A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, December 2, 1978

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

1. Rule 42 - Interrogatories.

2. Real party in interest and dismissal rule.

3. Other amendments and changes to proposed final draft of November 24, 1978.

4. Approval of final draft of rules.

5. Consideration of ORS sections superseded.

6. Consideration of miscellaneous amendments to ORS sections relating to process and other rules.

7. Submission of final product to legislature.

8. Approval of minutes of meetings held 8/25/78, 10/28/78, 11/3/78

9. New business.

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held December 2, 1978

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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

Chairman Don McEwen convened the meeting at 9:30 a.m. The Chairman announced that public statements would be received from anyone present who wished to address the Council.

Letters from Stanton F. Long, John C. Sihler, Robert G. Ringo, and Thomas E. Cooney were distributed to the Council.

Arthur Johnson, Eugene, suggested that the Council not adopt any rule allowing interrogatories, and if the Council did retain Rule 42, Section 42 B. should clearly indicate that discovery was limited to the subjects listed in that section. He also stated that Rule 44 D., relating to reports of examining physicians, should be redrafted to provide more flexibility in the manner of obtaining information from examining physicians. He stated that Rule 59 B., relating to instructions, was awkwardly worded in referring to the judge instructing the jury on matters which the judge "thought" were necessary.

William Wiswall, Eugene, spoke and said that he recommended no rule allowing interrogatories be promulgated by the Council.

Burl Green, Portland, spoke and stated that he opposed interrogatories, but said that if Rule 42 were to be retained, the reference in Rule 42 B. to pre-existing mental condition should be removed. He also asked that the revised version of Rule 36 B.(4) relating to identification of expert witnesses incorporate an exception for medical malpractice cases.

He also stated that he recommended that consolidation in Rule 53 be limited to "upon motion of a party". Mr. Green was asked if he opposed any tentative rule other than those mentioned. He stated that to the extent he was knowledgeable about the proposed final draft, these were the primary objections.

Robert Ringo, Corvallis, spoke and stated that he agreed with the statements of Mr. Green relating to Rule 36 B.(4) and that he agreed with Mr. Johnson's comments relating to examining physicians' reports. He also stated that he was opposed to any interrogatories and said that written instructions should be mandatory if requested by the parties in every case.

David Landis, Portland, spoke and stated he was opposed to interrogatories in any form and that, for all controversial matters, the Council should defer action during this biennium.

RULE 42. INTERROGATORIES.

Carl Burnham moved, seconded by Charles Paulson, to delete Rule 42 from the rules. The motion passed with Laird Kirkpatrick, Judge Copenhaver, Judge Johnson, Harriet Krauss, and Don McEwen opposing the motion. Several members of the Council stated that they were voting in favor of the motion, not because they opposed the interrogatory rule, but because of the volume of comment received. They felt that because the subject was controversial, it would be better to defer action on interrogatories during this biennium to allow the legislature to concentrate on the balance of the ORCP.

RULES 21 AND 26. REAL PARTY IN INTEREST.

Dick Bodyfelt moved, seconded by James O'Hanlon, that the defense of an action not being prosecuted in the name of a real party in interest be inserted as a listed defense (7) in Rule 21 A., with conforming changes in the balance of Rule 21 as set out in the memorandum of November 26, 1978, furnished to the Council.

RULE 36 B.(4). EXPERT WITNESSES.

Judge Dale moved, seconded by Charles Paulson, that Rule 36 B.(4) be eliminated in its entirety. The motion failed, with Charles Paulson, Judge Dale, Randolph Slocum, and Wendell Gronso voting in favor of the motion. Randolph Slocum made a motion, seconded by Charles Paulson, to include an exception in Rule 36 B.(4) for cases of professional negligence. The motion failed, with Charles Paulson, Wendell Gronso, Laird Kirkpatrick, Randolph Slocum, and Judge Dale voting in favor of the motion.

RULE 53. CONSOLIDATION.

Darst Atherly made a motion to insert the words "upon motion of any party" in section 53 A. It was seconded by Garr King. The motion passed with Judge Dale, Judge Copenhaver, Judge Johnson, and Charles Paulson opposing the motion.

RULE 59. INSTRUCTIONS.

Judge Dale moved to delete "which it thinks" after "law" in the first sentence of Rule 59 B. The motion was seconded by Charles Paulson. The motion passed unanimously.

ORS 16.470. ACCOUNT STATED.

The Executive Director asked the Council whether they wanted to incorporate the provisions of ORS 16.470 relating to an account stated in the rules because of the elimination of the interrogatory rule. After discussion, Judge Dale moved, seconded by Judge Copenhaver, that ORS 16.470 remain as a rule in the form of an ORS section and that the Council study whether it should be incorporated into the ORCP in the next biennium.

RULE 36 B.(4). EXPERT WITNESSES.

Laird Kirkpatrick moved, seconded by Randolph Slocum, that the language of the last sentence of Rule 36 B.(4)(a) as set out in the September 15 tenative draft, relating to a 30-day limit on response to requests for names of experts, be incorporated into the final draft of Rule 36 B.(4). The motion passed with Charles Paulson, Lee Johnson, Judge Jackson, and Sidney Brockley voting against the motion.

RULE 46. DISCOVERY ACTIONS.

Dick Bodyfelt moved to amend Rule 46 D. by specifically adding a request for names of experts under Rule 36 B.(4) and a request for doctors' reports under Rule 44 B. and C. as matters subject to a court order to compel discovery. The motion was seconded by Garr King. The motion passed with Judge Dale and Randolph Slocum voting against the motion.

RULE 7. SUMMONS.

The Executive Director called the Council's attention to the letter from Mr. David Hatton of Oregon Legal Services Corporation, St. Helens, relating to publication of summons for indigent petitioners in dissolution proceedings. He suggested that the provision of Rule 7 D.(5)(a) which allowed a judge to order mailing instead of publication partially solved this, but further suggested that the provision also say "or any other manner

reasonably calculated to apprise the defendant of the existence and pendency of the action." Darst Atherly moved that Rule 7 D.(5)(a) be amended in accordance with the suggestion. The motion was seconded by Mike King and it passed unanimously. It was suggested that the Executive Director make appropriate modifications in the comments to Rule 7 D.(5)(a).

RULE 44 E. HOSPITAL RECORDS.

The Executive Director also pointed out that there was no statute equivalent to the last sentence of Rule 44 E. as set forth in the tentative draft and that he therefore understood the Council's position to be that the sentence should be eliminated and no statutory equivalent be recommended to the legislature. The Council agreed.

RULE 22 A. COUNTERCLAIMS.

Don McEwen moved, seconded by Darst Atherly, to eliminate the words "legal and equitable" from Rule 22 A. The motion failed with Don McEwen, Randolph Slocum, Darst Atherly, and Lee Johnson voting in favor of it. It was suggested no changes be made in Rule 22 pending more careful consideration of the entire rule during the next biennium and that Bob Lacy's suggestions relating to Rule 22, set out in the memorandum of December 1, 1978, be deferred until that time.

RULE 9. SERVICE OF PAPERS.

Laird Kirkpatrick moved, seconded by Wendell Gronso, to add the word "request" to Line 6 of Rule 9 A. The motion passed with Judge Copenhaver opposing the motion.

RULE 46. DISCOVERY SANCTIONS.

It was suggested that because of the elimination of Rule 42, some language changes were necessary in Rule 46. The Executive Director indicated that changes would be made.

RULE 7 - SUMMONS; RULE 59 - PEREMPTORY CHALLENGES.

Dick Bodyfelt raised a question as to whether the words "apparently in charge" in Rule 7 D.(2)(c) were as specific as they should be. No change was suggested. He also asked whether the language of Rule 59 D.(2) relating to consolidation could be misunderstood, but no change in the draft was suggested.

RULE 23 D. WAIVER OF OBJECTIONS TO PLEADING.

Dick Bodyfelt moved, seconded by James O'Hanlon, that Rule 23 D. be amended by the addition of a provision that a party who has asserted an

objection to a pleading did not waive the objection by failing to reassert the same objection to an amended pleading filed by an opponent. The motion passed with Sidney Brockley opposing it.

RULE 59. INSTRUCTIONS.

Laird Kirkpatrick moved that Rule 59 B. be amended to provide that instructions be given in writing if requested by the parties, as is presently provided by the ORS section. The motion was not seconded.

Darst Atherly moved, seconded by Wendell Gronso, that the Rules of Civil Procedure in the proposed final draft, dated November 24, 1978, as modified, together with conforming amendments to rules remaining in ORS sections and the proposed ORS sections superseded, be promulgated by the Council and submitted to the legislature before the commencement of the legislative session. The motion passed unanimously.

Darst Atherly moved, seconded by Mike King, that the Executive Director be instructed to send copies of the Council's tentative drafts of Rules 42 and 36 B.(4) to the Oregon State Bar, the American Trial Lawyers Association, the Judicial Conference, and the Oregon Association of Defense Counsel, with the explanation that these rules had been withheld by the Council to allow further consideration during the next biennium and stressing that the Council would appreciate a statement of the position of these organizations on these rules. The motion passed unanimously.

The Council then discussed the proposed plan to have legislative counsel draft the necessary bills for submission to the legislature as set out in the letter from the Executive Director to Mr. Robert Lundy dated November 30, 1978, copies of which were furnished to the Council. The Council agreed that the procedure outlined in the letter should be followed.

A motion was made by Donald McEwen, seconded by Mike King, that three members of the Council be appointed by the Chairman with authority to approve amendments to rules remaining in ORS sections which would be submitted by the Council to the legislature, and to approve any further language changes required in the preparation of the rules to be submitted to the legislature.

Don McEwen moved, seconded by Wendell Gronso, to approve the minutes of the Council meetings held August 25, 1978, October 21, 1978, November 3, 1978, and November 18, 1978. The motion passed unanimously.

The meeting was adjourned at 12:55 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

ADDENDUM TO MINUTES OF MEETING OF
COUNCIL ON COURT PROCEDURES HELD
DECEMBER 2, 1978

Insert as first paragraph under RULE 44 E., HOSPITAL RECORDS, on Page 4:

The Council then discussed the letter from Mr. John Sihler which had been distributed to the Council. Dick Bodyfelt moved that Rule 44 E. be amended by the deletion of the words "for such injury" at the end of the section. The motion was seconded by Darst Atherly and passed unanimously.

APPENDIX A.

RULE 57

JURORS

A. Challenging compliance with selection procedures.

A.(1) Motion. Within 7 days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief, on the ground of substantial failure to comply with ORS 10.010 to 10.490 in selecting the jury.

A.(2) Stay of proceedings. Upon motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with ORS 10.010 to 10.490, the moving party is entitled to present in support of the motion the testimony of the clerk or court administrator any relevant records and papers not public or otherwise available used by the clerk or court administrator, and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply

with ORS 10.010 to 10.490, the court shall stay the proceedings pending the selection of the jury in conformity with ORS 10.010 to 10.490, or grant other appropriate relief.

A.(3) Exclusive means of challenge. The procedures prescribed by this section are the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with ORS 10.010 to 10.490.

