules in other states which I have been using, and in all cases, the comments were labeled: advisory committee, staff, author's or reporter's comments, or just plain interpretative commentary by some attorney. In no case were these comments adopted by the court actually making the rules.

The question of whether the comments should be more extensive is a separate question. There will not be sufficient time before submission to the legislature to expand the comments substantially, but if the Council wishes, this could be done next spring. No submission of unofficial staff comments to the legislature would be required.

(3) We received several suggestions that the rules specify the order of trial in a third party case. Rules 22 E., 28 B. and 53 deal with separation of trial by saying nothing about the order of trial and this is presumabely at the discretion of the trial judge. I am not aware of any jurisdiction that has a specific rule relating to order of

trial in third party cases. If the Council feels this is desirable, I could check the other jurisdictions and attempt to draft a rule for Oregon. I suspect the situation is complicated by the fact that right to jury trial might be affected.

(4) It was again called to my attention that the last sentence of Rule 44 E. is not a rule of procedure but creates a cause of action. Rule 44 E. comes from the existing ORS section, but we could perhaps leave the last sentence as a statute, referring to cause of action arising from failure to obey the rule.

(5) Rule 64 B. could be interpreted to say that where the court reserves ruling on a directed verdict motion and the jury cannot agree, no judgment may be entered because there is no "verdict." This could be cured simply by adding "or if the jury cannot agree on a verdict" to the last sentence.

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276-3331

October 19, 1978

Mr. Donald W. McEwen
Chairman
Counsel on Court Procedures
1408 Standard Plaza
1100 S. W. Sixth Avenue
Portland, Oregon 97204

Re: Proposed Rule 36B(4)(a)

Dear Don:

Many of the lawyers in this area are concerned about the above proposed Rule which would require a party to deliver a written statement identifying expert witnesses and stating subject matter of his expected testimony. The proposed Rule further provides that with certain exceptions, the report and statement must be delivered not less than 30 days prior to trial.

I realize that a similar practice is followed in the Federal Courts, I would oppose such a rule in the State Courts. One problem area in Eastern Oregon is that we have numerous crop cases usually involving crop damage, comparative yields, farming practices and farm machinery. Ordinarily local farmers testify in these cases as experts and it is not uncommon to have several farm experts of this type involved in the trial. Sometimes we don't know who they are or what they are going to say until our farm clients get them in our office a few days before trial. I realize this might fall within the exception but I think the Rule is unnecessary in the State Courts, makes more work for the attorneys and more expense for our clients.

Sincerely yours,

George H. Corey

GHC:mf
cc: Mr. Fred Merrill
Executive Director
Counsel on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

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October 23, 1978

Mr. Carl Burnham, Jr.
Yturri, Rose & Burnham
P.O. Box S
Ontario, Oregon 97914

Re: Bodyfeldt Rule

Dear Carl:

I write with regard to the above proposed rule for Oregon Civil practice in the hopes that my thoughts and comments will be shared with those who eventually make the decision regarding this rule.

As I understand it, the rule would require that substantially all of the proposed expert's testimony, for either party, be required to be reduced to writing and made available to the opposing parties at least 30 days before trial.

The rule poses temporal and financial impracticalities which will greatly hamper rather than aid the expeditious handling of litigation in Oregon. Of first and foremost interest to attorneys and parties alike is the matter of finances. Expert witness time, when real expertise is required, is very expensive. There is a great likelihood that thousands of dollars will be required to be spent in litigation involving experts because of the imposition of this rule. The many hours of expert time in reducing their opinions to writing and the many hours of attorney time in examining and assisting in the development of that writing prior to its submission to the other parties will be very expensive indeed.

If such a rule is imposed it will be very likely that that expense will be incurred whether or not the case is tried, and that fact alone will probably reduce the number of settlements which are made within the last 30 days prior to trial. I am sure that your experience, like mine, indicates that that period is the most fruitful in settling cases, and that factor alone may cause more cases to be tried thus increasing the load upon the Courts.

Then there is the problem illustrated by George Corey's remarks at the forum in Pendleton where he pointed out that reducing the testimony of ten different farmer witnesses as to some matter involved in agriculture, would be very difficult, probably very time consuming, and almost impossible to get done 30 days before trial.

I do not feel that the rule would assist in streamlining Oregon practice. I think it is very likely that it would pose one or more stumbling blocks to effective trial practice and I hope that your committee will see fit to weed it out as an undesireable rule.

