N O T I C E

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

November 7, 1978

FROM: Council on Court Procedures
University of Oregon Law Center
Eugene, Oregon

The next meeting of the COUNCIL ON COURT PROCEDURES will be held on 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, Oregon. At that time, the Council will discuss and consider various suggested revisions to the Oregon pleading, practice and procedure rules.

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held November 18, 1978

Conference Room of Souther, Spalding, Kinsey, Williamson and Schwabe

1200 Standard Plaza, 1100 S.W. Sixth Avenue

Portland, Oregon

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

The meeting was called to order at 9:35 a.m. in the conference room of Souther, Spalding, Kinsey, Williamson and Schwabe, 1200 Standard Plaza, 1100 S.W. Sixth Avenue, Portland, Oregon. Justice Lent presided at the meeting.

The Council heard a statement by Stanton F. Long of Eugene, Oregon, Chairman of the Oregon State Bar Procedure and Practice Committee. Mr. Long stated that the committee had examined the rules and that they recommended no rule be enacted regulating discovery of experts and also that no rule be enacted relating to interrogatories. If the Council were to enact a rule allowing interrogatories, the committee suggested that the rule be modified by making such interrogatories only available upon court order. Mr. Long suggested that the language of ORCP 42 be modified to this effect and indicated he would submit a written copy of their suggested modification.

Letters from Lloyd W. Weisensee, Peter C. McCord, John Dudrey, and S. Ward Greene were furnished to the Council.

It was then decided to consider the rules in numerical order, discussing all suggestions and comments received for each rule.

ORCP 1. The Council discussed whether there should be a transition period when both new and old rules were effective and whether the rules should apply to actions pending at the time of or filed after the effective date of the rules. Judge Sloper moved, seconded by James O'Hanlon, that the Council ask the legislature to set the effective date of any rules submitted, and not amended or repealed, as January 1, 1980. Wendell Gronso moved, seconded by Judge Copenhaver, to amend by adding that the Council also change the last sentence of ORCP 1 to refer to actions "filed" after the effective date of the rules. The motion to amend failed with Wendell Gronso, Judge Copenhaver, Judge Jackson, and Randolph Slocum voting in favor of the motion. The main motion then passed with Laird Kirkpatrick and Judge Tompkins voting against the main motion. The Council also agreed to add the suggested language relating to citation of rules as set out on Page 20 of the November 16, 1978, memorandum.

ORCP 2. The Council discussed ORS 16.460 and agreed that it intended to repeal that ORS section and that no rule be enacted directing the order of trial in cases where both legal and equitable issues were presented. The Council agreed to add the words "of this state" to the last sentence of ORCP 2.

ORCP 4. The Council agreed that the word "party" be substituted for the word "person" in the second sentence of Rule 4. Laird Kirkpatrick suggested that some definition of "defendant" similar to that in ORCP 7 A. be added. It was agreed that ORCP 4 A.(5) be changed to say "Has expressly consented to the exercise of personal jurisdiction over such defendant". Laird Kirkpatrick repeated comments by Eugene Scoles. Mr. Scoles suggested that if ORCP 4 E.(1) and (3) were applied to a situation where two out-of-state residents contracted to perform services in Oregon but no act was performed in Oregon and suit were brought for breach of contract, there could be some doubt that the case would have sufficient minimum contacts with Oregon to meet constitutional requirements. It was suggested that the comments to Rule 4 clearly indicate that application of the rule would be subject to further court interpretation of constitutional limits. On motion of Laird Kirkpatrick, seconded by Judge Sloper, the Council voted unanimously not to repeal ORS 59.155 and to also leave section J. in the rule. This would provide the same basis of jurisdiction in the rule as in the ORS section, but the ORS section would provide an additional method of serving process. The Council agreed to delete the first sentence of ORCP 4 L. The Council also agreed to delete the words "under this subsection" from ORCP 4 M.

ORCP 5. The Council agreed to add the word "also" to the last sentence of ORCP 5 A. after the word "section".

ORCP 7. On motion of Judge Sloper, seconded by Dick Bodyfelt, the Council voted unanimously to change ORCP 7 C.(2)(a), (b) and (c) as follows: substitute "court clerk or administrator" for "court"; and change the last sentence to read "It must be in proper form and have proof

proof of service on the (plaintiff's/defendant's) attorney or, if (plaintiff/defendant) does not have an attorney, proof of service on the (plaintiff/defendant)".

Upon motion of Randolph Slocum, seconded by Judge Sloper, the Council directed that the comment to ORCP 7 make clear that the basic test of adequate service of summons is that which is set forth in the first sentence of ORCP 7 D.(1) and that the specific methods of service as applied to particular defendants in the rule would be service which is presumed to be reasonably calculated to apprise the defendant of the existence and pendency of the action. The comment should also make clear that other service methods could under some circumstances satisfy the basic standard. Judge Tompkins voted against the motion.

The Council agreed that the words "at the dwelling house or usual place of abode of the person to be served" be added after the word "complaint" in Line 3 of ORCP 7 D.(2)(b) and that the word "immediately" be added to the sixth line of ORCP 7 D.(2)(b).

Laird Kirkpatrick moved, seconded by Darst Atherly, to add language that indicated that substituted and office service were complete upon mailing to the defendant. The motion passed, with Judge Copenhaver and Judge Tompkins voting against the motion.

James Garrett moved, seconded by Mike King, that the words "deliver to addressess only" be added at the end of the first sentence of ORCP 7 D.(2)(d). The motion failed, with James Garrett, Wendell Gronso, and Mike King voting in favor of the motion.

The Council discussed whether ORCP 7 D.(5)(c) should be changed to allow the judge to vary the number of times a summons should be published but took no action to change the tentative draft. It also agreed that ORCP 7 E. was intended to permit service of summons by an employee of an attorney and that the language of the tentative draft clearly permitted this.

Judge Dale moved, seconded by Darst Atherly, that ORCP 7 F.(2)(a)(ii) be amended to substitute the words "a separate document attached to the summons" for the word "endorsement".

ORCP 8. The Council agreed to change the beginning of ORCP 8 C. to say "Any civil process may be served on Sunday. . .".

ORCP 9. Upon motion by Laird Kirkpatrick, seconded by Dick Bodyfelt, the Council voted unanimously to delete section 9 C. Upon motion by Judge Sloper, seconded by Judge Tompkins, the Council voted unanimously to change the first sentence of ORCP 9 D. to read "All papers required to be served upon

a party by section A. of this rule shall be filed with the court within a reasonable time after service".

Judge Wells moved, seconded by Dick Bodyfelt, that ORCP 9 F., Line 6, should include the words "upon the court's own initiative". The motion passed unanimously.

Judge Dale moved that ORCP 9 F. be deleted. James Garrett seconded the motion. The motion passed, with Judge Wells opposing the motion.

The Council agreed to delete the words "required by its terms to be served" from Lines 2 and 3 of ORCP 9 A.

ORCP 10. It was agreed that section 10 C., relating to additional time after service by mail, should have been included in the tenative draft of the rules.

ORCP 13. The Council discussed questions which had been raised about replies in ORCP 13 and no change was suggested.

ORCP 14. The Council discussed the question of the relationship of this rule and other rules to local rules of court. It was suggested that the entire subject of local rules be considered during the next biennium.

ORCP 15. The Council discussed objections that had been raised to the time periods provided and no changes were suggested. The Council discussed the language in ORCP 15 B.(1) and (2) relating to time periods running from service of the order. Since ORCP 9 A. had been changed to clearly require service of orders, no change was suggested in those subsections. It was agreed to change the words "or other act to be done" in ORCP 15 D., Line 3, to the words "or allow any other pleading or motion".

ORCP 16. The Council agreed to delete the words "or in another pleading" at the end of Rule 16 D.

ORCP 17. The Council discussed the comment received favoring verification. No change was suggested in the rule.

ORCP 18. The Council discussed the relationship between ORCP 18 B. and divorce cases and prayers for general relief in equitable cases. It was pointed out that the rule is not different from existing ORS language and does not say the only prayer which can be used is a demand for damages, but only says that if damages are requested, they must be

specifically stated. No change was suggested in the language of the rule.

ORCP 19. The Council agreed that the last clause of the second sentence of ORCP 19 C. be deleted and that "or avoided" be added at the end of the second sentence.

ORCP 20. The Council agreed to delete the word "real" from ORCP 20 I. and J. so that the provisions of those sections would apply to both real and personal property.

ORCP 21. The Council discussed the procedure on a motion to dismiss asserting defenses numbered (1) through (6) of ORCP 21 A. No change was suggested. The Council agreed to change the words "notice of the order" to the words "service of the order" in ORCP 21 D. The Council agreed to add the words "or any other pleading containing more than one claim or defense not expressly stated" to ORCP 21 E.(1).

ORCP 22. The Council discussed whether the words "legal or equitable" were needed in ORCP 22 A. and 24 A. It was suggested that the words be retained simply to reinforce the elimination of any procedural distinctions between suits in equity and actions at law. The Council discussed the possibility of specifying the order of trial in third party cases. It was suggested that whether or not a rule specifying the order of trial was desirable, the subject was too complex to insert at this time.

ORCP 26. The Council discussed whether "bailee" should be included in the rule. No change was suggested. The question was also raised how a real party interest objection seeking a dismissal would be raised. The last sentence of ORCP 26 refers to a dismissal but ORCP 21 A. does not cover a real party in interest. The Executive Director was aksed to advise the Council if any changes were required. The Council agreed to change the word "their" to "that party's" in Line 5 of ORCP 26.

ORCP 28. The Council discussed the suggstions relating to this rule submitted by Mr. Weisensee. It was suggested that the rule as written was sufficiently broad to allow joinder of a manufacturer and shipper of the same goods in an action for damage or defect in the goods and no change in the language was suggested. The Council agreed to make the last clause of ORCP 28 B. a separate sentence.

ORCP 29. The Council agreed to delete the words "and whose joinder will not deprive the court of jurisdiction of the subject matter of the action" from the first sentence of ORCP 29 A. and to delete the last sentence of ORCP 29 A. The Council discussed the language of ORCP 29 B. and no change was suggested.

ORCP 31. The Council agreed that a section should be added to ORCP 31 to incorporate the procedure of ORS 13.120 relating to dismissal of the stakeholder.

ORCP 32. The Council discussed suggestions made relating to ORCP 32, but it was suggested that the rule was identical to a statute passed after careful consideration by the legislature and no change should be made at this time.

ORCP 33. The Council discussed possible changes to ORCP 33 B. relating to intervention of right. It was suggested that the entire intervention rule should be reviewed completely by the Council during the next biennium, but that no changes would be made in the rule at this time.

ORCP 36. The Council discussed the definition of scope of discovery in ORCP 36 B., the language relating to discovery of insurance policies in ORCP 36 B.(2)(a), and the relationship between Rule 36 B.(2)(a) and Rule 42. No change in the language of those portions of the rule were suggested.

Laird Kirkpatrick moved to delete the language in section 36 B. (4)(a) relating to depositions of expert witnesses and to have the comments indicate that the availability of other discovery from expert witnesses was being left to case law. The motion was seconded by Judge Dale. Judge Copenhaver moved, seconded by Judge Sloper, to table the motion. The motion to table failed, with Judge Copenhaver, Judge Sloper, Judge Wells, Judge Jackson, and Dick Bodyfelt voting in favor of the motion. The main motion passed, with Darst Atherly voting against the motion.

ORCP 37. The Council agreed to delete the second sentence of ORCP 37 A.(1) and to change the last sentence as suggested on Page 3 of the memorandum of November 13, 1978. The Council discussed ORCP 37 D., relating to preserving of a recording of an oral deposition, but no other change in the language was suggested.

ORCP 40. The Council discussed ORCP 40 and its relationship to written interrogatories. It was pointed out that a deposition on written questions and an interrogatory were not the same thing, and it was suggested that the comment point this out.

ORCP 42. The Council decided to defer any action on ORCP 42 until the next meeting.

ORCP 44. The Council agreed that the last sentence of ORCP 44 E. should be left in ORS as a statute.

ORCP 45. The Council agreed to replace the first sentence of ORCP 45 A. with the language suggested on Page 15 of the memorandum of November 16. Laird Kirkpatrick moved, seconded by Judge Sloper, that ORCP 45 B. be revised to eliminate the necessity of a court order to establish the admission and to require a warning on the request for admissions that failure to respond would result in an admission. The motion passed with James O'Hanlon, Mike King, and Darst Atherly opposing the motion.

ORCP 46. The Council agreed to the change in ORCP 46 B.(2) suggested on Page 15 of the November 16 memorandum.

ORCP 47. Dick Bodyfelt moved, seconded by Judge Dale, that the existing provisions relating to summary judgment of ORS 18.105 be incorporated into the rules as ORCP 47. The motion passed unanimously.

ORCP 51. Judge Sloper moved, seconded by Judge Tompkins, that ORCP 57 be amended to require a written demand for jury trial within five days of the date set for trial or the right to jury trial would be waived. The motion failed, with Judge Tompkins, Judge Wells, Judge Jackson, Judge Sloper, and Judge Casciato voting in favor of the motion. The Council discussed the relationship between ORCP 51 and ORS 46.180 relating to demand for jury trial being required in district court, but no action was taken.

ORCP 52. The Council agreed that references to "continuances" in Rule 52 should be changed to "postponements" and that a new section B. should be added to incorporate the procedure in ORS 17.050.

ORCP 53. Dick Bodyfelt moved, seconded by Darst Atherly, that ORCP 53 A. be amended by addition of the words "upon motion of any party" at the beginning of the section. The motion failed, with Laird Kirkpatrick, Mike King, Judge Jackson, Dick Bodyfelt, Darst Atherly, and James O'Hanlon voting in favor of the motion.

ORCP 54. The Council agreed to add "Upon notice of dismissal or stipulation under this section, the court shall enter a judgment of dismissal" to ORCP 54 A. It also agreed to change references to dismissals and motions of dismissal in the rest of the rule to refer to judgments of dismissal. The Council also agreed to change the words "upon the merits" in the third line of ORCP 54 B.(3) to "with prejudice". The Council also agreed to delete the second sentence of ORCP 54 C.

ORCP 55. The Council discussed issuance of subpoenas by court clerks and attorneys. It was agreed that the reference to clerks issuing subpoenas should be retained for parties litigating without an attorney

and that the suggested language on Page 12 of the November 13, 1978, memorandum be added to ORCP 55 F.(1).

ORCP 56. The Council agreed to change the first and second sentences of ORCP 56 as suggested on Page 19 of the November 16, 1978, memorandum.

ORCP 57. The Council approved the language of the proposed revised ORCP 57 submitted with the November 10, 1978, memorandum, except for the deletion of the words "that if the court finds there is a good faith controversy between multiple plaintiffs or multiple defendants" in ORCP 57 D.(2), third sentence. Dick Bodyfelt moved, seconded by Laird Kirkpatrick, that the language on Page 19 of the November 16, 1978, memorandum relating to peremptory challenges being in writing be added to ORCP 57 D.(3). The motion failed, with Dick Bodyfelt, Laird Kirkpatrick, and Judge Casciato voting for the motion.

ORCP 58. The Council agreed to change the language of ORCP 58 B.(1) as suggested on Page 19 of the memorandum of November 16, 1978.

ORCP 59. The Council discussed changing "may" to "shall" in ORCP 59 C.(1), but no change was made. The Council agreed to change ORCP 59 C.(3) to read: "Jurors may take notes of testimony or other proceedings in trial and may take such notes into the jury room." Judge Dale moved, seconded by Judge Casciato, that the language on Page 12 of the October 30, 1978, memorandum, except for the third sentence thereof, be substituted for ORCP 59 C.(5). The motion passed unanimously. Dick Bodyfelt moved, seconded by James O'Hanlon, that the language on Page 9 of the October 30, 1978, memorandum be substituted for the existing language in ORCP 59 H.

ORCP 61. The Council agreed to incorporate the language changes in ORCP 61 A. and D. suggested on Pages 13 and 14 of the October 30, 1978, memorandum and to eliminate section E.

ORCP 62. The Council discussed making findings of fact compulsory in all cases. No change was made in the tentative draft.

ORCP 63. The Council agreed to change the language of ORCP 63 B. as suggested on Page 50 of the October 30, 1978, memorandum.

ORCP 64. Dick Bodyfelt moved, seconded by James O'Hanlon, to restore subsection B.(5) relating to excessive damages, to ORCP 64 B. The motion passed with Judge Wells, Judge Dale, and Judge Copenhaver voting against the motion.