B. Jury; how drawn. When the action is called for trial the clerk shall draw from the trial jury box of the court, one by one, the ballots containing the names of the jurors until the jury is completed or the ballots are exhausted. If the ballots become exhausted before the jury is complete, the sheriff, under the direction of the court, shall summon from the bystanders, or the body of the county, so many qualified persons as may be necessary to complete the jury. Whenever the sheriff shall summon more than one person at a time from the bystanders or the body of the county, the sheriff shall return a list of the persons so summoned to the clerk. The clerk shall write the

names of such persons upon separate ballots, and deposit the same in the trial jury box, and then draw such ballots therefrom, as in the case of the panel of trial jurors for the term.

C. Examination of jurors. The full number of jurors having been called shall thereupon be examined as to their qualifications. The court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.

D. Challenges.

D.(1) Challenges for cause; grounds. Challenges for cause may be taken on any one or more of the following grounds:

D.(1)(a) The want of any qualifications prescribed by ORS 10.030 for a person competent to act as a juror or improper summons under ORS 10.030 (3).

D.(1)(b) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

D.(1)c) Consanguinity or affinity within the fourth degree to any party.

D.(1)(d) Standing in the relation of guardian and ward, attorney and client, physician and patient, master and servant, landlord and tenant, or debtor and creditor, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

D.(1)(e) Having served as a juror on a previous trial in the same action or proceeding, or in another action or proceeding between the same parties for the same cause of action, upon substantially the same facts or transaction.

D.(1)(f) Interest on the part of the juror in the action, or the principal question involved therein, except such juror's interest as a member of or citizen or taxpayer of a county or incorporated city.

D.(2) Challenges for cause; trial. Challenges for cause may be tried by the court. The juror challenged and any other person may be examined as a witness on trial of the challenge.

D.(3) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall

exclude such juror. Either party shall be entitled to three peremptory challenges, and no more. Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to a total of three peremptory challenges.

D.(4) Conduct of peremptory challenges. After the full number of jurors have been passed for cause, peremptory challenges shall be conducted as follows: The plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the said order of alternation shall not defeat the adverse party of his full number of challenges, and such refusal by a party to exercise his challenge in proper turn shall conclude that party as

to the jurors once accepted by that party, and if his right of peremptory challenge be not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted, may increase the number of peremptory challenges and may allocate peremptory challenges allowed to one side between or among parties on one side.

E. Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give according to the law and evidence as given them on the trial.

F. Alternate jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the

order in which they are called shall replace jurors who, prior to the time the jury retired to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged as the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

PROPOSED OREGON RULES OF CIVIL PROCEDURE

FINAL DRAFT

NOVEMBER 24, 1978

(For consideration at meeting to be held December 2, 1978)

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INTRODUCTION

By virtue of ORS 1.745, all provisions of law relating to pleading, practice and procedure in all civil proceedings in courts of this state are deemed to be rules of court. As such, they remain in effect until they are superseded, modified or repealed by rules promulgated by the Council on Court Procedures which have been submitted to the legislature and not amended, repealed or supplemented by statute.

It has been the purpose of the Council on Court Procedures to undertake a systematic review of the general rules of pleading and practice, primarily contained in ORS Chapters 11 through 45, and to ~~gradually~~ replace the existing sections with comprehensive, integrated and logically arranged rules. During this biennium, the Council has concentrated upon the areas of process and personal jurisdiction, pleading, discovery, joinder and trial practice. The Oregon Rules of Civil Procedure, numbered 1 through 64, which follow, would either entirely or substantially replace rules which now appear in ORS Chapters 11, 13, 15, 16, 17 and in portions of ORS Chapters 14, 18, 41, and 45. The ORS sections superseded are given following each rule. It is anticipated that these rules would be published as a separate "Oregon Rules of Civil Procedure" section of the Oregon Revised Statutes and that in future years other substantial portions of ORS Chapters 11 through 45 would be replaced by additional Oregon Rules of Civil Procedure. Because the authority of the Council is limited to

procedural rules in civil proceedings, not including rules of evidence or appellate procedure, some portions of existing statutes in ORS Chapters 11 through 45 will remain as statutes.

The rules which follow are unique Oregon Rules of Civil Procedure. The Council sought to promulgate the best rules which could be developed for practice in Oregon courts. Existing ORS sections are heavily relied upon, with an attempt to clarify the language of those sections where necessary and to arrange the provisions in a logical and useful sequence for guidance of litigants, attorneys, and judges. Where the existing procedural rules were inadequate, the Council has not hesitated to incorporate procedural rules from other states and the Federal Rules of Civil Procedure or to develop entirely new rules.

The comment which follows most rules was prepared by Council staff. It represents staff interpretation of the rules and the intent of the Council, and is not officially adopted by the Council.

For reference, subdivisions of rules are called sections and indicated by capital letters, e.g., A.; subdivisions of sections are called subsections and indicated by Arabic numerals in parenthesis, e.g., (1); subdivisions of subsections are called paragraphs and indicated by lower case letters in parenthesis, e.g., (a); and subdivisions of paragraphs are called subparagraphs and indicated by lower case Roman numerals in parenthesis, e.g., (iv).

RULE 1

SCOPE: CONSTRUCTION; APPLICATION; CITATION

A. Scope. These rules govern procedure and practice in all circuit and district courts of this state, except in the small claims department of district courts, for all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin except where a different procedure is specified by statute or rule. These rules shall also govern practice and procedure in all civil actions and special proceedings, whether cognizable as cases at law, in equity, or of statutory origin, for the small claims department of district courts and for all other courts of this state to the extent they are made applicable to such courts by rule or statute. Reference in these rules to actions shall include all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin.

B. Construction. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.

C. Application. These rules, and amendments thereto, shall apply to all actions pending at the time of or filed after their effective date.

D. Citation. 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)(1).

COMMENT

For district courts, see: ORS 46.100 and 46.110. For justice courts, see: ORS 52.010 and 52.020. For tax court, see ORS 305.425(3). For effective date of rules, see: ORS 1.735. The Council will recommend January 1, 1980, as the effective date for these rules.

RULE 2

ONE FORM OF ACTION

There shall be one form of action known as a civil action. All procedural distinctions between actions at law and suits in equity are hereby abolished, except for those distinctions specifically provided for by these rules, by statute, or by the Constitution of this state.

COMMENT

For right to jury trial, see: ORCP 50.

This rule abolishes the last vestiges of procedural difference based upon a case being historically legal or equitable. Right to jury trial is not affected as it is a constitutional right. Different procedures are, of course, followed in cases tried to a jury and to a court. In the rules, where a "law - equity" or an "action - suit" distinction was used to specify procedures appropriate to a jury trial or non-jury trial, this has been changed to a direct reference to cases tried to a court or a jury. Terminology, such as "actions and suits" and "judgments and decrees" has been eliminated.

RULE 3

COMMENCEMENT OF ACTION

Other than for purposes of statutes of limitations, an action shall be commenced by filing a complaint with the clerk of the court.

COMMENT

This is based on the existing rule in the first sentence of ORS 15.020.

For commencement of an action and statutes of limitations, see ORS 12.020.

RULE 4

PERSONAL JURISDICTION

A court of this state having jurisdiction of the subject matter has jurisdiction over a ~~person~~ party served in an action ~~or proceeding~~ pursuant to Rule 7 under any of the following circumstances:

A. Local presence or status. In any action ~~or proceeding~~ whether arising within or without this state, against a defendant who when the action ~~or proceeding~~ is commenced:

A.(1) Is a natural person present within this state when served; or

A.(2) Is a natural person domiciled within this state; or

A.(3) Is a corporation created by or under the laws of this state; or

A.(4) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise; or

A.(5) Has ~~specifically~~ expressly consented to the exercise of personal jurisdiction over such defendant.

B. Special jurisdiction statutes. In any action ~~or proceeding~~ which may be brought under statutes or rules of this state that specifically confer grounds for personal jurisdiction over the defendant.

C. Local act or omission. In any action ~~or proceeding~~ claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

D. Local injury; foreign act. In any action ~~or proceeding~~ claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

D.(1) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

D.(2) Products, materials, or things distributed, processed, serviced, or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

E. Local services, goods or contracts. In any action or proceeding which:

E.(1) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state, ~~or~~ to pay for services to be performed in this state by the plaintiff, or to guarantee payment for such services; or

E.(2) Arises out of services actually performed for the plaintiff by the defendant within this state (out), or services actually performed for the defendant by the plaintiff within this state, if such performance within this state was authorized or ratified by the defendant or payment for such services was guaranteed by the defendant; or

E.(3) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ~~ship~~ send

from this state goods, documents of title, or other things of value or to guarantee payment for such goods, documents, or things; or

E.(4) Relates to goods, documents of title, or other things of value ~~shipped~~ sent from this state by the plaintiff to the defendant on the defendant's order or direction or ~~shipped~~ sent to a third person when payment for such goods, documents, or things was guaranteed by defendant; or

E.(5) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

F. Local property. In any action ~~or proceeding~~ which arises out of the ownership, use, or possession of real property situated in this state or the ownership, use, or possession of other tangible property, assets, or things of value which were within this state at the time of such ownership, use, or possession; including, but not limited to, actions to recover a deficiency judgment upon any mortgage, ~~or trust deed note or~~ conditional sale contract, or other security agreement relating to such property, executed by the defendant or predecessor to whose obligation the defendant has succeeded.

G. Director or officer of a domestic corporation. In any action ~~or proceeding~~ against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office

as a director or officer.

H. Taxes or assessments. In any action or ~~proceeding~~ for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this state.

I. Insurance or insurers. In any action ~~or proceeding~~ which arises out of a promise made anywhere to the plaintiff or some third party by the defendant to insure any person, property or risk and in addition either:

I.(1) The person, property, or risk insured was located in this state at the time of the promise; or

I.(2) The person, property, or risk insured was located within this state when the event out of which the cause of action is claimed to arise occurred; or

I.(3) The event out of which the cause of action is claimed to arise occurred within this state, regardless of where the person, property or risk insured was located.

J. Securities. In any action ~~or proceeding~~ arising under the Oregon Securities Law, including an action ~~or proceeding~~ brought by the Corporation Commissioner, against:

J.(1) An applicant for registration or registrant, and any person who offers or sells a security in this State, directly or indirectly, unless the security or the sale is exempt from ORS 59.055; or

J.(2) Any person, a resident or nonresident of this state, who has engaged in conduct prohibited or made actionable under the Oregon Securities Law.

K. Certain marital and domestic relations actions.

K.(1) In any action to determine a question of status instituted under ORS Chapter 106 or 107 when the plaintiff is a resident of or domiciled in this state; or

K.(2) In any action to enforce personal obligations arising under ORS Chapter 106 or 107, if the parties to a marriage have concurrently maintained the same or separate residences or domiciles within this state for a period of six months, notwithstanding departure from this state and acquisition of a residence or domicile in another state or country before filing of such action; but if (out) if an action to enforce personal obligations arising under ORS Chapter 106 or 107 is not commenced within one year following the date which the party who left the state acquired a residence or domicile in another state or country, no jurisdiction is conferred by this subsection in any such action.