Very truly yours,

SWAN, BUTLER & LOONEY, P.C.

By: H. Clifford Looney

HCL:sj

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NORMAN K. WINSLOW
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(503) 363-9231

October 24, 1978

Executive Director
University of Oregon School of Law
Eugene, Oregon 97403

Re: Proposed Oregon Rules of Civil Procedure--Tentative Draft, and Rule 17 in particular

Gentlemen:

In accordance with your request for "comments" concerning all of the above rules, I desire to respond.

I am sure you will be receiving a letter from Judge Ed Allen of the Lane County Circuit Court, concerning the above special rule eliminating the necessity of the verification of pleadings. I have heard Judge Allen speak briefly concerning his objections, and I agree with all of them.

Even under present practice, if there is any real "problem" about the verification of the pleading by your client, there are excuses to have the attorney verify it. However, for all of the reasons that are in Judge Allen's letter, I feel that we should retain verification in the state practice.

I desire to add one additional "slight thought". It is my opinion that there is importance in connection with all litigation, to have the client know that the case is actually being "commenced", or "defended against". If he has to sign something of this nature, it "brings home" to him, his involvment, and I think this is also important to a proper attorney-client relationship.

Frankly, at the moment I have not had an opportunity to read all of the rules, and this letter should not necessarily be construed as my "approval" of all of the rest of them.

Sincerely yours,

Norman K. Winslow

NKW:jm

OREGON TAX COURT
106 STATE LIBRARY BUILDING
SALEM, OREGON 97310

CARLISLE B. ROBERTS
JUDGE

MRS. LILLIAN M. DONKIN
CLERK

October 27, 1978

Professor Fredric R. Merrill
Executive Director of the
Council on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403

Dear Professor Merrill:

The summary of proposed Oregon rules of civil procedure, printed in the Oregon State Bar Bulletin for October 1978, stimulates me to inquire of you relating to the applicability of the rules to the Oregon Tax Court.

As a court with state-wide jurisdiction, special statutes have been provided for service of papers and process, avoiding the use of the sheriff for service, substituting the clerk of the tax court as the officer responsible for serving the certified copies of complaints (again using mail services). ORS 305.415.

The tax court has the same powers as the circuit court and may exercise all ordinary and extraordinary legal, equitable and provisional remedies available to the circuit courts, "as well as such additional remedies as may be assigned to it." ORS 305.405. The court has developed its own rules, some of which are deemed required because of the state-wide jurisdiction. (A copy of the current rules is enclosed herewith.)

I would appreciate receiving a copy of the full text of the new rules and to have your opinion whether this court, as one of Oregon's trial courts, will be subject to

them. (I have in mind that the present statutes relating to appeals to the Oregon Tax Court, found in ORS chapters 305 to 321, may be superseded by enactment of the new rules of civil procedure if there is a conflict in language between the new rules and the present statutes affecting the tax court.)

Your advice will be appreciated.

Very truly yours,

Carlisle B. Roberts

Carlisle B. Roberts
Judge

CBR/hm

encl.

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

November 1, 1978

Hon. Carlisle B. Roberts
Judge
Oregon Tax Court
106 State Library Building
Salem, Oregon 97310

Dear Judge Roberts:

Enclosed please find two copies of our proposed rules. You will note that Rule 1 provides that the rules apply to courts of the state, other than the circuit or district courts, only to the extent they are made specifically applicable by rule or statute. There is no statute making the general rules of procedure applicable to the tax court, and under ORS 305.425 the tax court is authorized to make its own rules. As far as remedies under ORS 305.405 are concerned, the Council has no power to change substantive rules, and thus far has considered remedies as substantive rules. In my opinion, there is nothing in the present tentative rules that will affect the tax court, except to the extent that your rules might incorporate some circuit court procedure which is being changed.

We probably will ask the legislature to change the reference to "rules of equity, practice and procedure" in ORS 305.425 to "practice and procedure in cases tried without a jury." Proposed Rule 2 eliminates any procedural distinction between law and equity, and the reference to equity procedure would no longer be appropriate.

If you have any specific questions or suggestions or feel that my interpretation of the applicability of the rules or the effect on the tax court is incorrect, please let me know, and I will call the matter to the attention of the Council.

Very truly yours,

Ffedric R. Merrill
Executive Director

FRM:gh
Encl.

cc: Donald W. McEwen, Esq.