The Executive Director asked the Council members to consider the matters relating to final submission raised in the November 17, 1978, memorandum carefully for discussion at the next meeting. The Executive

Director also indicated that the suggested modifications to ORS sections related to process discussed on Page 1 of the November 10, 1978, memorandum would be considered at the November 2, 1978.

The next meeting of the Council will be held on Saturday, December 2, 1978, at 9:30 a.m. in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

The meeting adjourned at 5:55 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: MATTERS FOR YOUR CONSIDERATION AT 11-18-78 MEETING

DATE: November 10, 1978

1. The following matters from the October 3, 1978, memorandum were left unresolved at the November 3, 1978, meeting:

A. DISPOSITION OF MISCELLANEOUS STATUTES RELATING TO SERVICE OF PROCESS LISTED IN ITEM 1, PAGE 1. The form of the suggested changes appear in Exhibits B and C of the August 23, 1978, memorandum to the Council relating to these statutes. Also, the Council did not resolve whether the provisions relating to service of process in security violations should remain as 4 J. or remain as ORS 59.155. If we incorporate them in the rule, we eliminate the possibility of serving the Corporation Commissioner and mailing summons to a corporate address.

B. HAVING RESTORED PROOF OF SERVICE FOR PAPERS SUBSEQUENT TO THE SUMMONS, DO WE WISH TO CHANGE THE SUMMONS BACK TO THAT EXISTING IN THE PRESENT ORS SECTIONS? See Item 4, Pages 4 and 5, of the October 3rd memorandum.

C. ADOPTION OF A REVISION OF RULE 57. The Council made some changes and asked me to furnish a redraft, which is attached. Please note the new language in Paragraph D.(1)(d) and subsection D.(2) as requested. Judge Wells had pointed out that attorneys occasionally

interpret the existing language of paragraph D.(1)(d) as meaning that the prospective juror may be challenged if that prospective juror stands in the relationship of attorney - client with one of the litigants' attorneys; the correct meaning is that the prospective juror stands in the relationship of attorney - client with an adverse party. To clarify this, I moved the attorney - client reference to the more specific later portions of the paragraph. The change in D.(2) gives the judge some discretion to increase or allocate challengers whether or not multiple parties are involved. I was unsure whether the Council was in favor of giving the judge authority to increase the number of challenges or just authority to allocate the challenges. I included both because it might be possible to have more than three parties on one side and no ability to agree on challenges. The language actually used was taken from Rule 60.247 of the Kansas Rules of Civil Procedure.

Also, notice that I have changed paragraph D.(1)(f) to refer to interest on the part of the juror "in the outcome of the action." After some further thought, I believe Judge Dale was correct in suggesting that interest in an action did not mean the same thing as interest in the event of an action. Webster's Third International Dictionary lists the following as an archaic meaning of the word, "event":

> "The outcome or consequence of anything...the issue or outcome of a legal action as finally determined."

Apparently, common law lawyers used "event" in this sense with some frequency, i.e., "interest in the event of an action" in disqualifying witnesses and "costs to abide the event." I looked at a number of disqualification statutes in other states and could not find anything closer to the meaning of "event" than "outcome." I think we should get rid of the word, "event", because most lawyers simply do not know the archaic meaning. I also found that when Idaho incorporated a similar statute referring to "event of the action" into court rules, they used the word, "outcome."

D. The rest of the issues raised in the memorandum of October 3rd, beginning with Item 7 on Page 9, should be resolved. Note that some of the references to rule numbers in the memorandum are incorrect; at Page 9, Item 7, Rule 49 H. should be 59 H.; at Page 13, under Point 10, in the first sentence, Rules 60 E., 60 A. to 60 A.(1) and 60 A.(2) should be 61 E., 61 A. to 61 A.(1) and 61 A.(2), and in the second sentence of the last paragraph, Rule 60 D. should be Rule 61 D.; at Page 15, under Item 5, Rule 64 B. should be 63 B.

2. The following matters relating to areas other than interrogatories and expert witnesses were raised at the public hearing and probably require some further consideration by the Council:

A. It was suggested that the requirement of a court order to establish an admission be eliminated. Does the Council wish to consider the suggestion that a requirement of notice of admission be substituted for court order? This could be done by substituting the following language for the last sentence of Rule 45 B.:

> "If a written answer or objection to any request is not served within the time specified above, the matter requested shall be deemed admitted upon service of a notice upon the party to whom the requests were directed that the requests for admissions are deemed admitted and stating that the party to whom the requests were directed may move for amendment or withdrawal of the admissions under section D. of this rule."

B. It was suggested that Rule 57 B.(5) of the tentative draft (incorporated in section C. of the proposed revised Rule 57) would allow the court to take over the voir dire and exclude the attorneys. The language was intended to codify existing practice. It appears to do that, but should it be changed in any respect?

C. Some speakers objected to the omission of "upon motion of any party" from Rule 53 on consolidation. This was specifically approved by the Council at the meeting in Salem.

D. There was some objection to Rule 9 C. on the ground that the court should not be allowed to order cross-claims served only on the plaintiff and not on the defendants. The provision is taken directly from Federal Rule 5 (c). I could not find any cases on the provision. Wright and Miller say the following:

"Rule 5(c) has seldom been invoked. Nevertheless, it still retains some of the potential envisioned by the draftsmen and summarized by the late Judge Clark at the Cleveland Institute on the Federal Rules.

> Rule 5(c) is a provision that you may go to court and dispense with service upon all of of the defendants when there are unusually large numbers, as in matters affecting certain possibilities as to land actions or things of that kind. There may be so many defendants that it is very difficult and cumbersome each time a paper is filed to include service upon all * * *. In other words, it is just a way of dispensing with so many copies in that rather unusual situation.

On the other hand, the advent of high speed and relatively inexpensive reprography technologies may well have rendered Rule 5(c) largely obsolute. Yet, even the Xerox machine may not sufficiently ameliorate the expense, in terms of both time and money, of serving a large number of defendants with long pleadings containing voluminous exhibits. When this is true, Rule 5(c) has some utility."

4 Wright and Miller, Federal Practice and Procedure, § 1151, p. 596.

E. It was suggested that Rule 9 F. was unnecessary and creates a procedural trap. The provision does not appear in the federal rules. The reporter's notes following the Rhode Island rule, from which it was taken, state the following:

"Rule 5(f) is substantially the same as a local rule of the U.S. District Court for Massachusetts. It makes the obligation to file somewhat more precise and emphasizes that failure to file does not automatically void the service of the paper not filed."

Perhaps the comments following Rule 9 could be clarified.

F. It was suggested that the change in the definition of "scope of discovery" was too restrictive. (See Marmaduke letter). The language adopted was a compromise between the ABA Committee suggestion that discovery be limited to the "issues raised by the claims and defenses of any party" and the present statutory and federal use of "relevancy to the subject matter in the pending action." The language used was adopted from the Federal Judicial Conference Committee recommendations. They rejected the ABA suggestion on the grounds that it would not curb abuses in discovery and invite litigation over meaning, but then said that if the objection is to "subject matter", that term could be eliminated to encourage judges not to "err" on the side of expansive discovery. I believe they are suggesting that their version would not limit the scope of discovery. This may be true in federal practice where claims and defenses are not precisely spelled out in pleadings. Under our rules, specific pleading is required, and there is the danger that a party will have to assert very tentative claims or defenses in order to secure discovery to establish whether they are real. The Council should reconsider whether changing the definition of "scope of discovery" would achieve any benefit which would outweigh the dangers involved.

G. The suggestion that parties be required to serve a

conformed copy of judgments showing date of entry on opposing parties is probably a good suggestion, but the change properly should be in the rules relating to judgments. We have not promulgated any rules that are replacing Chapter 18 at this time.

H. The suggestion that the rules do not provide for transcription of a recording of a non-stenographic deposition after filing raises a good point. We could add the following language to Rule 39 G.(2):

> "If a recording of a deposition has been filed with the court, it may be transcribed upon request of any party under such terms and conditions as the court may direct."

I. The suggestion that a reply to all affirmative defenses be retained proceeds on the assumption that in a majority of the cases, the plaintiff will admit and deny affirmative defenses with particularity in the reply. I think the Council has proceeded on the assumption that in the majority of the cases, the reply will be the equivalent of a general denial and is unnecessary. Mr. McClanahan's point, about the clarity of court authority to order a reply in a case where a defendant wanted specific response to an affirmative defense, may have merit. We could change the last sentence of Rule 13 B. to read as follows:

> "There shall be no other pleading unless the court orders that a reply be filed to admit or deny allegations in any defenses asserted, on the grounds that definition of the issues would be clarified thereby, or orders some other pleading."

J. The hospital record problem raised by Tom Cooney presents a classic catch 22. I called Ray Mensing at the Oregon Hospital Association. There is a new federal regulation, 42 CFR, Part 2, that prevents hospitals from revealing hospital records of drug and alcohol abusers. Most hospitals are subject to the regulation because they receive federal money. The regulation is very broad in defining drug and alcohol abusers and also forbids any special identification or labelling of drug abusers or identifying any person as a drug or alcohol abuser. Apparently, when a hospital receives a subpoena under ORS 41.940 (Rule 55 H.) or a demand for access to hospital records under ORS 441.810 (Rule 44 E.), it must examine the records and determine if the person involved could satisfy the definition of drug and alcohol abuser. If so, the hospital must refuse to reveal the records without a court order. In resisting the court order, the hospital cannot rely upon the regulation because to do so would identify the person involved as a drug and alcohol abuser. Since the rules don't create any access or subpoena other than what exists under present law, we are not creating the problem or making it any worse in our draft of the rule. Whether or not we could do anything to deal with the problem by creating some special rule for in camera hearings of hospital subpoenas, the problem is far too complex to attempt to

change our rules before January 1, 1978. I suggested to Mr. Mensing that if he had any proposal which he wished the Council to consider, it should be submitted for consideration during the next biennium.

K. The suggestion of a transition period, during which both new and old rules would be application, sounds very confusing and unworkable. If there is a problem with disclosure and education relating to the new rules, the Council might consider asking the legislature to make the rules effective on a specific later date, such as January 1, 1980. In any case, the thrust of Mr. Johnson's remarks seemed to be that problems would be created for persons serving process. Rule 7 is sufficiently similar to existing rules and flexible enough that I do not foresee any serious problems.

L. The point about the ambiguity in substituted service is well taken. The present language could be interpreted to allow service of process upon a person over the age of 14 years residing at the dwelling house wherever you could find such person. This could be easily cured by adding "at the dwelling house or usual place of abode of the person to be served" between "complaint" and "to" in the third line of revised Rule 7 D.(2)(b).

M. The point that Rule 8 C., as drafted, suggests anyone can serve process is also well taken. The rule could be changed to say, "Any civil process may be served or executed on a Sunday..."

N. It is true that Rule 9 does not answer a number of questions about who may serve process or the manner of service of process. This was intentional in the sense that Rule 9 only incorporates some incidental provisions relating to process which appeared in Chapter 16. The rule does not attempt to cover the varieties of manner of service of process scattered throughout the rest of ORS. It probably would be advisable at some time to have a comprehensive rule relating to service of process, but there is no way to do this before submission to this legislature. I would suggest we ask Mr. Johnson to work with staff to develop a proposed rule during the next biennium.

O. The reason I thought the tenative draft of the rules contained a section enlarging time for service by mail is that it should. The original Rule 10 submitted by the process committee contained five sections, including the following as the last section:

> "E. Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Two of the sections of the original rule, relating to enlargement of time and motions, were dropped at the Bend and Salem meetings. The section quoted above was not deleted by the Council and was inadvertently not included in the tentative draft.

P. One of the Council members asked what effect the provisions of Rule 51 would have in district court where six-person jurors are used and two peremptory challenges are used. We are not repealing ORS 46.190, which provides for two challenges in district court ORS 46.190 remains as a specific statute that overrides the general rules. (Rule 1)

Q. One of the persons attending the meeting was asked what effect Rule 7 would have in FED actions. ORS 105.130(1) provides that except as provided in subsection (2), summons shall be served and returned as in other sections. ORS 105.130(2) provides for posting of the summons if the sheriff cannot find the defendant, and subsections (3) and (4) of ORS 105.130 say that service shall be 7 to 10 days before the date set for trial. We have not modified or repealed ORS 105.130; therefore, the only change from present procedure would be following Rule 7, rather than ORS Chapter 15, for personal service. Sections (2) to (4) of ORS 105.130 will remain as specific provisions overriding the general rules. (See Rule 1.)

R. The attached letter from Phil Lowthian considers whether Rule 18 B. is consistent with divorce practice. Rule 18 B. states exactly what ORS 16.210(2)(c) says in the present ORS sections. I suppose the question would be whether Rule 1 would make any difference for divorce practice. There is a specific provision, ORS 107.085,

relating to petitions in domestic relations cases, but it says nothing about the contents of the prayer. I called Mr. Lowthian, who suggested that the prevailing practice in Multnomah County is to disregard ORS 16.210 for divorce cases and that re-enactment in our rules might cause some problems with that. I then called Judge Harlow F. Lenon and posed the problem to him. He stated that, although ORS 107.085 does not specify what must be in the prayer, since ORS 107.055 did not require any pleading by a defendant other than an "appearance", they were not requiring any specific pleading from the petitioners. He did not think that our rules would create any problem.

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: Letters from Michael L. Williams and Lloyd W. Weisensee

DATE: November 13, 1978

Two of the letters which we have received are much more detailed than the others and require separate consideration.

I. Letter of Michael L. Williams dated November 3, 1978.

A. Regarding the typographical errors (see Pages 1 and 2), the changes have been made. To be consistent, we should also eliminate the pronouns as suggested (see pages 2 and 3). I agree with the point about the serial commas (see Page 3) and have gone through the rules and tried to add the serial commas where necessary. Regarding the split infinitives (see Page 4), the author suggested in Mr. Williams' letter says the following about split infinitives:

> "The English-speaking world may be divided into (1) those who neither know nor care what a split infinitive is; (2) those who do not know, but care very much; (3) those who know and condemn; (4) those who know and approve; and (5) those who know and distinguish."

As a determined (1), I did a little checking and found that Perrin's Writer's Guide and Index to English, Third Edition, Page 713, says the following: "There is no point in rearranging a sentence just to avoid splitting an infinitive unless it is an awkward one." This makes sense to me, and on that basis I made the changes

Mr. Williams suggested in 36 B.(2)(a) and in 55 C.(2)(c) [referred to in the letter as 55 B.(2)(c)].

B. The words, person, party, defendant, etc., are not defined in the rules. As far as I am concerned, they are used as words of common usage and this is consistent with most jurisdictions' procedural rules. I would hesitate to attempt to set up definitions. In context, the words are relatively free of ambiguity, and to my knowledge, they have not created problems.

C. Rule 2 would perhaps be more clear if "the constitution" were changed to "the constitution of this state." I think we were referring to the state constitution, not the federal constitution.

D. In Rule 4, I think "specifically consented" is closer to correct. We intended to say that the defendant has somehow manifested consent, as opposed to implied consent. The suggested change does not particularly clarify this. Perhaps we should change "specifically consented" to "the defendant has given actual consent to the exercise of jurisdiction."

E. Rule 4 I.(1) should say "risk insured" as suggested. In Rule M., the reference to "under this subsection" was in the Wisconsin statute. In our rules, 4 M. is a section. The reference is confusing, and the statute would be more clear if it simply read "...it is immaterial whether the action or proceeding has been commenced..." In Rule 24 B., the suggested change of title makes sense.

F. In Rule 34 D., suggesting a death on the record does sound odd, but that apparently is the standard procedure, and it appears in this form in the federal rules.

G. I agree that the language in the last sentence of Rule 37 A.(1) is awkward. Rather than the change suggested, I think the following would be more clear: "The petition shall name persons to be examined and ask for an order authorizing the petitioner to take their depositions for the purpose of perpetuating their testimony, or shall name persons in the petition from whom discovery is sought and shall ask for an order allowing discovery under Rule 43 or Rule 44 from such persons for the purpose of preserving evidence..."

H. Our rules substitute "present in the state when served" for "found", which appears in the present statutes. I agree that "physically present" might be more precise. I do believe, however, that the language was intended to cover anyone even briefly in the state, including anyone flying over Oregon. Any form of presence in the state has generally been accepted as a valid basis for jurisdiction. See Grace vs. McArthur, 170 F.Supp. 442 (E.D. Ark. 1959). I do not think Shaffer v. Heitner can be read to eliminate this basis for jurisdiction. Although Shaffer v. Heitner does eliminate quasi in rem jurisdiction as illogical through the application of minimum contacts analysis, it does not discuss presence.