K.(3) In a filiation proceeding under ORS Chapter 109, when the act or acts of sexual intercourse which resulted in the birth of the child are alleged to have taken place in this state and the child resides in this state.

L. Other ~~minimum contacts~~ actions. ~~In an action or proceeding otherwise arising out of some minimum contacts by the defendant with this state where, under the circumstances, it is fair and reasonable to require the defendant to come to this state to defend an action. The minimum contacts referred to in this section shall be deemed sufficient.~~ Notwithstanding a failure to satisfy the requirement of sections B. through K. ~~to E.~~ of this rule, in any action where ~~so long as the~~ prosecution of the action against a defendant in this state is not

inconsistent with the Constitution of this state or the Constitution of the United States.

M. Personal representative. In any action or proceeding against a personal representative to enforce a claim against the deceased person represented where one or more of the grounds stated in section B. ~~to~~ through L. would have furnished a basis for jurisdiction over the deceased had the deceased been living, ~~and~~ It is immaterial ~~under this subsection~~ whether the action ~~or proceeding~~ ~~had been~~ is commenced during the lifetime of the deceased.

N. Joinder of claims in the same action. In any action ~~or proceeding~~ brought in reliance upon jurisdictional grounds stated in sections B. ~~to~~ through L., there cannot be joined in the same action or proceeding any other claim or cause against the defendant unless grounds exist under this ~~section~~ rule, or other rule or statute, for personal jurisdiction over the defendant as to the claim or cause to be joined.

O. Defendant defined. For purposes of this rule and Rules 5 and 6, "defendant" includes any party subject to the jurisdiction of the court.

COMMENT

This rule is designed ~~to~~ TO: (a) incorporate most provisions for personal jurisdiction in one rule; (b) to extend the exercise of jurisdiction over persons by Oregon courts to the permissible limit under the United States and Oregon Constitutions; and (c) to give a comprehensive and useful description of generally accepted grounds for personal jurisdiction. The rule deals only with amenability to jurisdiction. Methods of service of process are found in ORCP 7. The basic form of the rule was drawn from Wisconsin Statutes § 801.05, modified to incorporate Oregon statutes and case law.

The Council recognizes that ultimately the permissible exercise of personal jurisdiction will be defined by court action interpreting constitutional limits. Where such limits presently are not well defined, persons relying upon bases of jurisdiction described specifically in the rule must always recognize the possibility of future court action defining the limits of personal jurisdiction. For example, where two non-residents contracted outside the state under ORCP 4 E.(1) or (2) and no action took place in the state, there is no controlling case deciding that a mere promise to act in Oregon is a sufficient minimum contact. As another example, future cases might limit the territorial bases of jurisdiction in ORCP 4 A. if the trend of Shaffer v. Heitner, 433 U.S. 186 (1977) continues. The intent of the Council was to extend personal jurisdiction to the extent permitted by the federal or state constitutions and not foreclose an attempt to exercise personal jurisdiction merely because no rule or procedure of the state authorized such jurisdiction.

4 A. This section includes the traditional territorial jurisdiction that creates general amenability to jurisdiction without any reference to the subject matter of the action. In slightly different language the grounds for jurisdiction are all covered under existing Oregon statutes. See ORS 14.010, 14.020 and 15.080(6). Subsection A.(4) covers a situation where a defendant engages in such substantial activities in this state, that it would be subject to jurisdiction in any action whether or not the action arose out of actvities in the state. See Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952).

4 B. This section recognizes that some other statutes or rules provide grounds for jurisdiction beyond this rule, including the separate provision relating to child custody cases in ORS Chapters 109 and 110. The rules do not provide for service of process on state officials, but, for the time being, the Council has not attempted to eliminate the separate statutes providing for service of process on state officials. The Council intends to study possible ways to integrate these bases of jurisdiction and service methods with ORCP 4 and 7. See: 57.075, 57.485, 56.630, 57.700, 57.721, 57.822, 59.155, 61.086, 61.471, 69.450, 69.500, 69.520, 91.578, 91.611, 92.375, 345.060, 486.521, 509.910, 648.061, 650.070, 650.075, 673.695, 696.250, 697.640, 703.120, 722.102, 731.324, 731.370, 731.434, 744.055, 746.320, 746.330, 746.340, 746.350, 746.360, 746.370, 767.495. For jurisdiction in child custody matters, see ORS 109.700 et seq. and 110.175.

Sections 4 C. through L. all require that the cause of action arise out of a described contact with this state.

4 C. and D. These sections apply in all tort and contractual claims for injury when either the acts giving rise to the injury occurred in Oregon or the injury took place in Oregon. The limits of the application of section 4 D. are the generally accepted limit of due process in this area. See: Hanson v. Denckla, 357 U.S. 235 (1958). These sections also eliminate any need for a separate Nonresident Motor Vehicle Act, ORS 15.190 and 15.200.

4 E. This section is designed to provide maximum flexibility for minimum contacts arising in situations of contractual activity and provision of goods and services.

4 F. This is based on ORS 14.035 (1)(c). Coverage is extended to actions arising out of ownership, use or possession of personal property if the property was located in the state at the time the action arose. No provision is made for quasi in rem jurisdiction. See Shaffer v. Heitner, ~~433 U.S. 186 (1977)~~, supra.

4 G. The situation described is that covered in Shaffer v. Heitner, supra.

4 H. This was the situation covered in International Shoe Co. v. Washington, 326 U.S. 310 (1945).

4 I. This is an expanded version of ORS 14.035 (1)(d).

4 J. This section incorporates the provisions of ORS 59.155. Note, ORS 59.155 has not been superseded, and the method of service of process described in that section may still be used.

4 K. Subsection K.(1) should be read in conjunction with ORS 107.075. Subsection K.(2) is the same as ORS 14.035(2). Subsection K.(3) is not covered by existing statutes, but provides a basis for jurisdiction in the situation involved in State ex rel Poole v. Dorroh, 271 Or 410 (1975) and State ex rel McKenna v. Bennett, 28 Or App. 155 (1977).

4 K. Subsection K.(1) should be read in conjunction with ORS 107.075. Subsection K.(2) is the same as ORS 14.035(2). Subsection K.(3) is not covered by existing statutes, but provides a basis for jurisdiction in the situation involved in State ex rel Poole v. Dorroh, 271 Or 410 (1975) and State ex rel McKenna v. Bennett, 28 Or App. 155 (1977).

4 L. This section is designed to extend jurisdiction in any case not covered in the specific sections, within the limits of due process. ~~It is modeled upon Rule 4.2 of the Alabama Rules of Civil Procedure.~~

4 M. If a basis for jurisdiction over a decedent exists under sections 4 B. through L., this also provides a basis for jurisdiction over the personal representative.

4 N. This is the equivalent of ORS 14.035 (4).

4 0. This makes clear that the rules for jurisdiction apply to any party where the court is seeking to exercise jurisdiction of such party, whatever formal designation is given to that party.

RULE 5
JURISDICTION IN REM

A court of this state having jurisdiction of the subject matter may exercise jurisdiction in rem on the grounds stated in this section. A judgment in rem may affect the interests of a defendant in the status, property, or thing acted upon only if a summons has been served upon the defendant pursuant to Rule 7 or other applicable rule or statute. Jurisdiction in rem may be invoked in any of the following cases:

A. When the subject of the action ~~of proceeding~~ is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This ~~sub~~section also shall apply when any such defendant is unknown.

B. When the action ~~or proceeding~~ is to foreclose, redeem from, or satisfy a mortgage, claim, or lien upon real property within this state.

~~C. When the action or proceeding is to declare property within this state a public nuisance.~~

COMMENT

With the comprehensive personal jurisdiction provided by ORCP 4, this rule probably will not be needed in most cases. No provision is made for quasi in rem jurisdiction. Shaffer v. Heitner, 433 U.S. 186 (1977). based solely upon the seizure of defendant's property

RULE 6

PERSONAL JURISDICTION
WITHOUT SERVICE OF SUMMONS

A court of this state having jurisdiction of the subject matter may, without a summons having been served upon a ~~person~~ party, exercise jurisdiction in an action ~~or proceeding~~ over a ~~person~~ party with respect to any counterclaim asserted against that person in an action ~~or proceeding~~ which the ~~person~~ party has commenced in this state and also over any ~~person~~ party who appears in the action ~~or proceeding~~ and waives the defense of lack of jurisdiction over the person, insufficiency of summons or process, or insufficiency of service of summons or process, as provided in Rule 21 G. Where jurisdiction is exercised under Rule 5, a defendant may appear in an action ~~or proceeding~~ and defend on the merits, without being subject to personal jurisdiction by virtue of this rule.

COMMENT

This describes the voluntary submission to jurisdiction presently covered in ORS 14.010 and 14.020 by reference to jurisdiction when a defendant "appears." The last sentence provides for a limited appearance by a defendant when the jurisdiction is in rem.

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summons to a person authorized to serve summons under section E. of this rule. A summons is issued when subscribed by plaintiff or a resident attorney of this state.

C.(1) Contents. The summons shall contain:

C.(1)(a) Title. The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(1)(b) Direction to defendant. A direction to the defendant requiring defendant to appear and defend within the time required by subsection (2) of this section and a notification to defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(1)(c) Subscription; post office address. A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(2) Time for response. If the summons is served by any other manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to section D.(5) of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C.(3) Notice to party served.

C.(3)(a) In general. All summonses other than a summons to join a party pursuant to Rule 22 D. shall contain a notice printed in a type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately.

C.(3)(b) Service on maker of contract for counterclaim.

A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately.

C.(3)(c) Service on persons liable for attorney fees.

A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should

plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately.

D. Manner of service.

D.(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant

authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication.

D.(2) Service methods.

D.(2)(a) Personal service. Personal service may be made by delivery of a certified copy of the summons and a certified copy of the complaint to the person to be served.

D.(2)(b) Substituted service. Substituted service may be made by delivering a certified copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff immediately shall cause to be mailed a certified 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 substituted service was made. Substituted service shall be complete upon such mailing.

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

who is apparently in charge. Where office service is used, the plaintiff immediately ~~thereafter~~ shall cause to be mailed a certified copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which office service was made. Office service shall be complete upon such mailing.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a certified copy of the summons and a certified copy of the complaint to the defendant by certified or registered mail, return receipt requested. Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

D.(3) Particular defendants. Service may be made upon specified defendants as follows:

D.(3)(a) Individuals.

D.(3)(a)(i) Generally. Upon an individual defendant by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons.

D.(3)(a)(ii) Minors. Upon a minor under the age of 14 years, by service in the manner specified in subparagraph (i) of this paragraph upon such minor, and also upon such minor's father, mother, conservator of such minor's estate, or guardian or, if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

D.(3)(a)(iii) Incapacitated persons. Upon an incapacitated person, by service in the manner specified in subparagraph (i) of this paragraph upon such person and also upon the conservator of such person's estate or guardian or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

D.(3)(b) Corporations; limited partnerships, unincorporated associations subject to suit under a common name. Upon a domestic or foreign corporation, limited partnership, or other unincorporated association which is subject to suit under a common name:

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership, or association.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found and does not have an office in the county where the action

or proceeding is filed, the summons may be served: by substituted service upon 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 a registered agent, officer, director, general partner, or managing agent.