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CLIFF S. BENTZ

October 28, 1978

Mr. H. Clifford Looney
Attorney at Law
P. O. Box 430
Vale, Oregon 97918

Dear Cliff:

Thank you very much for your letter of October 23, 1978. I will be sure that the Council is informed of your comments.

You might be interested to know that at my first meeting I raised some of the same questions that you have in your letter, and the Council instructed Mr. Merrill to redraft the discovery rule to eliminate the need of an expert to write out his testimony 30 days in advance of trial.

As you know, the final public hearing on the proposed rules will be held in Portland on November 3, 1978, and the rules will be finally voted on on December 2, 1978.

Very truly yours,

YTURRI, ROSE & BURNHAM

By
Carl Burnham, Jr.

CB:ar
cc: Mr. Fred Merrill (W/Encls.)

CIRCUIT COURT OF OREGON
SECOND JUDICIAL DISTRICT
EUGENE

EDWIN E. ALLEN
JUDGE

October 30, 1978

Professor Fred Merrill
Executive Director
Counsel on Court Procedure
University of Oregon School of Law
Eugene, OR 97403

Re: Rule 17, Tentative Draft, Proposed Oregon Rules of Civil Procedure

Dear Professor Merrill:

I am writing this letter to you, with copies to selected members of the Committee to state my opposition to Proposed Rule 17, eliminating the verification of pleadings.

It has been my experience that even with the necessity for verification, that some attorneys and some pro se litigants are inclined to be more than a little fast and loose with the truth, the whole truth, and nothing but the truth.

I would submit that the elimination of the verification and the formality which should be associated therewith would accentuate this problem.

I have observed in the trial of cases, both before and behind the bench, that a verified pleading has often been used as an effective method of impeachment. Therefore, it is with some suprise, considering the composition of the Committee, that it is proposed that verification of pleadings be eliminated.

Sincerely yours,

Edwin R. Allen

Edwin E. Allen,
Circuit Judge

EEA:rem
cc: Hon. Wm. H. Dale
Darst B. Atherly
Hon. John M. Copenhaver
Hon. Alan F. Davis
Laird Kirkpatrick
Hon. Val D. Sloper
Hon. Wendell H. Tompkins
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October 31, 1978

Mr. Donald W. McEwen, Chairman
Council on Court Procedures
1408 Standard Plaza
1100 S. W. Sixth Avenue
Portland, Oregon 97204

Dear Don:

Re: Proposed Oregon Rule of Civil Procedure 36B.(1)

I strongly urge the Council on Court Procedures not to narrow the scope of discovery that is now authorized by ORS 41.635. In my opinion liberality in the scope of discovery is better for both plaintiffs and defendants, because it generally leads to a more complete understanding of the matter in suit and at an earlier stage than at the time of trial. This should, and I think does, produce more just results from litigation.

In Oregon, I do not think that deposition practice is being abused. The only problems with depositions that I have experienced in the past 25 years have been due to the old restrictions on the scope of discovery, such as the skirmishes over the discovery of witnesses' identities. Time and money are not being wasted on such trivial things any more.

Interrogatories are a different matter. Although they are immensely valuable in certain types of cases and should be available for use, they are by their nature more susceptible to abuse, and it has been known to occur. I contend, though, that when interrogatories are misused, the misuse is attributable not to the latitude that is permissible in the scope of discovery but to the inherent nature of interrogatories and to the way that they have been allowed to be used. They can be used like a lever to shift the burden of investigative work from one side to the other, and

to multiply the amount of work required by the other side to answer them in comparison to that required to ask them. These characteristics are to some extent the price that has to be paid for having the tool. Restricting the scope of discovery as proposed in Rule 36B.(1) is not going to reduce that price to any worthwhile extent. The way to do it is to limit the number of interrogatories that can be served without the court's permission and to give the court power to prevent hardship. You are doing both in proposed Rules 42E and 36C.

Proposed Rule 36B.(1) poses a dilemma. If one may ask only about what is relevant to a claim or defense, how can he learn whether he has that claim or defense in cases where the facts pertaining to it happen to be in someone else's possession? In those cases he could not plead the claim or defense because he would not know that he had it, and he could not discover that he had it because questions about it would be irrelevant until it was pleaded. Not so neat.

Thank you for considering this viewpoint -- and for doing a big job so well.

Very truly yours,

Don H. Marmaduke

Don H. Marmaduke

DHM:vm
cc: Fred Merrill