I. On the reference to section 4 L., the requirement of minimum contacts is qualified by "fair and reasonable" because this is the language used in the International Shoe case. It may be true that courts have not given much meaning to "fair and reasonable" as a separate test for minimum contacts (see the Lindy opinion in the Academy Press case furnished to you with the staff comment relating to forum non conveniens), but International Shoe still remains the basic definition of the constitutional limit. The language suggested by Mr. Williams probably does the same thing and arguably would fit any future modifications in the constitutional limits.

J. In Rule 5, the word "subsection" should read "section." The sentence, however, does not say "only" when the defendant is unknown and would apply to both known and unknown defendants. Perhaps the addition of the suggested word "also" would clarify this. There is a way to serve such unknown defendants by publication. It is specifically provided by Rule 7 D.(5)(e).

K. The federal rules say that for a willful violation of the subscription rule an attorney may be "subjected to appropriate disciplinary action." We did not include this because it was unclear whether the Council had the power to promulgate disciplinary rules for attorneys. In any case, the code of professional conduct would forbid signing a pleading not supported by good grounds or simply for the purposes of delay. Perhaps we should refer to the code in the

comments. The Council could, if they wished, add an additional sanction by providing a cost assessment as suggested by Mr. Williams.

L. Mr. Williams has suggested that the Council should change the effect of lack of subject matter jurisdiction in his reference to Rule 21 G.(3). While I agree with his criticism of the subject matter jurisdiction rule, I believe subject matter jurisdiction is clearly beyond the rule-making power of the Council and we could change the basic concept that lack of subject matter jurisdiction is not waivable. Given this basic concept, all Rule 21 G.(3) does is provide a procedure for asserting lack of subject matter jurisdiction.

M. I believe the Council decided to incorporate Rule 32 without change because the class action statute had been recently enacted by the legislature after careful and exhaustive consideration. Most of Mr. Williams' comments go to issues that appear to have been the subject of consideration by the legislature. In any case, it would be dangerous to make changes in Rule 32 without an exhaustive analysis of that rule.

O. On the relationship between Rule 36 B.(4) and Rule 42, I believe the Council intended a request for names and addresses of expert witnesses would be different from interrogatories. Rule 42 does provide that you can use interrogatories to get names of expert witnesses (Rule 42 B.3). Rule 36 B.(4) contains its own sanctions. At the present

time, a failure to furnish the names of experts would create the possibility that the unnamed expert witness could not be called at trial. Rule 36 B. (4)(c). A party, however, might not wish to risk waiting until trial and take a chance on whether the court would exclude unnamed expert witnesses, and therefore the function of 42 B.(3) would be to provide a way of seeking names of expert witnesses which could be enforced by a court order under Rule 46. If Rule 42 is eliminated, we could perhaps consider adding a failure to respond to a request for the names of expert witnesses to Rule 46 A.(2). This addition would make it possible to get a court order for the names of expert witnesses rather than attempt to exclude them at trial.

O. In the comments to Rule 45, I don't see the problem with the word "request." In context, it can refer to an earlier individual or group of matters where admissions are sought. In section D., the section has nothing to do with res judicata or collateral estoppel. Those concepts refer only to the legal effect of a judgment in another case. That section refers to the effect of an admission in a pending case and to the evidentiary use of admissions in future cases.

P. I believe the question of required findings of fact by the trial judge in Rule 62 was discussed by the Council when the trial rules were considered. Does the Council wish to reconsider this in the light of Mr. Williams' suggestions?

P. The question in the post script to Mr. Williams' letter relating to summary judgments has been raised by several people. We had left ORS 18.105 as an ORS section because we had not gotten to the judgments portion of the statutes. Logically, however, summary judgments fit with other pretrial procedures, and we simply could consider adopting ORS 18.105 without change as Rule 47.

2. Letter of Lloyd W. Weisensee dated November 3, 1978.

A. I think the basic point that Mr. Weisensee is making in his comments to Rule 4 is somewhat the same as that presented by Mr. Williams. See section 1.H. above. The argument is that Shaffer v. Heitner means that all bases of jurisdiction are subject to the minimum contacts and reasonableness tests of International Shoe. Arguably, the reasoning applied in the Shaffer case to eliminate quasi in rem jurisdiction would mean that other traditional bases of jurisdiction, such as presence or doing business, must be subjected to the requirement that minimum contacts exist in a given case and that it is fair and reasonable that the case be tried in the jurisdiction. The problem is that the Shaffer v. Heitner case deals only with quasi in rem jurisdiction. The court opinion does not even suggest in dicta that the Supreme Court intends to apply the International Shoe test to all bases of jurisdiction. It can be argued that quasi in rem was a special case and "presence" and "doing business" are more rational and more accepted bases of jurisdiction. The Kulko case referred to does not

support any extension of International Shoe. It merely holds that a man who was aware that his family was moving to California did not knowingly and intentionally involve himself with the State of California and thereby become subject to jurisdiction to modify a child support award.

In other words, at the present time, there is no Supreme Court opinion that would invalidate our Rule 4 A. The policy questions of whether we wish to anticipate possible Supreme Court action or limit jurisdiction by forum non conveniens have been considered by the Council.

B. The language of Rule 28 A. comes directly from ORS 13.161. The situation described by Mr. Weisensee seems to be one where joinder would be desirable but probably would be allowed under a correct application of "same transaction, occurrence or series of transactions or occurrences." See Tanbro Fabrics Corp. v. Beaunit Mills, Inc., 167 N.Y. Supp. 2d 387 (1957)(buyer allowed to join actions against independent manufacturer and processors of defective goods); 7 Wright and Miller, Federal Practice and Procedure, § 1653, pages 270 and 271.

To change the common question of law or fact and same transaction requirements from cumulative to alternative would vastly broaden joinder. The test for joinder under an alternative approach would allow joinder of parties under the same grounds appropriate for a glass action. The joinder provision of ORS 13.161 was just adopted

by the legislature in 1977 and it would be inadvisable to extend it even further without some further experience under that rule.

C. The suggestion relating to venue objections in Rule 29 is a good one. Rule 29 was taken verbatim from Federal Rule 19 without specific consideration of the venue situations in state courts. It should be noted that the quoted language is in the necessary, not indispensable, parties section of the rule. In other words, there is no suggestion that a case would be dismissed because joining an indispensable party would change venue. The rule only says that if a necessary party would create venue problems, you do not join the necessary party. The venue situation in the state courts, however, is so different from the federal courts that if it seems desirable to have a party joined, this should be done without worrying too much about venue. We could substitute the language which Mr. Weisensee suggests.

D. The intervention rule, Rule 33, which we have suggested, basically retains the existing ORS approach. It leaves the question of intervention to the trial judge. Mr. Weisensee suggests that we add a classification of intervention as a right when the party seeking to intervene would be bound by the judgment. I am not sure I understand the problem presented in Mr. Weisensee's letter. There, the binding effect of the judgment only realizes when defense is tendered. Carroll v. Nodine, 41 Or 412 (1902). When defense is tendered, the indemnitor has practical opportunity to control the defense. It would seem that

intervention would be more crucial for a person in privity with a party. The person in privity would be bound by a judgment without a practical opportunity to control the defense. However desirable intervention might be in such a situation, the question is part of the greater problem of whether we wish to take discretion from the trial judge in the intervention. The federal rules do, by setting up a required form of intervention when someone claims interest relating to the property or transaction and is so situated that "the disposition of the action may as a practical matter impair or impede his ability to protect that interest." Federal Rule 24. This would cover Mr. Weisensee's point but also presents a number of other problems, and I would suggest that the Council put the intervention rule on the agenda for review and possible revision during the next biennium.

E. Mr. Weisensee's question about the status of ORS 16.460(2) is, I think, answered by the fact that the ORS section is repealed under our new rules. With the elimination of the procedural distinction between suits and actions and free joinder of claims, defenses, and counterclaims under Rules 21, 22 and 24, the necessity for that provision is gone. Once the section is eliminated, the host of confusing cases, including the "bizarre" Corvallis Sand & Gravel v. State Land Board rule (equitable defenses must be asserted in a law

action and cannot be brought as a separate case in equity) are no longer applicable. Mr. Weisensee does correctly point out that one aspect of the law - equity division remains, that is, right to jury trial. ORS 16.462 provided:

> "When such an equitable matter is interposed, the proceedings at law shall be stayed and the case shall thereafter proceed, until the determination of the issues thus raised, as a suit in equity by which the proceedings at law may be perpetually enjoined or allowed to proceed in accordance with the final decree; or such equitable relief as is proper may be given to either party. If, after determining the equities, as interposed by answer or reply, the case is allowed to proceed at law, the pleadings containing the equitable matter shall be considered withdrawn from the case, and the court shall allow such pleadings in the law action as are provided for in actions of law."

Under our rules, the order of proceeding for mixed law and equity issues is left to the discretion of the trial judge, but where there are legal and equitable issues in the same case and the factual questions overlap, the order of trial in effect determines the right to jury trial. Whichever decision maker goes first binds the other as to the common factual issues. The right to jury trial, however, is a constitutional issue under Article I, Section 17, and Article VII, Section 3, of our constitution, and no rule we would make could take away the constitutional right to jury trial. State v. Studebaker Touring Car, 120 Or 254 (1927). The constitutional test is a historical one

which looks to the procedure in the separate courts of law and equity when the constitution was adopted. Moore Mill and Lumber Company v. Foster, 216 Or 204 (1959). Any rule relating to order of trial which we establish would risk setting up an unconstitutional procedure in some circumtances; for example, the language of ORS 16.460 quoted above created situations where apparently the court was told to try equitable defenses first, irrespective of the right to jury trial on common factual issues with a legal claim. C. F. Yellow Mfg. Accept. Corp. v. Bristol, 193 Or 24, 43 (1951). I think the best approach is our Rule 50, which simply leaves this to the constitutional test.

The language suggested by Mr. Weisensee opts for trading the uncertainty of the constitutional test for granting jury trial in every case of mixed legal and equitable issues. This could be done by the Council as it would not be infringing on the right to jury trial by granting the right to jury trial where one might necessarily exist under the constitutional test. The question of extension of the jury trial is a policy matter which is up to the Council.

F. The provisions of Rule 55 C.(1)(a)(i) stating that the clerk may issue subpoenas comes from the existing statute, not the federal rules. It was left in our rules to cover a case where a party is litigating without an attorney. Attorneys can issue subpoenas; however, parties cannot. A party without an attorney would have to

have the clerk issue a subpoena. The reference to proof of service being needed to have the deposition subpoena issued in Rule 55 F.(1) also is necessary to allow a party without an attorney an opportunity to get a deposition subpoena. I agree that this might present some problems if the party seeking the deposition is not sure when the deposition can be served. This would arise so infrequently that I am not sure it is worth changing. If the Council wishes to change this, we could add the following language at the end of the second line of Rule 55 F.(1): "...or a certificate that a notice to take a deposition will be served." On the same grounds, I do not think that the suggested change to Rule 39 A. is necessary. The reference to serving a notice before the deposition subpoena is issued is to provide a basis for the clerk to issue the subpoena, not for the protection of the person whose deposition is being taken.

G. The provision in Rule 21 A. relating to hearing by the court refers only to defenses 1 through 6. The statute of limitations defense, defense 8, discussed in Mr. Weisensee's letter, could not be "tried" by the court. All the court can do is what it could do under a demurrer, that is, look at the fact of the pleading and see if a statute of limitations defense appears. The procedure on defenses 1 through 6 is purposely left general to allow the court discretion in making the factual determination underlying the defense.. For these

defenses, no right to jury trial arises, and the rule requires the court to allow the parties reasonable opportunity to present "evidence and affidavits." I assume evidence would include testimony by witnesses which a party desires to call to establish lack of jurisdiction or capacity, etc.

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: Comments of Orlando J. Hollis

DATE: November 16, 1978

Mr. Orlando J. Hollis of Eugene has submitted a series of worthwhile comments and suggestions relating to our tentative draft of the rules. This memorandum summarizes them for your consideration. This summarization is my own, and may not be completely accurate in stating Mr. Hollis' position. The first section relates to the more substantive questions which should be considered by the Council. The second section lists a group of grammatical and stylistic changes which should be made and which I shall include in the final draft, unless Council members object.

A. SUBSTANTIVE SUGGESTIONS

1. Rule 1 should say that the rules apply to actions filed after their effective date. It would be less confusing to work with two sets of rules in different cases than to have two different sets of rules apply to the same case.

2. Why not say in Rule 1 that references to actions in the rules include special proceedings established

by the legislature. The continued awkward use of "actions and proceedings" in the rules could be eliminated.

3. The reference to a court having jurisdiction of the subject matter in the introductions to Rules 4 and 5 is confusing and unnecessary. Theoretically, a court does not need subject matter jurisdiction to exercise jurisdiction over the person.

4. Rule 6 should be included as a subsection of Rule 4. All the ways of asserting personal jurisdiction should be incorporated in one rule.

5. In Rule 4 F., the assertion of jurisdiction for a deficiency judgment against a person who has had no contact with Oregon, other than purchasing land subject to a mortgage, may exceed constitutional limits.

6. In Rule 5, there is no reference to how property comes within the jurisdiction of the court. There should be some reference to "property specifically described in the complaint filed".

7. In Rule 7 C.(2), is it wise to use one uniform time for response to summons? Doesn't increasing the time from 20 to 30 days for response after service in state contribute to delay? Also, doesn't decreasing

the time for response to summons served outside the United States risk due process objections?

8. The notices to defendant requires in Rule 7 C.(3)(a), (b) and (c) should refer to filing with the "clerk or court admnistrator" rather than with the "court". The lay defendant, for whom this section is intended, might assume court means judge, which is inconsistent with Rule 9 E. Also, under Rule 9 B., the service of subsequent papers must be made on an attorney if a party is represented by an attorney. The required notice does not tell the lay defendant this.

9. The relationship between Rule 7 D.(1), (2) and (3) is not clear. Rule 7 D.(3) sets up a rule of conditional preference for service in several cases, but the first two sentences of Rule 7 D.(1) seem to indicate that this need not necessarily be followed. If the Council intends that the first two sentences of Rule 7 D.(1) be the basic standard and that the service methods described in Rule 7 D.(3) would be prima facie compliance with this standard, why not say so? Also, since 7 D.(2) is designed to describe in detail different ways of serving process, and 7 D.(3) describes how these ways may be applied to individuals, etc., why not make this clear?

10. In Rule 7 D.(2)(c), office service is not necessarily a reliable type of service. Requiring mailing helps but in some types of offices, there is no guarantee that the papers would ever get to the defendant.

11. In Rule 7 D.(3)(b)(ii), shouldn't the availability of alternative methods of service be limited to a situation where you cannot find a person to serve within the state, as opposed to within the county? Wouldn't there be a due process objection when a plaintiff used an alternate method of service, knowing there was a person available for service within the state?

12. In Rule 7 D.(3)(d), Lines 4 and 5, is it clear that the phrase, clerk or secretary, is being used in a technical sense, rather than <u>any</u> clerk or secretary working for a board? Also, should provision be made for service on city attorneys and school board attorneys, as well as district attorneys.

13. In Rule 7 D.(5)(c), the publication of summons four times appears mandatory in every case. Should the court be given some discretion by adding "...unless the court orders Otherwise" to the last sentence?

14. In Rule 7 E., the rule is apparently designed to permit service by employees of an attorney. Should this be made explicit in the rule? A sentence as follows could be added: "An employee of an attorney may serve summons."

15. In Rule 7 F.(2)(a)(iii), lines 2 and 3, referring to a separate endorsement is ambiguous. It would be better to say "as a separate document attached to the summons".

16. In Rule 7 F.(2)(c), what if an official doesn't have a seal?

17. Rule 9 D. still has some problems. First, the introductory sentence is not clear; it refers to a complaint, rather than an original complaint, and does not exempt summons. Secondly, after restoring proof of service, why should a person be authorized to file a paper before service? The sentence should read: "All papers required to be served upon a party by section A. of this rule shall be filed with the court within a reasonable time after service.

18. Is Rule 9 F. necessary? Attorneys regularly file papers that they serve without this specific rule.

19. Does Rule 10 need to be clarified for computing time periods before an event? For example, Rule 32 I. refers to "30 days prior to commencement of an action".