D.(3)(c) State. 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.

D.(3)(d) Public bodies. Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service or office service upon an officer, director, managing agent, clerk, or secretary thereof. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

D.(4) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed

by the law of the foreign country for service in that county in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

D.(5) Service by publication or mailing to a post office address.

Order for publication or mailing.

D.(5)(a) On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action, the court may order service by publication, or at the discretion of the court, by mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only.

D.(5)(b) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(3) shall state: "This paper must be given to the court within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D.(5)(c) Where published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D.(5)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

D.(5)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in sections I. and J. of Rule 20, the action or proceeding shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy at the time of

the commencement of the action, and served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D.(5)(f) Defending after judgment. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D.(5)(g) Completion of service. Service shall be complete at the date of the last publication.

E. By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in ORS 20.020.

F. Return; proof of service.

F.(1) Return of summons. The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by mail.

F.(2) Proof of service. Proof of service of summons or mailing may be made as follows:

F.(2)(a) Service other than publication. Service other than publication shall be proved by:

Affidavit of service.

F.(2)(a)(i) The affidavit of the server indicating the time, place, and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise, and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where, and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

Certificate of service.

F.(2)(a)(ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, proof may be made by the sheriff's or deputy's certificate of service indicating the time,

place, and manner of service, and if defendant is not personally served, when, where, and with whom the copy of the summons and complaint was left or describing in detail the manner and circumstances of service. If the summons and complaint were mailed, the certificate ~~affidavit~~ shall state the circumstances of mailing and the return receipt shall be attached.

F.(2)(a)(iii) Form. An affidavit or certificate containing proof of service may be made upon the summons or as a separate document attached to the summons.

F.(2)(b) Publication. Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon,)
: ss.
County of_____)

I, _____, being first duly sworn, depose and say that I am the _____(here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth

dates of issues in which the same was published).

Subscribed and sworn to before me this ____ day of _____, 19 __.

_____
Notary Public for Oregon

My commission expires
_____ day of _____, 19 __.

F.(2)(c) Making and certifying affidavit. The affidavit of service may be made and certified before a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such affidavit.

F.(3) Written admission. In any case proof may be made by written admission of the defendant.

F.(4) Failure to make proof; validity of service. If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

G. Disregard of error; actual notice. Failure to ~~strictly~~ comply with provisions of this rule relating to the form of summons,

issuance of summons, and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, or affidavit or certificate of service of summons, and shall disregard any error in the content of service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

H. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 8 D.

COMMENT

For process, see Rule 8. For service of subpoenas, see Rule 55.

This rule brings all general provisions for service of summons together in one place. The basic standards of adequacy of service of summons is set forth in the first sentence of ORCP 7 D.(1). Succeeding portions of the rule provide ways in which service may be made and how these ways may be used for particular defendants, including conditional preferences. The particular methods, however, are methods which may be used. The rule does not require them to be used. Compliance with the specific methods of service would be ~~prima facie~~ presumed to be service reasonably calculated, under all the circumstances, to apprise the defendant of the pendency of the action and afford a reasonable opportunity to appear and defend. Other methods of service might accomplish the same thing. Subsection 4 F.(4) and section 4 G. also make clear that any technical defects in the return, form of summons, issuance of summons, and persons serving do not invalidate service if the defendant received actual notice of the existence and pendency of the action. Note, however, that summons must be served and returned; mere knowledge of the pendency and nature of the action will not require the defendant to appear and defend.

The defined methods of service apply both to in state and out of state service. The grounds for personal jurisdiction are covered in ORCP 4. They include service within the state and domicile within the state and, to that extent, location of service is related to personal jurisdiction; beyond that, there is no reason to limit methods of service by territorial boundaries.

The rule does not describe any service of process on state agents who are fictionally appointed as agents for service of process upon out of state defendants. Modern jurisdictional theory does not require service within the boundaries of the state, and requiring service on the Corporation Commissioner or other state official is a useless act which is burdensome and expensive for the officials and litigants. To the extent that such service has been left temporarily in separate ORS sections, it is incorporated by the second sentence of subsection D.(1).

Section B. is based upon ORS 15.020 but makes clear what "issued" means.

Subsections C.(1) and (3) are based upon ORS 15.040 and 15.220. Subsection C.(2) changes the disparate time for response to services in the state, in another state, outside the United States, and by publication, previously contained in ORS 15.040, 15.110 and 15.140, to a uniform 30-day period. The notices to defendant in subsection C.(3) have been changed slightly to conform to changes elsewhere in the rules.

Again, the basic test of adequate service is set forth in the first sentence of subsection D.(1). A type of service, called office service, has been added in D.(2) and a specific description of service by mail has been added. The only specific service by mail described in the rule is in D.(3)(b)(ii).

The specific methods of service described in subsection D.(3) for particular defendants are modified forms of the methods of service described in ORS 15.080. The most significant change is in paragraph D.(3)(b), which provides that the preferred method of service is personal service or office service upon a responsible officer, director or agent in the county where the action is filed; if this cannot be accomplished, four alternatives are available to the plaintiff: personal service or office service upon such persons wherever they may be found within or without the state; substituted service at the dwelling house or usual place of abode of such persons, whether located within or without the state; mailing to such persons; or service upon any agent who may be found in the county where the action was filed. Since the basic standard remains adequacy of notice, the agent

so served must be one likely to notify responsible persons in the corporation of the pendency of the action. This paragraph applies to associations and limited partnerships which may be sued under a common name; service in the case of partnerships and associations not suable under a common name is service on the named individual defendants and is covered by paragraph D.(3)(a). The effect of service on less than all partnership or association members in terms of judgments and enforcement of judgments is left to ORS 15.100 and other rules dealing with that subject. ORS 17.085 and 17.090 were eliminated.

Subsection D.(4) was adapted from Federal Rule 4 (i).

The publication provisions of section D.(5) differ from ORS 15.120 to 15.180 in the circumstances when publication is available. Under the existing statutes, publication is available only in certain classes of cases depending upon the nature of the case or location and availability of a defendant for service within the state. This rule makes publication available only as a last resort, when service can be accomplished by no other reasonable method but makes such publication available for any case. Once publiation is available, the procedure followed is similar to that of the present statutes.

Note, if a defendant h a mailing address and cannot othe wise be served, sec tion D.(5)(a allows a ju to order ma ing instead publication.

Subsection E. is based upon ORS 15.060 but eliminates a specific description of the sheriff. The sheriff, as a person over 18, can, of course, serve unless the sheriff is a party.

Section 7 F. is based upon ORS 15.060, 15.110 and 15.160. Subsection F.(4) would avoid invalidation of good service of summons because of some technical defect in the return. A return and proof of service are still required by subsections F.(1) and (2)

Subsection G. prevents invalidation of service because of technical defects and would allow amendment of summons or return.

RULE 8

PROCESS - SERVICE OF PROCESS

A. Process. All process authorized to be issued by any court or officer thereof shall run in the name of the State of Oregon and be signed by the officer issuing the same, and if such process is issued by a clerk of court, the seal of office of such clerk shall be affixed to such process. ~~Summons~~ Summonses and subpoenas are not process and are covered by Rules 7 and 55, respectively.

B. County is a party. Process in an action ~~or proceeding~~ where any county is a party shall be served on the county clerk or the person exercising the duties of that office, or if the office is vacant, upon the chairperson of the governing body of the county, or in the absence of the chairperson, any member thereof.

C. Service or execution. Any ~~person~~ civil process may be served or executed ~~any civil process~~ on Sunday or any other legal holiday. No limitation or prohibition stated in ORS 1.060 shall apply to such service or execution of any civil process on a Sunday or other legal holiday.

D. Telegraphic transmission of writ, order or paper, for service; procedure. Any writ or order in any civil action or ~~proceeding~~, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy as defined in ORS 757.631, of such writ, order or paper so transmitted may be served or executed by the officer or person to

whom it is sent for that purpose, and returned by such officer or person if any return be requisite, in the same manner and with the same force and effect in all respects as the original might be if delivered to such officer or person. The officer or person serving or executing the same shall have the same authority and be subject to the same liabilities as if the copy were the original. The original, if a writ or order, shall also be filed in the court from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent. In sending it, either the original or a certified copy may be used by the operator for that purpose.

E. Proof of service or execution. Proof of service or execution of process shall be made as provided in Rule 7 F.

COMMENT

This rule is primarily based on existing ORS sections in Chapter 16. A separate section for ~~service of~~ process is necessary, as subpoenas and summons not issued by a court are not court process. The only substantial change is section 8 C., which is the modification of ORS 16.830 suggested to the last legislature by the Oregon State Bar. ORS 16.880 and 16.765 are eliminated entirely. The rule only covers matters relating to process presently in ORS Chapter 16. Persons who may serve process and manner of service are covered in the various sections of ORS relating to such process. The Council plans to consider other rules relating to process in the future.

RULE 9

SERVICE AND FILING OF PLEADINGS
AND OTHER PAPERS

A. Service; when required. Except as otherwise provided in these rules, every order, ~~required by its terms to be served~~, every pleading subsequent to the original complaint, ~~unless the court otherwise orders because of numerous defendants~~, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer ~~or~~ of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 7.

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party or by mailing it to such attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within

this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. Service by mail is complete upon mailing.

~~C. Service; numerous defendants. In any action or proceeding~~ in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereupon upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

D. Filing; no proof of service required. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Such filing by a party or a party's attorney shall constitute a representation that a copy of the ~~paper has been or will be served upon each of the other parties~~

~~as required by section A. of this rule. No further proof of service is required unless an adverse party raises a question of notice. In such instance the affidavit of the person making service shall be prima facie evidence.~~

C. Filing; proof of service. 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. Except as otherwise provided in Rules 7 and 8, proof of service of all papers required or permitted to be served may be by written acknowledgment of service, by affidavit of the person making service, or by certificate of an attorney. Such proof of service may be made upon the papers served or as a separate document attached to the papers.

D. ~~E~~. Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse upon such pleading or paper the time of day, the day of the month and the year. The clerk or person exercising the duties of that office is not required to receive for filing any paper unless the name of the court, the title of the cause and the paper, and the names of the parties, and the attorney, if there be one, ~~is~~ are legibly endorsed on the front of the document, nor unless the contents thereof can be read by a person of ordinary skill.

F. Effect of failure to file. If any party to an action or proceeding fails to file within five (5) days after the service any of the papers required by this rule to be filed, the court, on motion of any party or of its own motion, may order the papers to be filed forthwith, and if the order is not obeyed, the court may order them to be regarded as stricken and their service to be of no effect.

COMMENT

This rule replaces the existing statutory provisions relating to serving and filing of papers subsequent to the summons and original complaint. The language used was adapted from Rhode Island Rule of Civil Procedure 5. Note, the rule requires service of orders. ORS 16.810, 16.850 and 16.870 are eliminated.

RULE 10

TIME

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020.

B. Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which is ~~has been~~ pending before it.

C. 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 such party and the notice or paper is served by mail, 3 days shall be added to the prescribed period.