20. The serial comma should be used in all rules.

21. Rules 14 and 16 B. raise a general question of the inadvisability of different local rules in different counties. Rule 14 could be greatly expanded as to the form of motions, supporting authorities and docketing of motions. Rule 16 B. could contain much more detail relating to pleading forms, such as how paragraphs should be numbered and numbering between counts. The Council also should consider the possibility of uniform local rules in some areas. At the very least, a rule should require that all local rules of court be published and circulated to attorneys in the state and be available upon demand to any person who requests a copy of those rules.

22. Why does Rule 15 A. give only 10 days to respond to a counterclaim when a defendant served with a complaint has 30 days? A plaintiff receiving an unexpected counterclaim may need more than 10 days to prepare a response.

23. Rule 15 B.(1), Line 3, and 15 B.(2), line 3, refer to service of a court order. There is no requirement in the rules that orders be served. Who would have the responsibility of service? The rule should say "filing of the order". (Note, Comment 30 below).

24. Rule 15 C. should give 20 days to respond to an amended pleading. For example, when a plaintiff files an amended complaint 22 days after service with additional claims, 10 days is too short a time to respond.

25. In Rule 15 D., Line 3, the reference to giving the court authority to expand the time for "other act to be done" is too broad. The section obviously is intended to refer only to time for pleading or motions. It should read "or allow any other pleading or motion".

26. Rule 16 D. should allow incorporation by reference only of other parts of the same pleading. Authorizing incorporation of statements from other pleadings creates confusion and complicated paper shuffling.

27. The last sentence of Rule 19 D. is not clear in authorizing denials by paragraph. It refers to specific denials of indicated paragraphs but denying an entire

paragraph is a form of general denial.

28. Paragraph 19 C. The second line refers to allegations in a pleading to which a responsive pleading is "required"; the fifth line refers to pleadings which are not "required or permitted". This is not consistent. Also, the statement that allegations in a pleading where no responsive pleading is required are taken as "denied" is too narrow. It should be "denied or avoided" or "controverted". For example, a defendant may wish to avoid new matter asserted in a plaintiff's reply. This would not change the requirement that a reply be filed to assert new matter because Rule 13 C. "requires" a filing of such a reply, and the answer is thus a pleading to which a responsive pleading is required. Once Line 5 is changed, the entire last clause could be omitted.

29. Why are Rules 20 I. and J. limited to real property? The same requirement of naming unknown heirs or persons would apply to personal property. Rule 5 provides quasi in rem jurisdiction for real and personal property. The reference should either be simply to "property" or to "real or personal property". (Note, Rule 5 E. relating to publication has a cross reference to these two sections).

30. In Rule 21 D., Line 10, the reference to "notice of the order" should say "filing of the order". (See Item 23 above).

31. In Rule 22 A., Line 2, why is it necessary to refer to "legal and equitable"? Under Rule 2, all procedural distinctions are abolished and simply stating that a defendant may assert all counterclaims would be sufficient. The same point applies to Rule 24 A., Line 3, also.

32. Rule 16 D. and Rule 24 C. both retain the existing requirement of separate statements of claims and defenses. ORS 16.080 provides that the procedure for objecting to a pleading for failure to comply with this requirement is a motion to strike. This is not clearly indicated in these rules. It could be done by adding the following to Rule 21 E.(1): "...or any pleading containing more than one claim or defense, not separately stated."

33. The reference to bailee in Rule 26, line 3, is inappropriate. The position of the bailee is not the same as the other parties described in the rule.

34. In Rule 28 B., the relationship of the last clause to the rest of the sentence is unclear. If the

clause is read as describing action available to a judge as a result of "the inclusion of a party against whom he asserts no claim" etc., it is merely repetitive of the first part of the sentence. The last clause probably was intended to give the judge authority to order separate trials in any joinder situation not merely conditioned upon claims not affecting all parties. This would be more clear if a period were placed after "him" in the fourth line and the last clause became a sentence as follows: "The court may order separate trials or make other orders to prevent delay or prejudice."

35. In Rule 29 B., reference to "equity and good conscience" seems inappropriate for a joinder decision. Why not use "under the circumstances"? Also, the last part of the first sentence is awkward. It should say, "...or should be dismissed because the absent person is deemed to be an indispensable party."

36. The Council has in one respect taken a step backward in Rule 31. The existing interpleader statute, ORS 13.120, describes a procedure that will allow a stake-holder to be dismissed upon deposit of the fund with the court and a representation made that no claim is asserted to the fund. No similar procedure is described here. Also,

the rule ought to require the stakeholder to deposit the fund or put up a bond.

37. Rule 32 B. would be more clear if the words "the court finds that" were added before "the prerequisites" in the second line and the word "that " added before the colon. Rule 32 B.(3)(f) is awkward and does not fit the rest of the series. Why not just say: "(f) the probability of sustaining the claim or defense". The court would have authority, if it wishes, to hold a preliminary hearing on any of the matters listed above, and why slant this factor against the maintenance of the action?

38. Is Rule 32 C. necessary? The court could always do this, and no special provision is necessary.

39. In Rule 32 D., top of Page 70, line 1, it should say "order <u>after</u> <u>hearing</u> whether". Surely, a decision of this nature would require a hearing. In Lines 3 and 4 of 38 D., on Page 70, the reference to "conclusions thereon" does not make sense. It should be "conclusions of law".

40. In Rule 32 E., who pays the expense of the notice of dismissal? Since this is an outright dismissal,

not a settlement, it should require the plaintiff to pay the costs. In Rule 32 E., Line 8, "if there is a showing" should be "if the court finds". The party should be required to prove this to the court's satisfaction, not simply make a showing. Also, in the last line of Rule 32 E., "before such class member may reasonably file an individual action" should be added before the comma. The statute of limitations "may run" in every case.

41. In Rule 32 G.(2), the form for request ought to include notice to the class member of the failure to respond. The consequences set out in Rule 32 G.(3) are quite serious, and a lay person receiving a paper entitled "request" may not see any compelling need to respond.

42. In Rule 32 I.(1)(a), "alleged cause of action" should say "alleged basis of the claim". In Rule 32 I.(2), why is there a provision for service on the Secretary of State? This is inconsistent with the approach taken in Rule 7.

43. Why shouldn't Rule 32 M. refer to consolidation rather than coordination? Under Rule 32 M.(1)(b), the cases would all be heard by one judge. Also, the coordination decision itself in Rule 32 M.(1)(a) ought to

be limited to an appellate judge. Finally, once that judge decides consolidation is appropriate, why send it back to the chief justice to select a hearing judge; why not have Rule 32 M.(2) say that the judge assigned for the consolidation decision, who would be completely familiar with the situation, is authorized to select a judge to hear the case.

44. Is the last clause of Rule 32 N. consistent with Rule 32 G.(3)? In Rule 32 G.(3), a class member who fails to make a required statement has his claim dismissed. Under Rule 32 N., the judgment is supposed to state an amount received. Is a person with a dismissed claim no longer a class member? Is a separate judgment entered dismissing claims of class members who fail to comply with Rule 32 G.?

45. In Rule 33 B., even though a statute grants a right to intervene, there should be some requirement that the intervention be timely. Why not change "at any time before trial" to "if asserted a reasonable time before trial".

46. Rule 34 does not adequately cover a transfer of interest. Rule 34 A. says the proceeding shall not abate on a transfer, but there is no provision for substitution in the case of a transfer; Rule 34 B. deals with

death, and Rule 34 C. with disability. (Note, we could use the language of Federal Rule 25(c) as follows:

> "Transfer of interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs theperson to whom the interest is transferred to be substituted in the action or joined with the original party."

47. Does Rule 36 B.(2)(a) authorize the discovery of the existence and limits of insurance from another party or from anyone? Since the latter portion of the paragraph creates a duty for a "party" after the request, shouldn't the discovery of existence and limits say "from another party"? In any case, this should be clarified.

48. In Rule 37 A.(1), Lines 6 and 7, why does the rule refer to petitioner's agent rather than the petitioner's attorney, and why must the petition be verified? Why not just say, "The petition shall comply with Rule 17".

49. Why allow depositions to be filed under Rule 39 G.(2)? The local federal district court has eliminated filing of depositions.

50. The first sentence of Rule 45 A. is very unclear. The main problem is the reference to an admission of a matter relating to a statement of fact. I realize this was taken from the federal rule, but wouldn't modifying the language in ORS 41.626 be much more clear:

> "After commencement of an action or proceeding, a party may serve upon any other party a request for the admission by the latter of the truth of relevant matters within the scope of Rule 36 B.(4) specified in the request, including facts or opinions of fact, or the application of law to fact, or of the genuineness of any relevant documents or physical objects described in or exhibited with the request."

51. The requirement of a court order to establish admissions in Rule 45 B. is a step backward. It requires a useless expenditure of judicial time and adds expense for the parties.

52. In Rule 46 B.(2)(b), the reference to "introducing designated matters in evidence" is not clear. One introduces evidence, not "matters", and should read "offering designated evidence".

53. The last paragraph of 46 B.(2) should be renumbered. At present, it appears to be part of Rule 46 B.(2)(e). It could be made Rule 46 B.(3) and the first

sentence read:

> "Payment of expenses. In lieu of any order listed in subsection 2 of this section..."

This assumes that the present reference to "foregoing" orders only refers to orders by a judge in the court where the action is pending.

54. In Rule 51 A., line 2, "controverted" should be "denied". Strictly speaking, controverted includes avoidance and upon avoidance, no fact issue is raised until an opponent denies the new material.

55. In Rule 52, the rule actually deals with postponement, not continuances. The title should be "postponement of trial", and Line 3 should be changed to refer to postponements, not continuances. Also, by substituting Rule 52 for ORS 17.050, a valuable procedure is lost. The following should be added as the second section of Rule 52:

> "B. Absence of evidence. If a motion is made for postponement on the grounds of absence of evidence, the court may require the moving party to submit an affidavit stating the evidence which the moving party expects to obtain. If the adverse party admits that such evidence would be given and that it be considered as actually given at trial, or offered and overruled as improper, the trial shall not be postponed. However, the court may postpone the trial if, after the adverse party makes the admission described in this section, the moving party can show that such affidavit does not constitute an adequate substitute for the absent evidence. The court,

> when it allows the motion, may impose such conditions or terms upon the moving party as may be just."

56. In Rule 54 A.(1), there is no judicial act required at all. In subsection 54 A.(2), the judicial action is referred to as an order. In the first two sections of 54 B.(2), reference is made to a motion for dismissal. In subsection 54 B.(2), reference is made to the court dismissing the case and in Rule 54 B.(3) to an order for dismissal. On the other hand, subsection 54 B.(1) refers to a judgment against the plaintiff. In all cases, this is the final action in the case, and for res judicata and other purposes, this would ordinarily be referred to as a judgment. For persons examining the record, such as an abstracter looking at the record in a case filed relating to title to property, the present rule makes the effect of the final action ambiguous. I would suggest that in subsection A.(1) a sentence be added that says: "Upon notice of dismissal or stipulation under this section, the court shall enter a judgment of dismissal." The other references to dismissal listed should be changed to reference to a judgment of dismissal. I also object to

the decision to make a judgment of dismissal with prejudice unless the court states otherwise. For a person examining the record, the most logical assumption would be that if nothing is said, there is no prejudice. Finally, the reference in subsection B.(3), Line 3, to an "adjudication on the merits" would be more clear if the words "judgment with prejudice" were used.

57. For purposes of clarity, the first sentence of subsection 54 B.(1) should be a separate subsection. It deals with a completely different subject than the rest of the subsection.

58. The last sentence of revised Rule 54 C. is unnecessary and misleading. The first sentence already makes the 5-day limit apply to subsequent claims. Also, there is no reference in the second sentence to a pending counterclaim. A third party defendant can assert a counterclaim and the same standard should be applied to third party defendants that is applied to original defendants.

59. In Rule 55 A., first line, the summons is not process. Why not begin the sentence by saying: "A subpoena is a writ or order directed...".

60. In Rule 55 D.(2), could the OLCC Enforcement Division be added to the list of agencies to which the

procedure is applicable.

61. Rule 56 would read better if the first sentence were changed as follows: "A trial jury in the circuit court is a body of 12 persons drawn as provided in Rule 57." The second sentence then could be eliminated.

62. In revised Rule 57 D.(3), the present statutory language does not make clear whether peremptory challenges must be oral or written or whether they are revealed to the jury. I believe uniform practice is to exercise peremptory challenges by secret ballot. Why not add a sentence that says: "Peremptory challenges shall be made in writing, and the identity of the party making the challenge shall not be revealed to the jury." In Rule 57 F., I feel very strongly that 6 alternate jurors are too many for any case. No case would justify the expense and waste of juror time.

63. In Rule 58 B.(1), some attorneys claim that if a plaintiff or defendant fails to "state a cause of action or defense or counterclaim" in their opening statement, the opponent is entitled to a directed verdict. The Oregon Supreme Court has held this is not true, but to avoid any problem, why not say: "The plaintiff shall concisely

state plaintiff's case and the issues to be tried; the defendant then in like manner shall state defendant's case based upon any defenses or counterclaims."

64. In Rule 59 C.(1), the sumission of exhibits to the jury should be mandatory. Why not say "shall" instead of "may" at the beginning of Line 2.

65. Rule 59 C.(3) does not clearly authorize the taking of notes by the jury. It should read: "Jurors may take notes of testimony or other proceedings on the trial and may take such notes into the jury room".

66. Finally, I suggest that one thing that should be included in the rules which would be very helpful, and which is presently included in ORS, is an official form of citation. I suggest that the following be added to Rule 1: "These rules may be referred to as ORCP and may be cited, for example, by citation of Rule 7, section D., subsection (3), paragraph (a), subparagraph (i), as ORCP 7 D.(3)(a)(i).

B. GRAMMATICAL AND STYLISTIC CHANGES

1. Rule 4 E.(3), Line 3; change "ship" to "send".

2. Rule 4 E.(4), Lines 2 and 3; change "shipped"

to "sent".

3. Rule 4 L., Line 7, change "B. to L." to "B. through K."

4. Rule 4 M., Line 4, and Rule 4 N., Line 3; change "B. to L." to "B. through L.".

5. Rule 4 N., Line 5; change "rule" to "rule or other rule or statute".

6. Rule 7 C.(1)(b), Lines 3 and 4, change "shall notify" to "a notification to".

7. Rule 7 C.(3)(a), Line 3, and 7 C.(3)(b), Line 3, and 7 C.(3)(c), Line 3; change "notice in a size equal to" to "notice printed in a type size equal to".

8. Rule 7 D.(5)(d), third line on Page 10; change "and" to "or".

9. Rule 7 D.(5)(e), Line 12; delete "the" before "favor".

10. Rule 7 F.(2)(a), Line 2; change "of" to "or".

11. Rule 7 F.(2)(a)(i), Line 8; change "is" to "was".

12. Rule 7; add section 7 I., Telegraphic transmission, from the tentative draft, to the revised draft as section 7 H.

13. Rule 8 A., Line 5; change "summons" to "summonses".

14. Rule 9 B., Line 2; insert ",if that party is" between "party" and "represented".

15. Rule 9 E., Line 11; change "is" to "are".

16. Rule 10 B., Line 2, on Page 35; change "has been" to "is".

17. Rule 15 C., Lines 1 and 2; change "plead in response" to "respond".

18. Rule 16 D., in title; remove "; exhibits".

19. Rule 17 A., second sentence; change to read "If a party is represented by an attorney, every pleading of that party shall be signed by at least one attorney of record in such attorney's individual name".

20. Rule 19 A., Line 2, on Page 43; change "its allegations" to "the allegations of an opponent's pleading" and in the third line insert "of all of the allegations of an opponent's pleading" between the words "denial" and "subject".

21. Rule 20 D.(2), Line 5, insert "or number" after "may".

22. Rule 21A., Lines 5, 14 and 20, add words "to

dismiss" after "motion".

23. Rule 24 B., Lines 1 and 2; change "action" to "claim" and in Line 4 eliminate "now".

24. Rule 24 C., Line 1; change "united" to "joined".

25. Rule 32 J.(3), Line 2; change "given" to "furnished".

26. Rule 32 K., Line 6, Page 75; change "I" to "J".

27. Rule 32 O., Line 2; insert "attorneys" between "any" and "fee".

28. Rule 33 A., Line 6; change "anything" to "something".

29. Rule 46 A.(1), Lines 5 and 8; change "judicial district" to "county".

30. Rule 46 A.(2), Line 9; change "inspection" to "discovery".

31. Rule 46 B.(1), Line 1, on Page 126, and Lines 1 and 3 on Page 127; change "judicial district" to "county".

32. Rule 46 B.(2), Line 7; change "and" to "including".

33. Rule 46 B.(2)(e); change to read as follows:

> "Any orders listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A. requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination."

34. Rule 51 C.(2), Line 1, change "upon motion of its own initiative" to "upon motion of a party or on its own initiative".

35. Rule 51 D., Lines 2 and 6, change "by" to "to"; Line 5, change "with" to "to"; Line 3, change "upon motion or of its own initiative" to "upon motion of a party or on its own initiative"; Line 5, change "has" to "shall have".

36. Rule 55 C., Line 14; change "judicial district" to "county".

37. Rule 55 D.(2)(c), Line 6, change "contact" to "promptly notify" and insert "postponement or" before "continuance".

38. Rule 55 D.(3), Line 2; change "in the" to "proof of".

39. Rule 55 E., title; change "witness' obligation to attend" to "obligation of witness to attend".

40. Rule 55 E.(2); change "purposes of testimony" to "purpose of giving testimony".

41. Rule 58 B.(5); eliminate "; and the court may extend such time beyond two hours".

42. Rule 59 D., Line 2, change "desires" to "indicates a desire".

43. Rule 62 F., Lines 2 and 3, change "the findings of the court upon the facts" to "the court's findings of fact".

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: SUBMISSION TO THE LEGISLATURE

DATE: November 17, 1978

Once the rules themselves and ORS sections replaced have been finally determined, we still have to decide how to submit modifications in other ORS sections to the legislature. To check how the new rules might affect other portions of ORS, we ran approximately 130 words describing basic procedures in the areas being changed and approximately 150 ORS section numbers affected by the new rules through the legislative OLIS computer word search program. The result was a stack of computer print-outs 15 inches high containing thousands of references to ORS sections. Each reference has to be checked manually to determine if the rules might require some change. The status of this work is as follows:

1. All the law-equity changes were identified and submitted to the legislative counsel. You have received copies mailed to you with a memorandum dated July 14, 1978. The changes eliminate a large number of references to suit, equity, and decree. Approximately 110 other changes are more substantial, falling into categories described in the

memorandum. Of these 110 changes, approximately 60% are probably rules of procedure, but it is extremely difficult to tell in some cases. The legislative counsel has made almost no progress in relation to this material.

2. The print-out related to process has all been checked and changes considered by the Council. The Council decided not to modify service of process on state officials at this time and is considering 13 miscellaneous changes.

3. The print-out relating to pleading has almost been completed, but no changes have been prepared or submitted to the Council.

4. In the process of preparing the rules, eight other procedural changes and two substantive statute changes were identified in memoranda to the Council.

5. The print-out for joinder, discovery, and trial have not been checked. This comprises approximately two-thirds of the words searched and one-half of the print-out.

I propose that we do the following in this area:

(1) For those process and miscellaneous procedural changes identified, they be listed in our submission as modifications. For those substantive statutes to be changed,

we add them to our submission in bill form and ask the judiciary committee to introduce them. Our submission would then include:

(a) New rules and comments

(b) ORS sections superseded

(c) ORS sections amended

(d) Suggested legislation

Note, superseded and amended are the words used in ORS 1.735.

(2) That I attempt to finish the pleading print-out and furnish needed changes to you by December 15; that I also identify those words remaining, most likely to indicate an ORS section needing change: for example, procedures abolished, such as, nonsuit. These changes as approved could then be added to the statutes amended or superseded or suggested legislation sections of our submission. Rather than identifying all cross references, we could submit a suggested statute authorizing legislative counsel to change the cross references in ORS. See Appendix A. How much can be done is questionable. In the last two weeks, I have had absolutely no time to work on this, and before December 2nd a final draft of the rules must be prepared. We could try to check the rest of the print-out before the time for submission of bills to the legislature has expired, and if any

crucial needed changes appear, submit them as bills. Again, how far this can be accomplished depends upon other time demands.

(3) Rather than attempt to decide how much of the law-equity changes are procedural, I suggest we request a general statute authorizing pure language changes (see Appendix B) and submit the 110 other changes as bills. The preparation of these changes, however, probably exceeds our secretarial capacity. I had hoped this would be done by legislative counsel. They have had the changes since late summer, but at this point have not done this nor even finally agreed to do it. If they would do the typing, we could attach them to our suggested legislation. If not, we probably can get them typed before the time expires to submit bills to the legislature.

The policy questions presented are: (A) to what extent are we willing to have what may be changes in procedural rules submitted to the legislature as statutes and (B) to what extent can we tolerate the risk of some ambiguity in other ORS sections until the next legislature.

APPENDIX "A"

For the purpose of harmonizing and clarifying the Oregon Revised Statutes to the provisions of the Oregon Rules of Civil Procedure, the legislative counsel is authorized to substitute references to the appropriate Oregon Rules of Civil Procedure for references to Oregon Revised Statutes sections repealed or amended by actions of the Council on Court Procedures, which go into effect by virtue of ORS 1.735.

APPENDIX "B"

For the purposes of harmonizing and clarifying the Oregon Revised Statutes to the provisions of the Oregon Rules of Civil Procedure eliminating the procedural distinctions between actions at law and suits in equity, the legislative counsel may substitute:

(1) For words designating suit(s) or suit(s) in equity, words designating action(s)

(2) For words designating action(s), suit(s) and proceeding(s), words designating action(s) and proceeding(s)

(3) For words designating decree(s), words designating judgment(s) and adjudge(s)

(4) For words designating judgment(s) and decree(s) or decreed and adjudged, words designating judgment(s) and adjudged

(5) For words designating action(s) at law, words designating action(s)

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ORVAL ETTER
OF COUNSEL

November 3, 1978

Mr. Fred Merrill
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, OR 97403

Dear Fred:

Fully aware that some of the following comments are nitpicking, some naive, and some probably unfounded, I send them to you with the hope you can overlook the shortcomings and find some of them useful. Putting together a new set of state rules for civil procedure is an awesome task, and perfection in achieving consistency, coherency, and wellfoundedness is impossible. You, the members of the counsel, and your staff (which I understand to be at most skeletal) deserve the praise and thanks of all Oregon lawyers and litigants.

I have divided my comments into three broad categories. First, I have listed various typographical errors and grammatical mistakes, knowing that you have probably already caught most of them. Second, I list a small number of stylistic problems in this draft of the rules, about which I am aware there can be some controversy. Many of these stylistic decisions are a subjective call in the last analysis anyway. Third, I have listed several substantive questions about some of the major policy decisions that have gone into the rules. It is probable that all of these substantive questions have been discussed by the Council already, but I feel strongly enough about them that I wish to express my opinion while there is still a chance of shaping the final version of the rules.

PART I. <u>TYPOGRAPHICAL AND GRAMMATICAL MISTAKES</u>.

Rule 3: In line 2, the word "commenced" is misspelled.

Rule 4: On page 9, in the tenth line the word "if" is repeated. In line 12 the word "on" is left out after the word

"date." In the comment to Rule 4, on page 10, in the first line the word "to" should be moved so that it follows "(a)."

Rule 7: In Section D., line 7, the word "served" is misspelled.

Rule 9: In Section E., line 11, the word "is" should be changed to "are."

Rule 10: In Section A., line 12, the word "this" is misspelled.

Rule 20: In the fourth line of the comment, the word "archaic" is repeated.

Rule 21: In Section A., line 10, the second occurrence of "process" is misspelled.

Rule 28: In Section B., line 3, the word "expense" is misspelled.

Rule 31: In line 11, the word "provision" should be plural.

Rule 32: In subsection B.(3), line 5, the word "question" should be plural. In subsection I.1, line 1, the word "commencement" is misspelled.

Rule 37: In subsection A.(1), page 90, in the sentence preceded by "(d)," the word "is" should be changed to the word "are." In the comments to Rule 37, second paragraph, line 6, the word "by" should be changed to the word "be."

Rule 39: In Section E., line 2, the word "a" should be inserted before the word "deposition."

Rule 46: In subsection A.(2), second paragraph, line 2, the word "may" should be inserted before the word "make."

Rule 59: In subsection F.(2), line 1, the word "the" should be inserted before the word "jury." In subsection F.(2), the word "the" should be inserted before the word "jury."

PART II. STYLISTIC PROBLEMS WITH THE DRAFT RULES.

1. Remnants of Sexism. The drafters of these rules have done a good job of eliminating 90% of the unconscious and now offensive use of the male pronoun and other male oriented "neutral" terms. But in a few rules, no elimination of such terms was made at all, and in a few other rules an occasional lapse occurs. The change should be made completely for two reasons. First, the use of male pronouns will only grow more offensive as the years pass, and the best time to eliminate them all is now. Second to have eliminated 90% and left 10% shows a less than comprehensive

review of the rules as a coordinated whole. I doubt if I have found all of them, but here is a list of the lapses I have discovered:

Rule 17: Section A., line 5, there occurs a "his."

Rule 22: In subsection C.(1), there is a "him" in line 5, a "he" in line 7, "he" occurs twice and there is also a "his" in line 8; amd "his" occurs twice in line 12, page 54.

Rule 28: Section B., line 3 contains a "he," line 4 contains a "him."

Rule 32: In Section E., line 10, there occurs a "his." In paragraph M.(1)(b), line 4 on page 76, the word "manpower" is used. It should be replaced by the word "personnel."

Rule 37: In Section B., line 14, there occurs a "he."

Rule 44: In the case name in the comment, there should be a period after "rel."

Rule 46: In Section D., line 6, there occurs a "his."

Rule 54: In Section E., line 4, there occurs a "him."

Rule 55: In Section G., line 7, there occurs a "his."

Rule 57: In paragraph B.(5)(a), line 12 contains a "his," line 14 contains a "his" and a "him," line 15 a "him," and line 17 a "his."

Rule 59: In subsection C.(5), the first line on page 159 contains "himself." In subsection C.(6), line 3 contains the word "fellow" which should be changed to "other."

2. The Serial Comma. I question the wisdom of the drafters of the rules in leaving out most serial commas. The serial comma is the comma separating the penultimate member of a series or list of equal sentence components from the last member. An ambiguity arises whenever some members of the series are compounds of words themselves. As a result, it is sometimes not clear if the final "and" applies to the entire list, or only to the last two members. The present draft of the rules sometimes uses the serial comma, and sometimes omits it.

I realize that at this point it would be a great deal of effort to put them all back in. Nevertheless, if the rules are to be truly excellent, this step should be considered. See Elementary Rule of Usage #2, in Strunk and White's The Elements of Style, (1972). The Federal Rules of Civil Procedure use the serial comma throughout.

3. Split Infinitives. Split infinitives are sometimes necessary either to avoid ambiguity, or to provide an especially forceful expression of an idea. Most of their occurrences in this draft of the rules are justified by neither of those needs. I suggest that they all be eliminated. Though it may seem snooty, high-toned legal writers sneer at the unconscious use of the split infinitive. This attitude, though well established by custom, may not be justified historically, or so I understand. I have been told that the grammatical rule against split infinitives in the English language arose as a result of a poorly informed pedantic attempt to conform the English translations of Latin passages to the grammatical structure of the Latin. The infinitive in Latin is always a single word. When it is translated into English, it of course becomes at least two words. To allow the English infinitive to be split by the insertion of a word translated from somewhere else in the Latin, was to mar the one-for-one correspondence between Latin grammar and semantics and English grammar and semantics. Whether this explanation is historically accurate, I do not know. I know only that split infinitives in English are frowned upon by strict grammarians and high-toned legal writers. A good discussion of the proper and improper use of the split infinitive may be found in Fowler's Modern English Usage, (2d edition, 1965), on pages 579-582.

Split infinitives occur in this draft of the rules in the following places:

In the introduction, second paragraph, line 4.

Rule 7: In Section H., lines 1 and 2, there is a carry-over split infinitive.

Rule 36: In the second line on page 83 there is one; then on page 86 in the first line of paragraph B.(4)(d) there is one; and in the third line of paragraph B.(4)(f) there is one carried over from the second line.

Rule 55: In paragraph B.(2)(c), line 3, occurs the worst example of a split infinitive in this draft of the rules. The words "to actually notify" should be changed to read "to give actual notice to."

4. The Ambiguous Use of the Word "Person". (What I have to say about the word "person" also applies in many cases in the rules to the use of the word "party." I think it matters less that the word "party" is ambiguous, but the Council might want to assign someone to look at this problem.) In about twenty-five percent of the rules the word "person" occurs; yet it is never defined. Sometimes, it is obvious that it means to include all legally cognizable entities including individuals, corporations, partnerships, and so on. At other times, it is fairly clear that

it means only natural persons, and not corporations, etc. Sometimes, it is ambiguous. I cannot tell now whether any of these ambiguities could cause problems, but it would be so simple to go through now and make the meaning explicit at each occurrence of the word, that it would be silly to risk future lawsuits arising from the ambiguity of this word.

The ambiguity will probably matter most in the rules concerning personal jurisdiction, and in the rules where residence or presence within the state matters.

5. Miscellaneous Ambiguities and Passages Difficult to Comprehend. The following is a list of places within the draft where there are inconsistent or ambiguous uses of language, or passages that I could not understand on the first couple of readings. I am fully aware that the latter problem may be a result of my own ignorance, rather than the language of the draft. Nevertheless, for what they are worth:

Rule 2: In line 4 there is a reference to "the" constitution. It seems to me that leaving the definite article in front of the word could imply that only the state constitution is referenced, or perhaps only the federal constitution. I suggest the passage be changed to read "the federal or state constitution."

Rule 4: In subsection A.(5), the word "specifically" should be moved to a position after the word "consented." As is, its most natural meaning is that the defendant has consented rather than done some other act. You mean that the defendant has consented in a focused and particular manner to the exercise of personal jurisdiction. In subsection I.(1), the word "risk" occurs, while in subsection I.(2) and I.(3) the phrase is "risk insured." Is there a distinction meant between the former and the latter? In Section M., line 6, I think that the phrase "immaterial under this subsection" should read "immaterial under the substantive law." This may be one of the places where it is my lack of understanding of the law, rather than an awkwardness in the language of the draft, that causes the problem.

Rule 24: In Section B., the title should read "forceable entry and detainer; rental due."

Rule 34: In Section D., line 6, I find the use of the word "suggested" odd.

Rule 36: In paragraph B.(4)(b), the word "only" in line 1 should be moved to line 3 and inserted between the words "trial" and "upon." You do not mean to restrict the parties to obtaining, as opposed to doing other things such as retaining, searching for, and so on; rather, you mean to put constraints upon the times when a party may obtain the discovery.

Rule 37: In subsection A.(1), on page 90, in the third line from the bottom, a very awkward phrase occurs. I suggest that the last sentence of subsection A.(1) be changed to read as follows: "The petition shall name the persons to be examined, and ask for an order authorizing the petitioner to take their depositions."

PART III. SUBSTANTIVE PROBLEMS.

Rule 4: I think there are two problems with the language the Council has chosen to implement their versions of personal jurisdiction. First, paragraph A.(1) is both poorly drafted and probably unconstitutional. It is not clear whether the word "present" means "physically present within the state" or whether some kind of "constructive presence" would be comprehended by the paragraph's language. Since the philosophy behind Rule 4 is to be as specific and detailed as practical in describing the kinds of activities which will give rise to personal jurisdiction, this ambiguity should be cleared up. Second, if this language means to include a person accidentally straying into Oregon's air space, or unavoidably flying over the state as a result of a purely fortuitous air route between two non-Oregon points, then I think such an extended reach of personal jurisdiction would be found unconstitutional under Shaffer v. Heitner.

The other problem with Rule 4 is much more serious, I think. The comment to Rule 4, Section 4L., expresses the intent behind the rule to be to stretch jurisdiction to the limits of due process. I think the language of the rule fails to do that in Section L. The problem arises from the words "fair and reasonable." If that phrase, and those words, are read to qualify the "minimum contacts" about which this section is concerned, then they may serve as a vessel for statutory constraints above and beyond the absolute minimum required by constitutional due process. Even the use of the phrase "minimum contacts" may someday be read to require something more than the absolute minimum constitutional due process requirement. Section L. should be changed to read simply: "Not withstanding the foregoing specified instances when personal jurisdiction may be exercised over a defendant, the courts of this state may exercise personal jurisdiction over a defendant in any circumstances where neither the federal nor the state constitution forbids it."