COMMENT

Section 10 A. is based upon Federal Rule 6 (a). The only substantial difference from the time computation provided in ORS 174.120 is the next to the last sentence of section 10 A. relating to intermediate Saturdays, Sundays and holidays for periods of less than 7 days. Section 10 B. was eliminated from the federal rule in 1968 because federal courts no longer have terms. Since Oregon courts do have terms, it was included in this rule.

RULE 11 (RESERVED)

RULE 12

PLEADINGS LIBERALLY CONSTRUED DISREGARD OF ERROR

A. Liberal Construction. All pleadings shall be liberally construed with a view of substantial justice between the parties.

B. Disregard of error or defect not affecting substantial right. The court shall, in every stage of an action, ~~or proceeding~~, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.

RULE 13

KINDS OF PLEADINGS ALLOWED
FORMER PLEADINGS ABOLISHED

A. Pleadings. The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses.

B. Pleadings allowed. There shall be a complaint and an answer. An answer may include a counterclaim against a plaintiff, including a party joined under Rule 22 D., and a cross-claim against a defendant. A pleading against any person joined under Rule 22 C. is a third-party complaint. There shall be an answer to a cross-claim and a third party complaint. There shall be a reply to a counterclaim denominated as such and a reply to assert any affirmative allegations in avoidance of any defenses asserted in an answer. There shall be no other pleading unless the court orders otherwise.

C. Pleadings abolished. Demurrers and pleas shall not be used.

COMMENT

The description of pleadings in section 13 B. changes the existing Oregon practice by eliminating the routine reply containing only denials of affirmative matter in the answer. No reply is required to deny affirmative matter in an answer. Under ~~Rule 19 C., allegations in a pleading to which no responsive pleading is required or permitted are automatically taken as denied~~. A reply is required to a counterclaim in an answer or

to raise new matter in avoidance of defenses asserted in the answer. The proper response to a crossclaim is an answer; the proper response of a party summoned to respond to a counterclaim under ORCP 22 D. is a reply. ORS 16.020 and 16.460 are unnecessary under ORCP 1 and 2.

RULE 14

MOTIONS

A. Motions, in writing, grounds. An application for an order is a motion. Every motion, unless made during trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

B. Form. The rules applicable to captions, signing, and other matters or form of pleadings, including Rule 17 A., apply to all motions and other papers provided for by these rules.

COMMENT

Section 14 A. is based on ORS 16.710. Section 14 B. is based on Federal Rule 7 and incorporates ORCP 17 A. to make clear that a party or attorney signing a motion or other paper is certifying that there is good ground to support it and it is not interposed for harassment or delay. ORS 16.720 to 16.740 are eliminated.

RULE 15

TIME FOR FILING PLEADINGS OR MOTIONS

A. Time for filing motions and pleadings. A motion or answer to the complaint or third party complaint or the reply to a counterclaim of a party summoned under the provisions of Rule 22 D. shall be filed with the clerk by the time required by

Rule 7 C.(4) to appear and defend. ~~A motion or answer to a cross-claim shall be filed within 10 days after service of an answer containing a cross-claim and a motion or reply to an answer, other than a party summoned under the provisions of Rule 22 D., shall be filed within 10 days after the service of the answer. A motion to a reply shall be filed within 10 days after service of the reply~~. Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.

B. Pleading after motion. (1) If the court denies a motion, any responsive pleading required shall be filed within 10 days after service of the order, unless the order otherwise directs.

B.(2) If the court grants a motion and an amended pleading is allowed or required, such pleading shall be filed within 10 days after service of the order, unless the order otherwise directs.

C. Responding to amended pleading. A party shall ~~plead in response~~ respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

D. Enlarging time to plead or do other act. The court may, in its discretion, and upon such terms as may be just, allow any other pleading or motion allow an answer or reply to be made, or ~~other act to be done~~ after the time limited by the procedural rules, or by an order enlarge such time.

COMMENT

For provisions relating to amended pleadings and responding to amended pleadings, see ORCP 23. For motion to make more definite and certain, see ORCP 21 D.

This rule brings all time requirements for responding to pleadings together in one rule. Section 15 A. provides the same time for response to pleadings as ORS 16.040. Subsections 15 B. (1) and (2) are new. Section 15 C. was covered by ORS 16.420. Section 15 D. is ORS 16.050.

RULE 16

PLEADINGS - FORM

A. Captions, names of parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action ~~or proceeding~~, the register number of the cause and a designation in accordance with Rule 13 B. In the complaint the title of the action ~~or proceeding~~ shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

B. Concise and direct statement; paragraphs; statement of claims or defenses. Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs, the contents of which shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be

referred to by number in all succeeding pleadings. Separate claims or defenses shall be separately stated and numbered.

C. Consistency in pleading alternative statements. Inconsistent claims or defenses are not objectionable, and when a party is in doubt as to which of two or more statements of fact is true, the party may allege them in the alternative. A party may also state as many separate claims or defenses as the party has, regardless of consistency and whether based upon legal or equitable grounds or upon both. All statements shall be made subject to the obligation set forth in Rule 17.

D. Adoption by reference; ~~exhibits.~~ Statements in a pleading may be adopted by reference in a different part of the same pleading. ~~or in another pleading.~~

COMMENT

The Council intends to retain existing Oregon practice in sections 16 A., 16 B. and 16 D., including separate statements of claims and defenses required by ORS 16.040. Section 16 C. is intended to eliminate any objection based upon hypothetical, alternative and inconsistent pleading as such. Inconsistent statements of simple facts clearly within the knowledge of the pleader would, however, be improper because of the obligation to plead truthfully under ORCP 17 A.

RULE 17

SUBSCRIPTION OF PLEADINGS

A. Subscription by party or attorney, certificate. Every pleading shall be subscribed by the party or by a resident attorney of the state, except that if there are several parties united in interest and pleading together, the pleading may be subscribed by at least one of such parties or ~~his~~ one resident attorney. If ~~any~~ 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. Verification of pleadings shall not be required unless otherwise required by rule or statute. The subscription of a pleading constitutes a certificate by the person signing that such person has read the pleading, that to the best of the person's knowledge, information, and belief, there is a good ground to support it and that it is not interposed for harassment or delay.

B. Pleadings not subscribed. Any pleading not duly subscribed may, on motion of the adverse party, be stricken out of the case.

COMMENT

This replaces the general verification requirements of ORS 16.070, 16.080 and 30.350, with a rule requiring only signature but specifying that such signature certifies truthfulness and merit. The approach is that suggested to the last legislature by the Oregon State Bar. If a corporation or entity were litigating without an attorney, the pleading would be signed by a person with authority to act for such corporation or entity. No specific reference to ethical obligations of attorneys signing pleadings was incorporated in the rule because the Council does not make disciplinary rules for attorneys. Signing a pleading in violation of this rule would be prohibited by the Oregon Code of Professional Responsibility and subject attorneys to discipline.

RULE 18

COMPLAINT, COUNTERCLAIM, CROSS-CLAIM THIRD PARTY CLAIM

A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain:

A. A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition;

B. A demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated; relief in the alternative or of several different types may be demanded.

COMMENT

The Council decided to retain fact pleading as opposed to notice pleading, i.e., to retain a requirement of fairly specific description of facts as opposed to adopting the less specific fact description allowable in federal courts. This rule is a rewording of ORS 16.210 to fit any form in which a claim for affirmative relief is asserted and to refer to pleading a claim for relief rather than a cause of action. The necessity of pleading ultimate facts retains the present Oregon requirements of pleading facts at a fairly specific level. For a comparable rule, see Florida Rules of Civil Procedure, 1.110(b)(2).

RULE 19

RESPONSIVE PLEADINGS

A. Defenses; form of denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the allegations upon which the adverse party relies. If the party is without knowledge or information

sufficient to form a belief as to the truth of an allegation, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. When a pleader intends in good faith to deny only a part or a qualification of an allegation, the pleader shall admit so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the allegations of the preceding pleading, the denials may be made as specific denials of designated allegations or paragraphs, or the pleader may generally deny all the allegations except such designated allegations or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all ~~the~~ of the allegations of the preceding pleading, the pleader may do so by general denial of all allegations of the preceding pleading subject to the obligations set forth in Rule 17.

B. Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, comparative or contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, unconstitutionality, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

C. Effect of failure to deny. Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Allegations in a pleading to which no responsive pleading is required or permitted shall be taken as denied, ~~except allegations in a reply to a counterclaim which shall be taken as denied~~ or avoided.

COMMENT

This rule governs all responsive pleadings. The language comes from Federal Rule 8(b) through (d) modified to fit Oregon practice. The rule is consistent with Oregon practice in most cases. In section 19 A. a general denial could only be used where the pleader intends to controvert absolutely every allegation in the opposing pleading; this is more consistent with specific pleading. Section 19 B. does not change the existing burden of pleading. Several specific affirmative defenses which do not appear in the federal rule but which are the subject of Oregon cases are included. Assumption of risk, contributory negligence and fellow servant are not defenses of much currency under existing Oregon law but were left in the rule for an unusual case or where an Oregon court might be applying foreign law. To determine when pleadings are required or permitted under section 19 C., see ORCP 13 B.

RULE 20

SPECIAL PLEADING RULES

A. Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

B. Judgment or other determination of court or officer; how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

C. Private statute; how pleaded. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

D. Corporate existence of city or county and of ordinances or comprehensive plans generally; how pleaded.

D.(1) In pleading the corporate existence of any city, it shall be sufficient to state in the pleading that the city is existing and duly incorporated and organized under the laws of the state of its incorporation. In pleading the existence of any county, it shall be sufficient to state in the pleading that the county is existing and was formed under the laws of the state in which it is located.

D.(2) In pleading an ordinance, comprehensive plan, or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan, or enactment by its title, if any, otherwise by its commonly accepted name or number, and the date of its

passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

E. Libel or slander action.

E.(1) In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.

E.(2) In the answer, the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether the defendant proves the justification or not, the defendant may give in evidence the mitigating circumstances.

F. Official document or act. In pleading an official document or official act it is sufficient to allege that the document was issued or the act done in compliance with law.

G. Recitals and negative pregnants. No allegations in a pleading shall be held insufficient on the grounds that they are pled by way of recital rather than alleged directly. No denial shall be treated as an admission on the grounds that it contains a negative pregnant.

H. Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in a pleading, the opposing party may be designated by any name, and when such party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

I. Designation of unknown heirs in actions relating to ~~real~~ property. When the heirs of any deceased person are proper parties defendant to any action relating to ~~real~~ property in this state, and the names and residences of such heirs are unknown, they may be proceeded against under the name and title of the "unknown heirs" of the deceased.

J. Designation of unknown persons. In any action to determine any adverse claim, estate, lien, or interest in ~~real~~ property, or to quiet title to ~~real~~ property, the plaintiff may include as a defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien or interest in, the ~~real~~ property in controversy, the following: "Also all other persons or parties unknown claiming any right, title, lien or interest in the ~~real~~ property described in the complaint herein."

COMMENT

For provisions relating to service of summons or unknown heirs or persons, see ORCP 7(D.)(c). For jurisdiction in rem, see ORCP 5.