Rule 5: In Section A., the last sentence creates a serious problem. First, it refers to "this subsection" when the rule contains no subsection. The paragraph headed by "A" is properly called a section. Second, the sentence says that this section shall apply when any such defendant is unknown, and I assume that means this section shall apply "only" when any such defendant is unknown. If it does not mean that, then it should read "shall also apply when any such defendant is unknown." However it

should read, it seems to contradict the first paragraph of Rule 5. A judgment in rem may affect the interests of a defendant only if that defendant has been served. It seems to me that if the defendant is unknown then the defendant could not have been served, unless there is some way to "serve" unknown defendants. The result of combining the two restrictions seems to be that jurisdiction in rem under Section A. may be obtained only when the defendant may not be served, and if the defendant may not be served then the judgment in rem would not affect the defendant's interest. It seems to me there is a futility involved in this reading of Rule 5.

Rule 17: I would like very much to see the Council add some kind of penalty to Rule 17 for violation of the last sentence of the rule. It is common knowledge among the bar, and among law students, that a good portion of the pleadings filed in the courts of this state are filed solely for the purpose of delay, and that a smaller though still substantial portion are filed for the purpose of harrassment. Requiring the signature of the person filing the pleading seems to be far too mild a deterrent to this practice. This Council obviously has authority to include penalties for violation of the rules within the rules themselves, because such penalties have been included in the discovery provisions. I would urge similar penalties involving cost recoveries be inserted to add teeth to Rule 17's admonishment against harrassment and delay. Without such penalties, Rule 17 will be widely seen as a joke, and will encourage hypocrisy.

Rule 21: By inserting subsection G.(3) in Rule 21, without change, the Council has missed a great opportunity to take an historical step in the rationalization of jurisdiction. The old notion that "subject matter jurisdiction" contains some mythical or metaphysical power, without which a court may not settle a dispute between the parties, is a fiction the Oregon Bar should abandon at this opportunity. When the parties have both invested much time and effort in a case, whether that case has gone to trial or not, and neither can show actual prejudice from the fact that the "subject matter jurisdiction" of the court was improper, then who should complain of the lack of subject matter jurisdiction? The taxpayers should complain of the wasted amount of court time, if the parties are told to start all over again in another court. The litigant who is hurt, or both litigants if they are both hurt, by the dismissal of their case, should complain for the manifest injustice involved in having to start over. To preserve this meaningless rule in the new Oregon Rules of Civil Procedure is a mistake the Council should rectify while there is still time.

Rule 32: I have several substantive questions about the new rule on class actions. First, in subsection B.(3), I object to the second sentence which lays down the rule that common questions

of law and fact do not "predominate" if adjudications of the claims of class members will be necessary, "unless the separate adjudications relate primarily to the calculation of damages." There seems to be no reason to pick out the single issue of damages, and decide that it and it alone is the only separately adjudicated issue which will not block a class action. In some cases that may appropriately be class actions, for example the litigation over the Dalkon Shield, many issues contain common questions of law or fact, such as the conspiracy to deceive the doctors, the inherent dangerousness of the IUD, and so on, and there are only two issues that need to be litigated separately: damages, and causation. It seems an arbitrary rule to block a class action on a device like the Dalkon Shield when all of the policies of a class action would be served thereby. I think subsection B.(3) should be changed to give the court discretion to permit a class action to go ahead in any case where there are one or more issues common to all the plaintiffs or all the defendants which would be grossly inefficient to litigate separately. Certainly to say that if there is more than the single issue of damages to be litigated separately that no class action is appropriate, is too harsh a rule.

Another problem I have with Rule 32 is the purpose of Section C. First, the apparent consequence of a court decision to maintain an action under subsection (3) rather than subsection (2) would be that the notice of Section G. is required. Why such notice is now required for subsection (2) class actions, I do not understand. If Section C. is meant to state that a class action brought under subsection (3) which does not seek damages, but only declaratory or injunctive relief, should be brought under subsection (2) so that the notice requirements of the subsection (3) action are avoided, then Section C should say so directly rather than in a roundabout fashion.

In subsection G.(1) of Rule 32, the second sentence contains a trap that will block many otherwise appropriate class actions. "The reasonable effort" test applies only to the identification of members, not to their notification. It may be quite cheap to identify the members of a class, but if the class is numerous and widely dispersed, it may be highly unreasonable and costly to send notice to all of them. Nevertheless, the second sentence seems to remove from the court's discretion the decision to send individual notice or not to all identified members of the class. This sentence should be modified.

Rule 42: Defining what a "question" is will generate many battles, no doubt, but one battle could be anticipated and resolved now: Is a request for the statement and report of experts (or each expert) allowed under Rule 36 one of the 30 questions of Rule 42?

Rule 45: The first problem I have with Rule 45 is a rather petty objection to the ambiguity involved in the word "request." Does that word refer to the entire list of questions sent to the other side, or does it refer to the individual questions sent to the other side? The language of the rule uses the word for both indiscriminately. It seems unnecessary awkwardness that could be removed without much effort.

The next problem is more serious. In Section D. the last sentence lays down some law about res judicata which seems to me to be wrong. If a defendant makes an admission in response to a request for admission, and that admission leads the court to find liability against that defendant, then a subsequent second plaintiff under the law of collateral estoppel should be able to use the judgment entered in the first law suit against that defense. Does the last sentence of Section D. mean to change that rule? If it does not mean to change the rule, then it should be rewritten to say so clearly.

I have another problem with respect to Section B. of Rule 45. On page 122 the second full sentence states: "The order shall be granted unless the party to whom the request is directed establishes that the failure was due to mistake, inadvertence or excusable neglect." This sentence seems to give away too much to the party seeking to avoid the request for admission. A failure to respond will always be a mistake or the result of inadvertence. I think the drafter of the sentence was probably thinking that the mistake or inadvertence would be an excuse to the refusal to admit a request for admissions rather than the failure to answer at all.

Rule 62: The Council should take this opportunity in the history of Oregon procedure to correct what has become a practical difficulty making many appeals from trials where a judge is sitting alone as factfinder a charade. Many attorneys, and especially many experienced trial attorneys, do not ask a trial judge to make findings of fact and conclusions of law, because they feel it prejudices the judges against them and does them more harm than good. The judges are thereby tempted, and quite often succumb to the temptation, to make only minimal rulings or judgments, without giving any reasons whatsoever. For example, our firm is right now in the midst of appealing from a judgment issued by Judge Rodman, of the Lane County Circuit Court, in a case which involved a five-day trial, many issues of disputed fact, and many complicated issues of law. Both sides realized it would be a tremendous burden upon Judge Rodman to make detailed findings of fact and conclusions of law and so neither side requested such work before the trial began. Judge Rodman's judgment, however, is a single paragraph on one page saying merely that the plaintiff wins on the first cause of action, and loses on the second cause of action. There may well be reversible error involved in reaching either of those conclusions. Either

or both of them may be supported by findings of fact. The appellate court, and the attorneys for both sides, can do nothing but speculate about what went on in Judge Rodman's mind. It seems to me that this violates the spirit and probably the letter of the constitutional due process requirement. It would not be a great burden upon judges, and it would be a great benefit to litigants and to the appellate courts, if judges were required to issue short statements of the reasons behind their rulings. These short statements would be far less in scope and detail than the statutory findings of fact and conclusions of law which litigants have the right to ask for before the trial. The purpose of these short statements would be merely to inform the parties of the basic reasons behind the judge's ruling, and afford the appellate courts a clue as to what the judge was thinking.

In the case I have cited as an example, we honestly believe Judge Rodman has made a major error of law which denies our client approximately $100,000. Nevertheless, it may well be possible that there was a legitimate way to reach the ruling he issued. But the legitimate way of reaching the issue would have flown in the face of the great weight of the testimony at trial. Therefore, it is likely that had he reached the factual questions, he would have found in our favor. He found against us, we think, because of a ruling of law which is reversible. Nevertheless, our client has been denied the effective right of appeal. The Council should adjust Rule 62 to take care of this situation.

Finally, as a general comment on the rules as a whole, I regret the decision to retain "fact" pleading, and I think compulsory counterclaims should be adopted.

Let me reiterate that the above should be taken in the spirit of tentative suggestions, not as harsh criticisms of the Council's work. The Council is nearing completion on an immense task done well. I would only hope that the rules are made as good as possible.

I would be happy to discuss any of my suggestions with you at any convenient time.

Sincerely,

Michael L. Williams

MLW:sp

P.S. Why is there no provision for summary judgment?

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November 3, 1978

Council on Court Procedures
Executive Director
University of Oregon School of Law
Eugene, Oregon 97403

Re: Proposed Oregon Rules of Civil Procedure

Dear Council Members:

I understand that in attempting to formulate new rules of Civil Procedure and soliciting comments and suggestions relating thereto, you have been disappointed by the response of the bar. With the number of practicing members of the bar now being in excess of 4,000, it is not difficult to understand why individual members scattered around the state, particularly members of small firms and sole practitioners, might feel that taking the time to respond would simply not be worthwhile. In spite of my own misgivings in that regard I would like to make some general comments about one or two selected areas of your proposed rules.

First, I am opposed to the wholesale replacement of code pleading by what I regard as essentially an adoption of the federal rules. The allegations made in a complaint should serve a broader purpose than to simply give notice of the general wrong allegedly done by a defendant as is the case in"federal rules" states. I suggest that to most practicing attorneys in the state, having the pleadings filed by the parties define the issues and then submitting those pleadings to the jury is far preferable to throwing together some loosely strung allegations, having a pre-trial conference, and letting the court, by pre-trial order define the issues to hide the lawyers sloppy workmanship.

Second, the proposed rules provide that lawyers furnish the opponent with names of proposed expert witnesses thirty days before trial with an outline of the witness' qualifications and what he is expected to testify to and make him or her available for deposition. I respectfully suggest that such a proposal will result in even more exorbitant costs for both sides than the present system, which is already discouraging to a plaintiff with a law suit which is worth something less than a quarter of a million dollars. One of the central and attractive features of our present tort system is that the courts are available to redress wrongs, whether they are $5,000 cases or $500,000 cases. Aside from the issue of costs, in many small cases, there are several experts available and it may not be possible to determine with any degree of exactitude who a party's expert will be at trial; one obvious example is in the area of attorney fees where one may not know until two or three days before trial who will be available and will be willing to come to court, if necessary, to testify as to the reasonableness of the fee prayed for.

Three, interrogatories - there is no question in my mind but what the proposed rule regarding interrogatories will simply and completely price a very great number of law suits out of existence. What lawyer is going to agree to take a $3,000 case or a $5,000 case on a contingent fee when an insurance company is the real defendant, and he is faced with the certainty of having to answer thirty interrogatories submitted by the attorneys fee and the defense, among all of the other harassing and cost building techniques which can be used under the proposed rules? The plain fact is that most lawyers do not have four law clerks or legal assistants and an automatic typewriter to answer interrogatories and respond to the various other "neat little discovery tools" envisioned by the proposed rules.

I am not suggesting that the current code pleading statutes and case law could not use some refurbishing and streamlining. Only that we should retain the essence of code pleading and direct our efforts toward improving and reducing the cost of the legal process to litigants rather than slowing the process down and raising the costs. I genuinely fear that if we do not I will live to see the day that there is a bureacracy to deal with and replace every aspect of what we now know as our legal system.

Thank you for your consideration.

Very truly yours,

Stephen D. Finlayson

SDF:lw

cc: Chairman Donald W. McEwen
Honorable Lee Johnson
Honorable William Jackson
Honorable John M Copenhaver
Honorable Wendall H. Tompkins
Professor Laird Kirkpatrick
Mr. E. Richard Bodyfelt

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Robert G. Ringo
James W. Walton
S. David Eves
Robert S. Gardner
J. Britton Conroy

November 6, 1978

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

Dear Mr. Merrill:

I would appreciate it if you would report these comments to your committee at the appropriate time.

On behalf of the Oregon Trial Lawyers Association, I wish to extend my appreciation to each member of the committee and yourself for all of the very detailed work that has been done. By appearing and raising some comments, we do not wish to be taken as critism or objections to the Council on Court Procedures. Many of these items are controversial items and we feel it is appropriate to have comments upon them.

It is my understanding that the commission intends to take no action upon the present procedure for a voluntary nonsuit within 5 days.

We would also wish to make of record our position upon the proposed rule that if an involuntary nonsuit is granted that would also be with prejudice. We would strongly object to this. We feel that each person is entitled to a ruling on the merits of his matter.

As we stated in the public hearing, we do object to the adoption of the interrogatories as setforth in the proposed rule 39. We are concerned both with the length of time it takes to get litigation to issue and the expense involved. At the present time we have found that pretrial depositions have been both expeditious and economical. The proposed interrogatories, we feel, would unnecessarily add to the cost of litigation which must eventally be borne by the party involved.

I am not authorized to and took no position upon the proposed rule 36 B4 as to the notation of the names of expert witnesses. As a personal comment of mine, one of the very real difficulties is that often times experts, due to their professional affiliations and associations, do not wish to be disclosed unless it is necessary to proceed to trial. They will help you prepare a case upon the understanding you will not disclose

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them unless it is necessary to appear as a witness. This is particularly true in medical malpractice actions, and I think the committee should seriously consider whether or not this will limit the opportunities for investigation and preparation in many sensitive cases.

As we noted at the hearing with regard to the proposed rule 53, the consolidation of action, it was felt that if neither plaintiff's counsel or defense counsel requested a consolidation, that there is probably a substantial reason why it should not be consolidated and should not be done on the court's own motion. Certain exceptions can be pointed out, but in substance, if the counsels involved does feel it is appropriate, they must have thoroughly considered the matters.

As stated, I would appreciate it if you would convey my congratulations to the commission for the tremendous work they have done. You may be sure of the cooperation of Oregon Trial Lawyers in implementing these as expeditiously as possible. We'd would be glad to review this matter with you at your convenience.

Very truly yours,

Robert G. Ringo

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November 6, 1978

Professor Fred Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene OR 97403

Re: Proposed Oregon Rules of Civil Procedure

Dear Professor Merrill:

I testified briefly on my own behalf during the November 3, 1978 public hearing in Portland. My testimony was directed primarily at Rule 42, Limited Interrogatories. Testimony subsequent to mine compels me to make a further statement in that regard.

I testified in support of Rule 42 at the November 3 hearing, and additional comments made on that subject further convince me that support is warranted. I believe that the time for adoption of limited interrogatories is at hand, and therefore see no merit whatsoever in deferring adoption until two years hence as suggested by some. Furthermore, I believe that the procedure proposed by the Council whereby interrogatories are propounded without leave of court is far superior to the alternative method of having to show cause at the outset. Conservation of both attorney and judicial time and expense evidently weighs in favor of the proposed procedure. The "protective order" route has the following advantages over the "good cause" requirement:

(1) Abuses or problems which may arise from interrogatories should not be anticipated, but should be dealt with only in the event they do arise and counsel cannot accommodate each other;

(2) Specific disagreements can be resolved by the court only after the interrogatories have been propounded and in the event agreement cannot be reached between counsel; and

(3) The requirement of a "good cause" showing renders it probable that two hearings will be necessitated for each set of interrogatories filed; even were "good cause" to be shown at the outset, the party served with interrogatories could still seek a protective order.

Furthermore, the fact that the Oregon Legislature in its last session deleted from the document production statute the requirement of a motion supports the wisdom of the scheme presently embodied in Rule 42. See, ORS 41.616.

The more I read and consider this Rule, the more I recognize its necessity and equity. The only proposal for change I would submit is that Rule 42E(2) be changed to read as follows:

E(2) Scope and Number. A party may serve more than one set of interrogatories upon an adverse party, but the total number of interrogatories shall not exceed thirty and the scope of interrogatories shall comply with Rule 36B, 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. However, interrogatories requesting the identity of persons, entities, expert witnesses, corporations, business entities, parties or persons controlled by parties under Rule 36B(1), (3), (6), and (7), shall be considered but one interrogatory for each individual or entity so identified.