Except for sections 20 F. and G., these rules are based upon existing Oregon statutes. Section 20 F. comes from Federal Rule 9 (d), and section 20 G. is new and designed to eliminate some archaic ~~archaic~~ pleading rules that remain in old Oregon case law. Section 20 A., based on Utah Rule of Procedure 9(c), is similar to ORS 16.480, except that the defendant must specifically allege the conditions precedent not performed. Section 20 H. has the same effect as ORS 13.020, but the clearer language from Alabama Rule of Civil Procedure 9(h) was used. ORS 16.540 was eliminated.

RULE 21

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

A. How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or ~~process~~ process, (6) failure to join a party under Rule 29, (7) failure to state ultimate facts sufficient to constitute a claim, and (8) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based

shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (6), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits and the court may determine the existence or non-existence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits.

B. Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

C. Preliminary hearings. The defenses specifically denominated (1) through (8) in section A. of this rule, whether made in a pleading or by motion and the motion for judgment on the pleadings mentioned in section B. of this Rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

D. Motion to make more definite and certain. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense or reply is not apparent, upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules upon motion by a party within 10 days after service of the pleading, or upon the court's own initiative at any time, the court may require the pleading to be made definite and certain by amendment. If the motion is granted and the order of the court is not obeyed within 10 days after ~~notice~~ service of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

E. Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) ~~any sham, or~~ frivolous, or irrelevant pleading or defense, or any pleading containing more than one claim or defense not separately stated; (2) ~~any~~ insufficient defense ~~or~~ or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading.

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to

be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.(2).of this rule on any of the grounds there stated.

G. Waiver or preservation of certain defenses. (1) A defense of lack of jurisdiction over the person, that a plaintiff has not legal capacity to sue, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, is waived (a) if omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 23 A. to be made as a matter of course; provided, however, the defenses denominated (2) and (5) of section A. of this rule shall not be raised by amendment.

G.(2) A defense of failure to state ultimate facts constituting a claim, a defense that the action has not been commenced within the time limited by statute, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B. or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B. in light of any evidence that may have been received.

G.(3) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

COMMENT

While the Council wished to retain fact pleading, it also wanted to curb excessive use of motions for purposes of harassment and delay. The legislature has already moved in this direction by providing that the pleadings not go to the jury. See, ORCP 59. Retention of fact pleading does not automatically mean retention of existing motion practice. This rule is designed to reduce the time spent on motions through simplification of procedure and a preclusion rule that requires assertion of all grounds for dismissal under this rule, which are raisable by motion, in a single motion. Although the structure of this rule is based upon Federal Rule 12, much of the language used was drawn from ORS sections or drafted to fit Oregon practice.

Section 21 A. covers the form of asserting defenses to an opponent's claim. At the pleader's option, these may be asserted in the answer or in a motion to dismiss. The motion to dismiss performs the function of the former demurrer or plea in abatement. Specific grounds for the motion, (1) through (6), do not go to the merits and are a matter for determination by the court either on the face of a pleading or based upon factual material submitted to the court. Grounds (7) and (8) go to the merits and the court can only decide if a party has pled properly. If a party wishes to assert facts showing lack or merit, this ~~ths~~ must be in the form of a summary judgment motion or at trial. Whatever form is used to assert the defenses, under the last sentence of section 21 A. and under section 21 C., the court has the flexibility to dispose of the matter in the most efficient manner. This rule eliminates the concept of special appearance and motions to quash. An objection of personal jurisdiction is treated as any other defense and is waivable only under the provisions of section 21 G.

The grounds for motion to strike and motion to make more definite and certain in sections 21 D. and E. come from ORS 16.100 and 16.110 and not from the federal rule. Note, the motion to strike is used to challenge the sufficiency of a defense or new matter asserted in a reply to avoid a defense, and replaces the former demurrer to an answer or a reply. The motion to strike is also the proper procedure to assert failure to state separately claims or defenses.

The consolidation and waiver rules of sections 21 F. and G. are modeled upon the federal rule. The consolidation requirement applies to any motion made under this rule; this would include motions under 21 A., B., D., and E., but not summary judgment or other motions. Special treatment is given to defenses related to personal jurisdiction and summons or process; under section 21 G.(1), they may not be asserted for the first time in an amended pleading.

outside this rule

RULE 22

COUNTERCLAIMS, CROSS-CLAIMS AND THIRD PARTY CLAIMS

A. Counterclaims. Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against ~~the~~ a plaintiff.

B. Cross-claim against codefendant. (1) In any action ~~or proceeding~~ where two or more parties are joined as defendants, any defendant may in ~~his~~ such defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action and shall be: (a) one arising out of the occurrence or transaction set forth in the complaint; or (b) related to any property that is the subject matter of the action brought by plaintiff.

B.(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

B.(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C. Third party practice. (1) At any time after commencement of the action ~~or proceeding~~, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action ~~or proceeding~~ who is or may be liable ~~to him~~ the third party plaintiff for all or part of the plaintiff's claim against ~~him~~ the third party plaintiff. The ~~third-party~~ plaintiff need not obtain leave to make the service if ~~he files~~ the third-party complaint is filed not later than 10 days after ~~he serves his original answer~~ service of the third party plaintiff's. Otherwise he the third party plaintiff must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall assert any defenses to the third-party plaintiff's claim as provided in Rule 21 and counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in sections A. and B. of this rule. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against

the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert ~~his~~ the third party defendant's defenses as provided in Rule 21 and the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third-party defendant.

C.(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C.(1) of this section.

D. Joinder of persons in contract actions. (1) As used in this section of this rule:

D.(1)(a) "Maker" means the original party to the contract which is the subject of the action who is the predecessor in interest of the plaintiff under the contract; and

C.(1)(b) "Contract" includes any instrument or document evidencing a debt.

D.(2) The defendant may, in an action on a contract brought by an assignee of rights under that contract, join as a party to the action the maker of that contract if the defendant has a claim against the maker of the contract arising out of that contract.

D.(3) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097.

D.(4) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E. Separate trial. Upon motion of any party or upon the court's own ~~motion~~ initiative, the court may order a separate trial of any counterclaim, cross-claim, or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

COMMENT

This rule is almost identical to the provisions of existing ORS sections. The Council added the fourth sentence of subsection 22 C.(1) to make clear that the trial judge should not give leave for a late impleader if this would prejudice existing parties. Section 22 E. was also changed slightly to allow a separate trial on the court's own initiative.

RULE 23

AMENDED AND SUPPLEMENTAL PLEADINGS

A. Amendments. A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Whenever an amended pleading is filed, it shall be served upon all parties who are not in default, but as to all parties who are in default or against whom a default previously has been entered, judgment may be rendered in accordance with the prayer of the original pleading served upon them; and neither the amended pleading nor the process thereon need be served upon such parties in default unless the amended pleading asks for additional relief against the parties in default.

B. Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues

made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

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

D. Amendment or pleading over after motion. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. If any motion is disallowed, the party filing the motion shall file a responsive pleading if any is

required. By filing any pleading pursuant to this section, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling.

E. Amended pleading where part of pleading stricken. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling upon the motion to strike.

F. How amendment made. When any pleading is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended pleading, or by interlineation, deletion, or otherwise. Such amended pleading shall be complete in itself, without reference to the original or any preceding amended one.

G. Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

COMMENT

For time for filing and responding to amended pleadings, see ORCP 15.

This is a combination of Federal Rule 15 and existing ORS sections. Section 23 A. is based upon Federal Rule 15(a) and ORS 16.430. Section B. is based on Federal Rule 15(b). Section C. is based on Federal Rule 15(c). Section D. is based upon ORS 16.380 and 400; note the court is specially authorized to grant a motion for a judgment on the pleadings but to allow repleading rather than enter a judgment. Section E. is based upon ORS 16.400. Section F. is based upon ORS 16.410, and Section G. is based upon ORS 16.360 and Federal Rule 15(d).

RULE 24

JOINDER OF CLAIMS

A. Permissive joinder. A plaintiff may join in a complaint, either as independent or as alternate claims, as many claims, legal or equitable, as the plaintiff has against an opposing party.

B. Forcible entry and detainer~~and rental~~ rental due. If a claim an action of forcible entry and detainer and ~~an action~~ a claim for rental due are joined, the defendant shall have the same time to appear as is ~~now~~ provided by law in actions for the recovery of rental due.

C. Separate statement. The claims ~~united~~ joined must be separately stated and must not require different places of trial.

COMMENT

This is based on the existing ORS section.

RULE 25 (RESERVED)

RULE 26

REAL PARTY IN INTEREST

Every action ~~or proceeding~~ shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in their own names without joining with them the party for whose benefit the action ~~or proceeding~~ is brought; and when a statute of this state so provides, an action ~~or proceeding~~ for the use or benefit of another shall be brought in the name of the state. No action ~~or proceeding~~ shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action ~~or proceeding~~ by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action ~~or proceeding~~ had been commenced in the name of the real party in interest.

COMMENT

This rule is based upon Federal Rule 17(a) but is generally the same as ORS 13.030. The rule specifically deals with guardians and actions in the name of the state and provides a procedure for dealing with real party in interest objections.

RULE 27

MINOR OR INCAPACITATED PARTIES

A. Appearance of minor parties by guardian or conservator. When a minor, who has a conservator of such minor's estate or a guardian, is a party to any action ~~or proceeding~~, such minor shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action ~~or proceeding~~ is brought. If the minor does not have a conservator of such minor's estate or a guardian, the minor shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

A.(1) When the minor is plaintiff, upon application of the minor, if the minor is 14 years of age or older, or upon application of a relative or friend of the minor if the minor is under 14 years of age.

A.(2) When the minor is defendant, upon application of the minor, if the minor is 14 years of age or older, filed within the period of time specified by law for appearance and answer after service of summons, or if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor.

B. Appearance of incapacitated person by conservator or guardian. When an incapacitated person, who has a conservator of such person's estate or a guardian, is a party to any action ~~or proceeding~~,' the incapacitated person shall appear by the conservator or guardian as may be appropriate or, if the court so

orders, by a guardian ad litem appointed by the court in which the action ~~or proceeding~~ is brought. If the incapacitated person does not have a conservator of such person's estate or a guardian, the incapacitated person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B.(1) When the incapacitated person is plaintiff, upon application of a relative or friend of the incapacitated person.

B.(2) When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by law for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

COMMENT

This rule is based on the existing ORS sections.

RULE 28

JOINDER OF PARTIES

A. Permissive joinder as plaintiffs or defendants. All persons may join in one action ~~or proceeding~~ as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any

question of law or fact common to all these persons will arise in the action. All persons may be joined in one action ~~or proceeding~~ as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

B. Separate trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to unnecessary ~~expense~~ expense by the inclusion of a party against whom ~~he~~ the party asserts no claim and who asserts no claim against ~~him and may~~ that party. The court may order separate trials or make other orders to prevent delay or prejudice.

COMMENT

This is based on existing ORS 13.161.