The ability to inquire as to the merits through interrogatories should be afforded by motion upon good cause, in the same manner as is afforded the ability to exceed thirty interrogatories under Rule 42E(2), and to obtain further discovery of experts under Rule 36B(4)(b). Secondly, while the limitation of interrogatories to thirty in number and the attempt to prevent skirting this limitation through compound questions are necessary, the extent of this limitation (per the Comment to Rule 42) could prohibit the acquisition of information through interrogatories. If the intent of the Council is that each address, telephone number, etc. of each individual or entity constitutes one interrogatory, a corporate plaintiff or defendant, for example, could insulate itself from answering any further interrogatories if it merely supplied the information requested under Rule 42B(1) for each of five of its officers or directors, irrespective of the fact

that it may have more than five officers or directors.

I urge your consideration of the matters raised herein, and wish to offer my congratulation and thanks for a job well done.

Very truly yours,

GARY I. GRENLEY

GIG:jlf

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November 6, 1978

Prof. Fred Merrill, Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Dear Fred:

I write to express my opposition to proposed Rule 42. I believe that this rule, if adopted, will necessarily make litigation more expensive to the litigants, especially in the smaller case, and will require more judicial time in that inevitably judges will be called upon to make rulings on the character and number of the questions and the adequacy of answers.

I believe that our present discovery procedures are adequate and that we should be looking for ways to reduce the number of conflict points in litigation rather than increasing them.

One of the virtues of written interrogatories, that of obtaining information from an organization when it is difficult to ascertain which individual should be deposed, seems to be accomplished by proposed Rule 39 C(6).

Very truly yours,

Morton A. Winkel

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November 7, 1978

Mr. Fred Merrill, Executive Director
Council on Court Procedures
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Reference: Court procedures

Dear Fred:

I am writing this letter to you, because I know the chairman will be on a cruise by the time this is received. I would appreciate it if this could be distributed to the other members of the council. I thought it wise to put into writing the thoughts of the committee of the Trial Section of the Oregon State Bar that was established to study, as best it could, the proposed rules.

The committee is composed of Walter J. Cosgrave, William E. Brickley, David C. Landis, Jere M. Webb, Robert P. Jones, Randall B. Kester and myself. The only member not present was Jere Webb, who was taking depositions on the east coast.

It was the unanimous feeling that, although the council had obviously done a prodigious amount of work in a short period of time, the matters considered to be presented to the legislature probably should not be submitted at this session. We felt there was a sense of rush, reflected by the many changes considered at your last meeting and in your letter to me of November 1, 1978.

If the council felt they <u>had</u> to submit proposed rules this session, once again we were unanimous that certain of these proposals should not be submitted until further consideration could be given by, not only the council, but by other interested segments of the bar. This could not be done in the short time allowed to us for our critique.

We were unanimous that the limited interrogatories of Rule 42 should not be submitted to this session. (I will not

advance the arguments, since I know you all have heard them many, many times.) There was, however, the question that I raised at the hearing of comparing Rule 40 to Rule 42. I really don't see any limitation in Rule 40 and the "deposition by written questions" certainly could be used as interrogatories are used.

Rule 36 B (4) The general question of experts. As pointed out at the hearing, there has been a proposed change, which I did not have in front of me at the time I spoke as chairman of this particular committee. Since the change was not voted on by the committee, I cannot speak for them, so what follows on this particular subject is my own thinking.

Judge Wells asked me why I would object to the requirement of the identification of the experts, so depositions could be taken. I, frankly, did not have the material in front of me and did not give a very satisfactory answer to his question. I will seek to do that now.

The big word is "cost." In the majority of products cases, experts are from out-of-state - California, Illinois, Michigan (Detroit), Florida and New York, being the principal areas. The same is true on railroad crossing cases, airplane accidents and in medical malpractice that I will discuss later in this letter. To my recollection, I have had only two clients who could afford even to send me to sit in while the defense was taking my expert's deposition. Therefore, such cost is really borne by the plaintiff's lawyer, which will eliminate many, many attorneys from entering this field of litigation if they are going to do it in a proper manner. How much more burdensome it would be, if I wanted to take the defendant's expert's deposition, to incur my own expenses, as well as the expenses of that particular expert in preparation and in testimony! In other words, as a practical matter, only the defendants could afford the luxury of the council's proposal. They would depose the plaintiff's expert (which as pointed out above is also expensive to the plaintiff's attorney) and the plaintiff, unless represented by a wealthy law firm, could not afford to take the defendant's expert's depositions.

How much more severe the problem becomes in medical malpractice should be quite apparent. It is extremely difficult to have any doctor, even from out-of-state, agree to testify at a trial. It would be even more difficult if that doctor knew he would have to give his testimony prior to trial and then be beaten about the head with such prior testimony at the time of trial. I would think that, before adoption of such a

dangerous rule, some investigation should be made into the cost of this practice in areas where it is currently in existence, such as some of the busier plaintiff's firms in San Francisco and Los Angeles.

Rule 53 Consolidation. The committee was unanimous that such consolidation should be permitted only upon motion of one party or the other and not upon the court's own motion. There could be many reasons that the attorneys would not wish consolidation and we did not feel our docket problems in the state of Oregon are such that it should be forced upon parties that did not wish it.

Rule 57 B (5) (b). The committee objected to the statement that the court may examine prospective jurors. I realize Judge Dale made a clear point that it was not intended to take the examination away from the attorneys, but we felt that with such authority, explicitly given in a statute, a dominant judge would exhaustively examine the jurors, really leaving nothing for the attorneys to do.

Rule 9 C Service of cross-claims when there are multiple defendants. Randall Kester of our committee was concerned that some defendant would not know of a claim made against him right up to the time of trial. This was a concern of the whole committee and, frankly, I should have asked for an answer when I made my appearance, and there may very well be one.

Rule 54 and Rule 60 Concerning dismissals. The committee felt these were rather radical changes and, once again, should not be submitted to this session until further imput has been received by the council.

Fred, I am sorry if this letter is poorly drafted. It is made from my notes and without a re-review of the proposed rules, nor proofread prior to my departure to join your Honorable Chairman on the Greek Island cruise.

(If you could put my name on your agenda list, I would appreciate being notified of the meetings. I realize they do come out in the Bar bulletin, but sometimes that is overlooked when one is in trial for a number of days. One member of our committee would like to be present at your meetings.)

Very truly yours,

Burl L. Green

e
cc: Donald McEwen

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November 8, 1978

Council on Court Procedures
Executive Director
University of Oregon
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Gentlemen:

RE: Public comment on Rule 18B

Divorce lawyers (Bombers) have generally moved beyond stating the amount of money demanded, in favor of more gentle suggestions that the court do the right thing.

Will you please run your proposed Rule 18B by a domestic relations judge or specialist, or two.

Yours truly,

Philip H. Lowthian
PHL:nb

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WENDELL GRAY
OF COUNSEL

November 9, 1978

Prof. Fred Merrill
Executive Director
Council on Court Procedures
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Eugene, Oregon 97403

Re: Proposed Oregon Rules of Civil Procedure

Dear Sir:

I have some suggestions for the Council to consider. The order of presentation is not a ranking.

I. Rule 4 Jurisdiction

First on proposed Rule 4.A.(4) - jurisdiction over persons or corporations present or doing business in the state on causes of action arising elsewhere. Jurisdiction over transitory causes of action should be narrowed to cases coming under long-arm criteria. There is no reason to make Oregon courts available to forum shoppers just because the hapless defendant does business here.

Furthermore, I think that a rereading of Perkins v. Benguet Consolidated Mining Co., 342 US 437 (1952) will prove to you that the U.S. Supreme Court found rather novel facts including de facto corporate headquarters in the jurisdiction. I think that a good argument can be structured on the basis of Shaffer v. Heitner and Kulko v. California that if a Pennoyer v. Neff connection is insufficient connection with a state then mere "doing business" is insufficient. What is the real difference between owning property and doing business? I submit there is none.

Secondly, I would also suggest that subject matter jurisdiction (ORS 14.030) may be overbroad in a due process sense and it is certainly overbroad in a policy sense. ORS 14.030 should be amended by adding language after "whenever arising" such as "if there are affiliating circumstances,

with this state. . ." Hanson v. Denckla, 357 US at 246; Kulko, 56 L Ed2d at 141.

Another way of stating my position is that forum non conveniens is a due process question. Vindication of Oregon's social policies is adequately protected by the long-arm statute. See eg. Myers v. Brickwedel, 259 Or 457, 486 P2d 1286 (1971).

II. Rules 28 and 29 - Joinder

I recently represented a defendant - a local lumber brokerage - who purchased plywood from a local manufacturer and then had the plywood treated at a local pressure treating plant with a water carried chemical. After treatment our client had an independent trucker pick the plywood up and deliver it to an ocean carrier in Seattle for carriage to San Juan, Puerto Rico. The ocean carrier loaded the plywood into its containers, sealed the containers, loaded the containers on flat cars and sent the containers to Oakland where they were loaded onto a container vessel and transported via the Panama Canal to San Juan. At San Juan a trucker (agent of the ocean carrier?) took the containers to the buyer-consignee's warehouse. The seals were intact. Upon opening, the plywood was found to be wet. Our client settled with the buyer.

The treatment plant sued our client for the treatment. Our client counterclaimed for damages. We also filed a third-party complaint against the ocean carrier alleging that if the plywood was properly dried the carrier must be at fault.

Our client's position was that either the plaintiff did not properly dry the plywood after treating or the ocean carrier did not properly protect the plywood from the elements. The trial court granted plaintiff's motion to dismiss the third-party complaint.

If we sued the ocean carrier in a separate action, the case would be removed because of diversity thus frustrating a motion to consolidate. Of course, the plaintiff claimed throughout that the wetting occurred after leaving its plant since its records allegedly showed that the plywood was properly dried. The carrier asserted no wetting occurred en route. If our client had won the race to the courthouse and filed against the treatment plant and the carrier alleging that one or the other of the defendants was liable, I suppose the defendants would not be successful in obtaining dismissal in view of Rule 28 permitting joinder of defendants for common fact questions, etc. However, the USCA annotations to FRCP Rule 20 do not give me a great deal of confidence that

joinder would be possible. The requirement of "series of transactions or occurrences" seems to refer to all parties. In my case the treatment plant was not involved in the carriage.

Proposed Rule 29A is couched in terms of relief among those already parties, see 29A, (1), and certainly the ocean carrier's presence is not needed for complete relief to the plaintiff treatment plant. Rule 29 thus would seem to require that the ocean carrier be a defendant as to the treatment plant before it could be made a defendant.

The nightmare (for a lawyer) situation thus exists of losing to the treatment plant because the jury found that the plywood left the treatment plant dry and losing against the ocean carrier based on the jury finding that the plywood was wet when received by the carrier.

My suggestion is that the Council amend proposed Rule 28A by changing the word "and" after "occurrences" to the word "or". Cf. Mesa, Etc. v. Western Union, Etc, 67 FRD 634 (D Del, 1975). Rule 28B gives the trial court all the authority necessary to order separate trials, etc.

III. Rule 29 - Joinder/Venue

Proposed Rule 29A provides that: "If the joined party objects to venue and the joinder would render the venue of the action improper, the joined party shall be dismissed from the action."

The foregoing language appears to be almost verbatim from FRCP Rule 19(a). This language has no place in a state court action. The federal statutes on venue are 28 USCA §§ 1391-1393 and change of venue are 28 USCA §§ 1404-1407. A cursory reading of 28 USCA §1392 with §1404 will show that venue in federal parlance is significantly different than in state practice. Federal venue is concerned with a different court structure and boundary concept than the state circuit court - county boundary system. Cf. ORS 14.040-.120.

Proposed Rule 29A should be amended to provide after the word "improper" the language: "the joined party may move for change of venue as if an original party defendant to the action and the court may change the place of trial as provided by statutes authorizing changes of venue."

factual issues to be decided by the court and jury, the factual issues to be decided by the jury shall be determined first and such findings shall be binding on the court to the extent necessary for its findings to be consistent therewith."

I further recommend that proposed Rule 51 C.(2) be amended by adding the phase: "In the event that a right to a jury trial does not exist as to some issues, the jury trial shall be first and the issues thus decided shall be res judicata to the extent decided by the jury in the subsequent court trial."

I draw to the Council's attention some other problems regarding the merger of law and equity. For example, is ORS 16.460(2) repealed? Justice O'Connell pointed out a bizarre situation in Corvallis Sand & Gravel v. State Land Board, 250 Or 319, 439 P2d 575, 586 (1968) which would be corrected by my proposed amendments providing that the jury issues are to be tried first.

Also please note the typographical error in the first line of 51 c.(2) - "of" should be "or".

VI. Rule 55 Subpoena

Proposed Rule 55 F.(1) provides that a subpoena for a deposition may be issued by a clerk on proof of service of a notice. This is from the federal rules and is an unnecessary anachronism. Furthermore, Rule 39 C contains adequate requirement of notice.

Additionally the service of notice before service of the subpoena is backwards. It has been my experience in federal practice that if a subpoena is necessary the attorney cannot predict in his notice when the deposition will be taken because he does not know if he will be able to serve the witness prior to the time fixed in the notice.

To protect unsuspecting witnesses from having sworn statements taken without notice to the other side, Rule 39 could be amended by adding to 39 A: "a witness may not be examined unless all parties are represented at the deposition or the party taking the deposition is sworn and testifies that a notice of the deposition was served on absent parties or the court grants leave with or without notice as provided in this rule; examination of a witness in violation of this rule is a civil contempt by the party taking the deposition and may be punished by sanction including dismissal of a

IV. Rule 33 - Intervention

Proposed Rule 33B. Intervention right. This proposed rule is unduly restrictive in at least two situations. The first of these is the "vouched in" party under the UCC. See ORS 72.6070(5)(a). See 67 Am Jur2d, p 940, Sales § 727. The second situation occurs in express or implied indemnity or contribution claims when the indemnitor is tendered the defense of the principal action. The result in the principal trial is binding on the non accepting indemnitor. See Anno 73 ALR2d 504. In these cases, if the tender is rejected, the skillful attorney for the defendant - indemnitee can try the case on bases that will result in a plaintiff's verdict but which will entitle the defendant to indemnity. The indemnitor is faced with a Hobson's choice: after acceptance of the tender and trial to a result that shows either no liability or liability on a ground for which indemnity would be denied the case cannot be retendered. The key appears to be "adequacy of representation." The lower courts tend to find that the indemnitor's interest will be protected absent a showing of collusion, incompetence, etc. See eg. NRDC v. Costle, 561 F2d 904 (DC Cir. 1977).

I suggest that proposed Rule 33B be amended by adding at the end of the sentence the phraseology: "or whenever the applicant for intervention may or will be bound by or collaterally estopped by the judgment or any fact which may be determined in the action." This change would affect the methods of handling situations such as illustrated in Collins v. Fitzwater, 277 Or 401, 560 P2d 1074 (1977); Fisher v. Wofford, 276 Or 603, 556 P2d 127 (1976); Liddycoat v. Ulbrickt, 276 Or 723, 556 P2d 99 (1976); U.S.F. v. Chrysler Mo. Co., 264 Or 362, 505 P2d 1137 (1972); Burnett v. Western Pacific Ins. Co., 255 Or 547, 469 P2d 602 (1970); Ferguson v. Birmingham Fire Ins. Co., 254 Or 496, 460 P2d 342 (1969).

V. Rule 50, 51, 58-62 Trial Procedure

Proposed Rule 1, 2, 50, 51, and Rules 58-62 open up the issue of whether or not the court's findings on equity issues prevail or whether jury findings prevail. I understand the Oregon rule is that equity prevails. ORS 16.460(2). Cf. Westview Community Cemetery v. Lewis, 293 So2d 373 (Fla App.). I believe that the Beacon Theaters Inc. v. Westover, 359 US 500 (1959) rule should be adopted in Oregon to preserve the right to a jury trial.

I recommend that proposed Rule 50 be amended by adding the following language "In the event an action involves

complaint or costs or such other remedy as the court deems in the interest of justice."

VII. Rule 21 - Motions

Proposed Rule 21 is based on FRCP Rule 12 and provides that hearings on pretrial motions shall be on the basis of "facts" appearing on the face of the pleadings and "matters" outside the pleading including affidavits and other evidence, etc. This procedure is exceedingly vague, and not just merely flexible and efficient as the comments suggest. Do affidavits rebute testimony? Is live testimony before the court permitted as a matter of right or discretion? Is a party to be denied a right to a jury trial on statute of limitations issues such as receipt of notice of malpractice? The federal courts have no adequate procedure to handle this void in FRCP Rule 12 and yet protect the rights of the parties. See eg. Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F2d 1280, 1285-6 (9th Cir. 1977).