RULE 29

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

A. Persons to be joined if feasible. A person who is subject to service of process ~~and whose joinder will not deprive~~

~~the court of jurisdiction over the subject matter of the action~~ shall be joined as a party in the action ~~or proceeding~~ if (1) in that person's absence complete relief cannot be accorded among those already parties, or (2) that person claims an interest relating to the subject of the action ~~or proceeding~~ and is so situated that the disposition in that person's absence may (a) as a practical matter impair or impede the person's ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. If such person has not been so joined, the court shall order that such person be made a party. If a person should join as a plaintiff but refuses to do so, such person shall be made a defendant, the reason being stated in the complaint. ~~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.~~

B. Determination by court whenever joinder not feasible. If a person as described in subsections A.(1) and (2) of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action ~~or proceeding~~ should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a

judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action ~~or proceeding~~ is dismissed for nonjoinder.

C. Exception of class actions. This rule is subject to the provisions of Rule 32.

D. State agencies as parties in governmental administration ~~proceedings~~ actions. In any action ~~or proceeding~~ arising out of county administration of functions delegated or contracted to the county by a state agency, the state agency must be made a party to the action ~~or proceeding~~.

COMMENT

For a specific rule relating to joint obligations, see ORS 15.100

This is based upon Federal Rule 19. The existing Oregon rules do not contain an adequate indispensable party rule. This rule directs a court to look to the factors relevant to a decision whether a party should be included and whether the case should proceed when joinder of an interested person is not feasible. Those factors are described in terms of particular consequences to the existing parties and the interested person and the ways by which these consequences might be ameliorated by shaping relief or other steps. Section 29 D. does not appear in the federal rule and was taken from ORS 13.190.

References to subject matter jurisdiction and venue were deleted as inappropriate to state practice.

RULE 30

MISJOINDER AND NONJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action or proceeding. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any state of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

COMMENT

This is based on Federal Rule 21. Misjoinder or non-joinder are presently asserted by demurrer, motion to strike or pleading.

RULE 31

INTERPLEADER

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

B. Procedure. Any property or amount involved as to which the plaintiff admits liability may, upon order of the court, be deposited with the court or otherwise preserved, or secured by bond in an amount sufficient to assure payment of the liability admitted. The court may thereafter enjoin all parties before it from commencing or prosecuting any other action regarding the subject matter of the interpleader action. Upon hearing, the court may order the plaintiff discharged from liability as to property deposited or secured before determining the rights of the claimants thereto.

COMMENT

Rule 31 A. is based upon Federal Rule 22. Adoption of this rule was recommended to the last legislature by the Oregon State Bar. Two forms of interpleader are covered by existing Oregon Law, ORS 13.120 and equitable interpleader. The effectiveness of the interpleader device in Oregon under the existing rules is hampered by the limited scope of ORS 13.120 and the historic limitations on equitable interpleader. This rule is of general application and eliminates the equitable interpleader requirements that the same debt or duty be claimed by all the interpleaded parties, that the claimant's titles or claims be dependent on or derive from a common source, that the stakeholder not have or claim any interest in the subject of the interpleader and that the stakeholder not have incurred any independent liability to any one of the claimants.

Section 31 B. was adapted from the Michigan court rules to preserve the procedure of ORS 13.120 which allows the stakeholder ~~who has no interest to deposit~~ to be dismissed from the action.

RULE 32

CLASS ACTIONS

A. Requirement for class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

A.(1) The class is so numerous that joinder of all members is impracticable; and

A.(2) There are questions of law or fact common to the class; and

A.(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

A.(4) The representative parties will fairly and adequately protect the interests of the class; and

A.(5) In an action for damages under subsection (3) of section B. of this rule, the representative parties have complied

with the prelitigation notice provisions of section I. of this rule.

B. Class action maintainable. An action ~~or proceeding~~ may be maintained as a class action if the prerequisites of section A. of this rule are satisfied, and in addition:

B.(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

B.(1)(a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

B.(1)(b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

B.(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

B.(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Common questions of law or fact

shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions or ~~proceedings~~, (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action, including the feasibility of giving adequate notice; (e) the likelihood that the damages to be recovered by individual class members if judgment for the class is entered are so minimal as not to warrant the intervention of the court; (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.

C. Court discretion. In an action commenced pursuant to subsection (3) of section B. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section B. of this rule.

D. Court order to determine maintenance of class actions. As soon as practicable after the commencement of an action ~~or proceeding~~ brought as a class action, the court shall determine by

order whether it is to be so maintained and, in action pursuant to subsection (3) of section B. of this rule; the court shall find the facts specially and state separately its conclusions thereon. An order under this section may be conditional, and may be altered or amended before the decision on the merits.

E. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.

F. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

F.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

F.(2) Requiring, for the protection of the members of

the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

F.(3) Imposing conditions on the representative parties or on intervenors;

F.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

F.(5) Dealing with similar procedural matters.

G. Notice required; content; statements of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases. In any class action maintained under subsection (3) of section B. of this rule:

G.(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort. The notice shall advise each member that:

G.(1)(a) The court will exclude such member from the class if such member so requests by a specified date;

G.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

G.(1)(c) Any member who does not request exclusion may, if such member desires, enter an appearance through such member's counsel.

G.(2) Prior to the final entry of a judgment against a defendant the court shall request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class, including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.

G.(3) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

G.(4) Where a party has relied upon a statute or law

which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation or regulation.

H. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses. When appropriate:

H.(1) An action ~~or proceeding~~ may be brought or maintained as a class action with respect to particular issues; or

H.(2) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

I. Notice and demand required prior to commencement of action for damages.

I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of Section B. of this rule, the potential plaintiffs' class representative shall:

I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

I.(1)(b) Demand that such person correct or rectify the alleged wrong.

I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.

J. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A., B., and C. of this rule upon a showing by a defendant that all of the following exist:

J.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such other people has been made;

J.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;

J.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and

J.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in, such methods, acts or practices alleged to be violative of the rights of potential class members.

K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted. An action for equitable relief brought under sections A., B., and C. of this rule may be

commenced without compliance with the provisions of section I. of this rule. Not less than 30 days after the commencement of an action for equitable relief, and after compliance with the provisions of section I. of this rule, the class representative's complaint may be amended without leave of court to include a request for damages. The provisions of section J. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

L. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.

M. Coordination of pending class actions sharing common question of law or fact.

M.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.

M.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to

the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

M.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.

M.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.

M.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.

M.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure

for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.

N. Judgment; inclusion of class members; description; names. The judgment in an action ~~or proceeding~~ maintained as a class action under subsections (1) or (2) of section B. of this rule, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action ~~or proceeding~~ maintained as a class action under subsection (3) of section B. of this rule, whether or not favorable to the class, shall include and specify by name those to whom the notice provided in section G. of this rule was directed, and whom the court finds to be members of the class, and the judgment shall state the amount to be recovered by each member.

O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.

COMMENT

These are the existing ORS sections relating to class actions. ORS 13.400 and 13.410 are left as statutes because they are rules of appellate procedure. ORS 13.310 is left as a statute because it is a rule of evidence.

RULE 33

INTERVENTION

A. Definition. Intervention takes place when a third person is permitted to become a party to an action ~~or proceeding~~ between other persons, either by joining the plaintiff in claiming what is sought by the complaint, ~~or~~ by uniting with the defendant in resisting the claims of the plaintiff, or by demanding something ~~anything~~ adversely to both the plaintiff and defendant.

B. Intervention of right. At any time before trial, any person shall be permitted to intervene in an action ~~or proceeding~~ when a statute of this state or these rules confers an unconditional right to intervene.

C. Permissive intervention. At any time before trial any person who has an interest in the matter in litigation may, by leave of court, intervene. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

D. Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 9. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. If the court allows the intervention, parties shall, within 10 days, file those responsive pleadings which are permitted or required by these rules for such pleading.

COMMENT

This rule is based upon the existing Oregon intervention rule in ORS 13.130. Section 33 B. recognizes the possibility of mandatory statutory intervention; see, ORS 105.760, 105.755 and 373.060. The first sentence of section 33 C. comes from the existing ORS section; the second is taken from Federal Rule 24(b). The existing rules do not clearly cover the procedure for intervention; this rule includes a new section 33 D. relating to procedure.

RULE 34

SUBSTITUTION OF PARTIES

A. Nonabatement of action or proceeding by death, disability or transfer. No action ~~or proceeding~~ shall abate by the death or disability of a party, or by the transfer of any interest therein, if the claim survives or continues.

B. Death of a party; continued proceedings. In case of the death of a party, the court shall, on motion, allow the action ~~or proceeding~~ to be continued:

B.(1) By such party's personal representative or successors in interest at any time within one year after such party's death; or

B.(2) Against such party's personal representative or successors in interest at any time within four months after the date of the first publication of notice to interested persons, but not more than one year after such party's death.

C. Disability of a party; continued proceedings. In case of the disability of a party, the court may, at any time within one year thereafter, on motion, allow the action ~~or proceeding~~

to be continued by or against the party's guardian or conservator or successors in interest.

D. Death of a party; surviving parties. In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action ~~or proceeding~~ in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action ~~or proceeding~~ does not abate. The death shall be ~~suggested~~ shown upon the record and the action ~~or proceeding~~ shall proceed in favor of or against the surviving parties.

E. 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 the person to whom the interest is transferred to be substituted in the action or joined with the original party.

F. Public officers; death or separation from office.

F.(1) When a public officer is a party to an action ~~or proceeding~~ in such officer's official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action ~~or proceeding~~ does not abate and such officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

F.(2) When a public officer sues or is sued in such officer's official capacity, such officer may be described as a party by official title rather than by name; but the court may require such officer's name to be added.

G. Procedure. The motion for substitution may be made by any party, ~~or~~ by the successors in interest or representatives of the deceased or disabled party, or the successors in interest of the transferor and shall be served on the parties as provided in Rule 9 and upon persons not parties in the manner provided in Rule 7 for the service of a summons.

Section E. was taken from Federal Rule 25.

COMMENT

This rule generally preserves the existing rules of ORS 13.080. ORS 13.090 was unnecessary and was eliminated. Sections 34 A. through D. use the language of the existing statute. The words, "if the claim survives or continues", were added to the first sentence of section 34 A. to make clear that this rule relates only to the procedural question of abatement of the action.

Sections 34 E. and F. are based upon sections (a) and (d) of Federal Rule 25. The federal approach to substitution of federal officials is more direct and flexible than existing Oregon practice. Section 34 G. provides a procedure for substitution, which is not addressed by the existing ORS sections.

RULE 35 (RESERVED)

RULE 36

GENERAL PROVISIONS GOVERNING DISCOVERY

A. Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

B. Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

B.(1) In general. For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

B.(2) Insurance agreements.

B.(2)(a) A party may obtain discovery of the existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action ~~or proceeding~~ or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action ~~or proceeding~~. In such case, the party seeking discovery shall be informed/~~advised~~ of any prior question regarding the existence of coverage at the time discovery of the existence and limits of the insurance agreement is sought. If any question of the existence of coverage later arises, the party discovered against has the duty to immediately inform/~~advise~~ the party who sought discovery immediately/of the question regarding the existence of coverage. The party seeking discovery shall be informed/~~advised~~ of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.