I submit that Rule 21 C should be amended by adding after the words "on application of any party" the phrase: "as a separate trial under Rule 53 B." At the same time Rule 53 B should be amended by adding after the word "issue" and "issues" the phrase: "including any issue raised by a motion under Rule 21."

Very truly yours,

Lloyd W. Weisensee

Lloyd W. Weisensee

LWW:fjw

cc: Donald W. McEwen, Esq., Chairman
Honorable William H. Dale

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WILLIAM F. JOHNSON (1946-52)
JOHNSON & TELFER (1953-56)
JOHNSON, TELFER & SLOAN (1956-67)
JOHNSON, SLOAN & JORDAN (1968-75)
JOHNSON, SLOAN & HAWKINS (1976)

November 9, 1978

IN REPLY, PLEASE REFER TO:

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

RE: Proposed Oregon Rules of Civil Procedure

Gentlemen:

I was shocked on Friday, October 13, at a legal education session in Medford, Oregon, to learn that Oregon attorneys are about to have a substantial portion of the Federal Rules imposed upon all Oregon Court cases and attorneys with virtually no approval or comment from the Oregon State Bar Association as a whole, and within the very near future.

A move of such significance, affecting such substantial changes in existing Oregon procedure, which will make prosecution of small actions (under $5,000 for example) so expensive that in the face of a stubborn defense, prosecution of such cases may be impractical, should be thoroughly considered by the Bar as a whole.

Frankly, there are some cases now that my office simply will not handle because as an economic matter, the compensation is not proportionate to the amount of effort and overhead that must be expended (i.e. Social Security cases).

I can foresee under the proposed rules, for instance the thirty interrogatory rule, it will not be economical against stubborn opposition to process any case unless the amounts are substantial. Your rules may be excellent in part, but in part I feel they will be oppressive and instead of expediting justice, will delay justice, and skyrocket costs. Any administrative action which is going to affect the little guy so substantially, should be more carefully considered by the bar as a whole.

Very truly yours,

SLOAN, HAWKINS & NEUFELD

William M. Sloan

WMS:sj

United States Department of Justice

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506 UNITED STATES COURTHOUSE
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ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

November 13, 1978

Mr. Laird Kirkpatrick
Assistant United States Attorney
211 E. 7th
Eugene, Oregon 97401

Re: The Proposed Oregon Rules of Civil Procedure

Dear Laird,

Thank you for giving me an opportunity to review the proposed Oregon Rules of Civil Procedure. By and large, I feel the Council has done an outstanding job in codifying and revising the existing rules. I have a few suggestions, some of which are merely grammatical, and others substantive. I hope they may be of some help to the Council, bearing in mind, of course, my total lack of practical experience in Oregon State Courts.

1. Introduction, page 2. I think it is regrettable that the comments to each rule, which provide so much insight into the intent of the Council, are not officially adopted. I would think that official comments of the Council would be useful to assist and guide the Courts in the interpretation of the new rules.

2. Rule 3. "Commenced" is misspelled.

3. Rule 4(A)(1). Aren't there a number of cases from other jurisdictions where a person appears in the state pursuant to court order on another matter, or is "lured" into the state through fraud or deception, in which such presence is deemed insufficient to invoke personal jurisdiction for public policy reasons?

4. Rule 36(B)(2)(a). I strongly disagree with the Council's apparent determination that an insurance policy is not discoverable until a question regarding the existence of coverage has been raised. In a personal injury case, a plaintiff may have several possible theories of recovery, and may undertake to develop facts to support each of them. He should be entitled to know, prior to expending his client's time and money, whether he is advancing his client's interest or, instead, simply developing and proving a coverage defense for his adversary. For example, I am aware of an aviation case in which the insurance did not cover the pilot who flew in weather conditions for which he was not rated. If

the insurance company desires to prove such facts in order to deny coverage, it should be entitled to do so; it should not be able to sit back while the plaintiff develops those facts for it in ignorance, and then notify him there is a coverage question and produce the policy. I believe that a plaintiff may potentially suffer tremendous prejudice by the rule as stated; by contrast, it is virtually no burden upon the insured party to disclose the policy.

5. Rule 36(B)(4). The second to last clause in this rule, "unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial," is a loophole which penalizes an attorney who prepares his case and rewards last-minute surprise. I believe the Council's anticipation "that ethical obligations would prevent attorneys from evading discovery by habitually putting off decision as to which experts to call until just prior to trial," is merely wishful thinking. In an adversary system such as ours, the parties are better protected by a rule that guarantees fair disclosure to all parties, in a timely manner, than to "hope" that attorneys, as advocates, and as fallible human beings, will act as we hope that they should.

6. Rule 36(B)(4)(d). You have split an infinitive on the first line. I hope to timely point it out to you.

7. Rule 36(B)(4)(f). As above, it appears you may have failed to immediately unsplit an infinitive.

8. Rules 42(E)(2), 45(F). Is it the intent of the Council to permit a total of 60 written discovery requests: 30 interrogatories and 30 requests for admission?

9. Rule 46(A)(4). If my recollection is correct, the Federal Rules were changed in 1970 to state that the court "shall" award expenses when a party is required to obtain an order compelling discovery. I believe the reason for this was that by giving the court discretion in awarding expenses, it was found that courts never did, and consequently attorneys were less likely to comply with discovery requests. Particularly in Oregon, where the Council has seen fit to limit the availability of requests for admission in interrogatories, it should draft the sanction provisions so as to insure that the limited discovery available is conducted in good faith and without unnecessary motion practice.

10. Rule 54(A)(1). This rule, taken almost verbatim from Federal Rule 41, is ambiguous on one point. Assume a case in which there are multiple parties, and a defendant seeks to file either a cross-claim against a co-defendant, or a third-party claim. Two

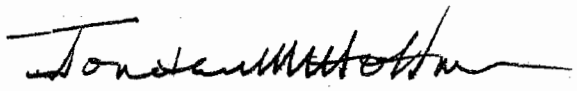
questions arise: first, is the party filing such a cross-claim or third-party claim a "plaintiff" for purposes of this rule? I believe that Rule 54(C) was designed to answer this question in the affirmative; however, the use of the word "plaintiff" in 54(A)(1) makes the answer somewhat unclear. Second, in the hypothetical given, what, if anything, is the policy reason for requiring all parties who have appeared to stipulate in a dismissal under Rule 54(A)(1)(b)? If a defendant files a cross-claim or third-party claim against another party, I do not understand why the plaintiff, or some other defendant, should have any right to determine whether the cross-claim or third-party claim should be dismissed.

11. Rule 54(B)(1). This rule, taken from the Federal Rules, really ought to be divided into two subsections. The subject matter of the first sentence is completely distinct from the remainder of the rule, and probably more properly belongs as part of Rule 54(B)(2).

12. Rule 59(H). Now that we in Oregon are attempting to join the Twentieth Century with respect to court procedures, is it really necessary to preserve the concept of exceptions? The court's decision to give a jury instruction is not intrinsically different from any other ruling on an issue of law which the court is obliged to make during the course of litigation, and the requirement of excepting to a proposed instruction, in my opinion, only imposes needless technicality which may prejudice the rights of litigants, without particularly improving administration of justice.

Thank you again for giving me the opportunity to comment. I hope some of these remarks may be of some small assistance to the committee.

Very truly yours,



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WENDELL GRAY
OF COUNSEL

November 14, 1978

Prof. Fred Merrill
Executive Director, Council on Court Procedures
University of Oregon Law School
Eugene, Oregon 97403

Re: Proposed Civil Rule 45

Dear Professor Merrill:

Proposed Rule 45 would broaden the allowable scope of requests for admission. Unlike the present statute, ORS 41.626, Proposed Rule 45 would permit a party to request the admission of "opinions of fact or of the application of law to fact." Proposed Rule 45 would be congruent in this respect with Federal Rule 36.

I believe that it would be a mistake to permit parties to go into matters of opinion by use of requests for admissions, because it would cause increased litigation of discovery matters for no purpose and would permit parties to circumvent the limitations of Proposed Rule 42.

Requests for admission serve their purpose best when limited to matters of fact. A party who denies a request carefully limited to fact risks an award for expenses of proof, including attorney fees, if the party had no reasonable ground to believe that it would prevail. 4A Moore's Federal Practice (2d Ed. 1978), ¶36.04[8], pp. 36-53-55. On the other hand, requests that go to matters of opinion central to a case will probably be denied by the responding party. If the facts are proved at trial, post-trial motions to assess costs and fees against the responding party may well fail because the parties could have had legitimate differences of opinion. On the other hand, if requests for admission continue to be limited to matters of fact, there ought to be fewer cases in the gray area where the parties could legitimately differ, at least when all factual information is in the hands of both parties.

Before 1970, Federal Rule 36, like ORS 41.626, did not provide for requests relating to matters of opinion. However, case law required responses to factual requests that called on the responding party to provide a measure of inference or conclusion. Anderson v. United Air Lines, 49 FRD 144, 148-49 (SD NY 1969), is a good example of the pre-1970 distinction between permissible requests calling for inferences or conclusions and impermissible requests calling for opinions. The distinction lies in the amount of information possessed by or available to the responding party.

The Council should also consider whether Proposed Rule 45 would not allow parties to circumvent Proposed Rule 42. For example, in a case in which plaintiff alleges that A was B's employee at the time of the accident, and B denies it, the following interrogatory would appear to be improper:

"Was A B's employee at the time of the accident?"

However, under Proposed Rule 45, the following request for admission would be proper:

"A was B's employee at the time of the accident."

Moore cites this statement as an example of a request for admission calling for an opinion drawn from applying the law of master and servant to the facts of the case. 4A Moore's Federal Practice, supra, ¶36.04[4], pp. 36-41-42.

I believe that the best way to resolve anomalies in the proposed discovery procedures would be to delete the reference to opinions from the first sentence of Proposed Rule 45 A. To the extent discovery relating to experts' opinions is itself a matter of opinion rather than fact, an exception could be made in Proposed Rule 45.

I hope the foregoing comments may be of assistance to the Council when it takes final action on the Proposed Rules.

Very truly yours,

John Dudrey

JD:fjw

cc: Donald W. McEwen, Esq.

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WENDELL GRAY
OF COUNSEL

November 14, 1978

Prof. Fred Merrill
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403

Dear Professor Merrill:

Relative to my suggestion in my letter of November 9 that indemnitors be permitted to intervene, I cite Benedict v. Breshears, 251 Or 443, 446 P2d 127 (1968). There the Supreme Court affirmed a judgment against the indemnitor. The indemnitor had attempted to intervene in the case against the indemnitee, but intervention was denied. In what may be a misaprehension of the generally accepted indemnity law the Supreme Court stated that the indemnitor could have accepted the tender of the defense and defended on behalf of the indemnitee. The court seems to hold that the defense would be for the indemnitee, however, it is generally accepted that once the indemnitor takes over, he has to pay the judgment whether or not the basis of liability is one for which he would be obliged to indemnify the indemnitee.

For an example of a case in which the indemnitee was able, by skillful record making, to set-up the case against the indemnitor see Nord, Lloyd, etc. v. Brady-Hamilton Stevedoring Co., 195 F. Supp. 680, 1961 AMC 2285 (D Or 1961). If any member of the Council is interested in delving into this device, I would suggest that he contact my ex-partner Nate Heath. Nate handled the cited case and several others in which our client was denied intervention under FRCP Rule 24 and yet was bound by the result.

On the collateral estoppel-right to a jury trial problem, I refer you to a short but excellent presentation of the problem raised in Shore v. Parklane Hoseriery Co., 565 F 2d 815 (2 Cir, 1977) cert. granted 56 L Ed 2d 387. See Note "collateral Estoppel and the Right to a Jury Trial," 57 Nebr L Rev 863 (1978).

Very truly yours,

Lloyd W. Weisensee

Lloyd W. Weisensee

LWW/bsw
cc: Justice Berkeley Lent

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WENDELL GRAY
OF COUNSEL

November 15, 1978

Counsel on Court Procedures
Executive Director
University of Oregon School of Law
Eugene, Oregon 97403

Re: Proposed Oregon Rules of Civil Procedure

Gentlemen:

The Counsel has solicited comments on the proposed Oregon Rules of Civil Procedure. In reviewing Rule Seven, SUMMONS, I have picked up what appears to be an inconsistency in the proposed Rule. I have enclosed copies of Pages 21 and 23 for your review. I have also underlined in red the two sections containing what I feel to be an inconsistency. The general tenor of the sections deals with the service of summons and complaint upon any person over fourteen (14) years of age residing in the dwelling house of the defendant (or in the case of a corporation, the registered agent, officer, director, general partner or managing agent).

At Page Twenty-Three, you will note I have placed parenthesis around the word "immediately". The word "immediately" does not appear in the parallel sentence on Page Twenty-One.

I am not sure of the meaning of the word "immediately", nor for that matter am I entirely sure I understand the effect of the two sentences respecting mailing of a copy of the summons and complaint to the defendant (or person to whom the summons is directed).

Query:

Would the failure of a plaintiff to cause a summons and complaint to be mailed to the person or persons specified result in a court lacking jurisdiction to enter default judgment against the defendant?

Query:

Should the section, or sections involved, contain further explanation and direction to a plaintiff's attorney such that upon mailing of the summons and complaint, the filing of an affidavit by the person so mailing, with the court, would be prima facie evidence of having satisfied all jurisdictional requirements?

Query:

If the word "immediately" is to remain in the section where I have marked it in paranthesis on Page Twenty-Three, should not there be a definition of such word and should not the word "immediately" also appear at Page Twenty-One in the parallel rule which I have underlined?

Very truly yours,

PETER C. McCORD

PCM:lb
Enclosures

Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

F.(3) Except when service by publication is available pursuant to section G. of this rule and service pursuant to subsection (4) of this section, service of summons either within or without this state may be substantially as follows:

F.(3)(a) Except as provided in paragraphs (b) and (c) of this subsection, upon a natural person:

F.(3)(a)(i) By personally serving the defendant; or,

F.(3)(a)(ii) If defendant cannot be found personally at defendant's dwelling house or usual place of abode, then by personal service upon any person over 14 years of age residing in the dwelling house or usual place of abode of defendant, or if defendant maintains a regular place of business or office, by leaving a copy of the summons and complaint at such place of business or office, with the person who is apparently in charge. Where service under this subparagraph is made on one other than the defendant, the plaintiff shall cause to be mailed a copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made; or,

F.(3)(a)(iii) In any case, by serving the summons in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by law to accept service of summons for the defendant.

office in the county where the action or proceeding is filed, the summons may be served: by personal service upon any person over the age of 14 years who resides at the dwelling house or usual place of abode of such registered agent, officer, director, general partner or managing agent; or, by personal service on any clerk or agent of the corporation, limited partnership or association who may be found in the county where the action or proceeding is filed; or by mailing a copy of the summons and complaint to such registered agent, officer, director, general partner or managing agent. Where service is made by leaving a copy of the summons and complaint at the dwelling house or usual place of abode of a registered, agent, officer, director, general partner, or managing agent, the plaintiff shall immediately cause a copy of the summons and complaint to be mailed to the person to whom the summons is directed, at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made.

F.(3)(d)(iii) In any case, by serving the summons in a manner specified in this rule or by any other rule or statute upon the defendant or an agent authorized by appointment or law to accept service of summons for the defendant.

F.(3)(e) Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant or clerk.

F.(3)(f) Upon any county, incorporated city, school district, or other public corporation, commission or board, by

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JOHN H. OTTING
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S. WARD GREENE

November 15, 1978

Professor Fredric R. Merrill
University of Oregon
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Eugene, Oregon 97401

Re: Council on Court Procedures

Dear Professor Merrill:

I am writing briefly to clarify one point I attempted to raise in my testimony before the Council on November 3, 1978.

I heartily approve of the award of costs, including attorney's fees, when a Motion is required to enforce compliance with the discovery rules. The problem I sought to point out, in referring to the Requests for Admission Rules, is that the Motion contemplated by the proposed new rules will be denied virtually every time it is opposed. In such cases, the rules seem to suggest that the Trial Court award costs against the moving party since his Motion was denied.

It would seem to me that a more equitable result might be obtained by requiring the deliquent party to pay the costs of the Motion even if he prevails, since no Motion would have been necessary, but for his failure to respond in the first place.

Of course, I believe the Request for Admissions provisions should be left alone. If they must be changed, the addition of something called a Notice of Admission would sufficiently alert even the most unwary attorney.

Very truly yours,

OTTING & ENZ, P.C.

S. Ward Greene

SWG:rb