B.(2)(b) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 and subsection B.(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under section B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action ~~or proceeding~~ or its subject matter previously made by that party. Upon request, a person who is not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person or party requesting the statement. If the request is refused, the person may move for a court order. The provisions of Rule 46 A.(4) apply to the

award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

B.(4) Expert witnesses.

B.(4)(a) Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and address of any person the other party reasonably expects to call as an expert witness at trial and the subject matter upon which the expert is expected to testify.

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

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

B.(4)(d) As used herein, the term, "expert witness", includes any person who is expected to testify at trial in an expert

RULE 37

PERPETUATION OF TESTIMONY OR EVIDENCE
BEFORE ACTION OR PENDING APPEAL

A. Before action.

A.(1) Petition. A person who desires to perpetuate testimony or to obtain discovery to perpetuate evidence under Rule 43 or Rule 44 regarding any matter that may be cognizable in any court of this state may file a petition in the circuit court in the county of such person's residence or the residence of any expected adverse party. ~~The petitioner, or petitioner's agent, shall verify that petitioner believes that the facts stated in the petition are true.~~ The petition shall be entitled in the name of the petitioner and shall show: (a) that the petitioner, or the petitioner's personal representatives, heirs, beneficiaries, successors or assigns are likely to be a party to an action ~~or proceeding~~ cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action ~~or proceeding~~; (b) the subject matter of the expected action ~~or proceeding~~ and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question or which is connected with the subject matter of the expected action ~~or proceeding~~; (c) the facts which petitioner desires to establish by the

proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons petitioner expects will be adverse parties and their addresses so far as one is known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each. ~~The petition shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony, or to seek discovery under Rule 43 or Rule 44 from the persons named in the petition.~~

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.

A.(2) Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition,

stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state in the manner provided for service of summons in Rule 7 F., but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rule 7 F., an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross examine the deponent. Testimony and evidence perpetuated under this rule shall be admissible against expected adverse parties not served with notice only in accordance with the applicable rules of evidence. If any expected adverse party is a minor or incompetent, the provisions of Rule 27 apply.

A.(3) Order and examination. If the court is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 43 specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 44. Discovery may then be had in accordance with these

rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

B. Pending appeal. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 43 or Rule 44 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which the party expects to elicit from each; (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in subsection (3) of section A. of this Rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

C. Perpetuation by action. This rule does not limit

the power of a court to entertain an action to perpetuate testimony.

D. Filing of depositions. Depositions taken under this rule shall be filed with the court in which the petition is filed or the motion is made.

COMMENT

This rule governs use of depositions, requests for production and inspection and medical examinations before a case is filed and pending appeal. It replaces the original Oregon deposition statute, ORS 45.410 to 45.470, which remained in ORS and applied to both depositions before and after a case was filed. The federal deposition procedure was adopted in Oregon and is generally used after a case was filed, but the original statute was used before filing. There was no ORS section dealing with depositions pending appeal.

The language used in this rule is a combination of the version of Federal Rule 27 appearing in the Vermont Rules of Civil Procedure, the Uniform Perpetuation of Testimony Act, and a small portion of the existing ORS sections. The rule is not a discovery provision; by its language and requirement that facts which the petitioner desires to perpetuate be specified and the reasons for perpetuation be given, it cannot be used to "fish" for information but only to perpetuate evidence.

Subsection A.(1) comes from the Uniform Perpetuation of Testimony Act. It is generally based upon Federal Rule 27 (a) but contains additional language in paragraphs (a) and (b) that permits a petitioner who had executed a written instrument, including a will, to anticipate an action after assignment or death and to perpetuate evidence to show the circumstances of execution and mental capacity. The requirement of attaching a copy of an instrument in paragraph (1)(b) is necessary to allow parties given notice of a deposition a meaningful opportunity for cross examination. The last clause of paragraph (1)(a), relating to a petitioner with an interest in real property, comes from ORS 45.420(1).

Under subsection A.(2), the general scheme for service of summons in ORCP 7 is followed for service of notice and petition. The rule follows the federal rule in providing that, if actual notice cannot be given to prospective parties, the petitioner may

proceed with an attorney appointed by the court to protect the interests of persons not served. Since the Council does not promulgate rules of evidence, perpetuation without notice under this rule involves no guarantee that evidence so perpetuated will be admissible in evidence. The next to the last sentence of this subsection was added to make this clear.

RULE 38

PERSONS WHO MAY ADMINISTER OATHS
FOR DEPOSITIONS; FOREIGN DEPOSITIONS

A. Within Oregon. Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

B. Outside the state. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court, and such a person shall have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and

both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign depositions.

C.(1) Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

C.(2) This rule shall be so interpreted and construed as to effectuate its general purposes to make uniform the laws of those states which have similar rules or statutes.

COMMENT

This rule is based upon the Vermont version of Federal Rule 28. This rule and ORCP 39 and 40 incorporate modifications suggested by the American Bar Association Special Committee of the Section of Litigation, providing a more flexible procedure for non-stenographic depositions. Section A. provides who shall administer an oath, not before whom a deposition shall be taken. It would not be necessary for the person who administers the oath to remain at the taking of the deposition after the witness is put on oath. See, Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October 1977, Second Printing and Revision, December, 1977), hereinafter referred to as ABA Special Committee Report.

Section 38 A. contemplates that in a particular case the court could appoint a person not generally authorized to administer oaths for the special purpose of a deposition. ORS 45.330, 45.350, and 45.360, providing for issuance of commissions for depositions were eliminated, but 38 B. provides that if necessary for a foreign deposition, a commission would be issued by the court.

Section 38 B. provides maximum flexibility to an Oregon litigant who wishes to take a deposition in another state or country. The Oregon litigant may need to comply with local requirements in taking the deposition and securing attendance of the witness. ORS 45.320 and 45.370 provide for taking depositions outside the state before commissioners appointed by the Governor, but the ORS provisions relating to appointment of Commissioners outside this state have been repealed, and those sections were eliminated.

Section 38 C. is the existing Uniform Foreign Deposition Act, ORS 45.910.

RULE 39

DEPOSITIONS UPON ORAL EXAMINATION

A. When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including the party, by deposition upon oral examination. Leave of court,

with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C.(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

B. Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C. Notice of examination.

C.(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action ~~or proceeding~~. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall

be attached to or included in the notice.

C.(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

C.(3) Shorter or longer time. The court may for cause shown enlarge or shorten the time for taking the deposition.

C.(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

C.(6) Deposition of organization. A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This section does not preclude taking a deposition by any other procedure authorized in these rules.

C.(7) Deposition by telephone. The court may upon motion order that testimony at a deposition be taken by telephone, in which event the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C.(4) of this Rule. If testimony is recorded pursuant to subsection C.(4) of this Rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this Rule, until the final disposition of the action or proceeding. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to

reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

G. Certification, filing and exhibits.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under ~~penalty of perjury,~~ oath, on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under penalty

of perjury, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under penalty of perjury that the recording, either filed or furnished to the person making the transcription, is a true, complete and accurate recording of the deposition of the witness and that the recording has not been altered.

G.(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action ~~or proceeding~~ is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition, shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action ~~or proceeding~~ is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance. 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.

G.(3) Exhibits. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, such person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G.(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection C.(4) of this Rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H. Payment of expenses upon failure to appear. H.(1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in

which the action or proceeding is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

H.(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

COMMENT

This rule is based upon Federal Rule 30 modified by existing ORS sections (which were based upon the pre-1970 federal rule language) and the proposed changes to accommodate non-stenographic depositions of the ABA Special Committee Report (see Comment to Rule 38). The term, "non-stenographic", includes video tape and any other recording device capable of producing a permanent and accurate record. ORS 45.020, 45.110 and 45.140 were eliminated as unnecessary.

Section 39 A. incorporates the 1970 amendments to the federal rules relating to time of taking depositions and special notice.

Section 39 B. covers that portion of ORS 44.230 relating to taking depositions of prison inmates. It requires a court order for such a deposition. That portion of ORS 44.230 relating to testimony at trial by prison inmates is covered under ORCP 55, relating to subpoenas.

Subsections C.(1), (2), (5) and (6) change the language of ORS 45.151 and 45.161 to conform to the 1970 amendments to the federal rules. Subsection C.(4) is based upon the recommendations of the ABA Special Committee Report and reverses the existing requirement for a court order to take a non-stenographic deposition. Subsection B.(7) is new. The ABA Special Committee Report recommended that a party be allowed to simply specify a deposition by telephone in the notice. This rule requires a court order for such a deposition.

Except for the addition of the last sentence, Section 39 E. is the same as ORS 41.185. Sections 39 D., F., and G. are generally the modified form of the corresponding federal rule sections recommended by the ABA Special Committee Report. Use of non-stenographic depositions requires special provisions relating to the manner of taking, signing, certifying and filing depositions because the person administering the oath will not necessarily be present or transcribing the deposition. The ABA approach did not contemplate filing of depositions with the court. This rule does provide for filing upon request of any party in subsection G.(2). For nonstenographic depositions, the rule contemplates that the oath will be administered on the recording and the recording will be preserved by the party taking the deposition unless the recording is filed with the court. Testimony would only be transcribed if requested by a party. If the recording or a transcription thereof is to be filed or used in the proceeding, it must be submitted to the witness for examination unless the parties and the witness waive the examination. A procedure for preserving changes by a witness and the reasons for such changes is provided, and the witness then signs a written statement affirming the correctness of the transcription or recording subject to any changes made. If a witness refuses to make such a statement within the time allowed, the deposition may be used as fully as though signed, unless suppressed by the court. For a nonstenographic deposition, the party taking the deposition certifies to the authenticity of the recording, and if transcribed, the person making the transcription also certifies that the oath was administered on the record and to the accuracy of the transcription. Other than changes related to nonstenographic transcription, the procedures described in these sections are not notably different from existing Oregon practice.

Subsection F.(3) provides a simplified method of dealing with exhibits.

Section 39 H. is ORS 45.200.

RULE 40

DEPOSITIONS UPON WRITTEN QUESTIONS

A. Serving questions; notice. After commencement of the action ~~or proceeding~~, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 55. The deposition of a person confined in prison may be taken only as provided in Rule 39 B.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify such person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 39 C.(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

B. Officer to take responses and prepare record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 39 D., F., and G., to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

COMMENT

The commission procedure for taking a deposition on written questions provided in the existing ORS sections is unnecessarily cumbersome. The language used is based upon Federal Rule 31.

RULE 41

EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS

A. As to notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

B. As to disqualification of officer. Objection to taking a deposition because of disqualification of the officer administering the oath is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

C. As to taking of deposition.

C.(1) Objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

C.(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

C.(3) Objections to the form of written questions submitted under Rule 40 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 20 days after service of the last questions authorized.

D. As to completion and return of deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with under Rules 39 and 40 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

COMMENT

Sections 41 A., B. and D. are based upon Federal Rule 32. Section 41 C. is based upon ORS 45.280. ORS 45.250 through 45.270 are retained as statutes because they were deemed to be rules of evidence.

RULE 42

LIMITED INTERROGATORIES

A. Availability; procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action ~~or proceeding~~ and upon any other party with or after service of the summons upon that party.

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

service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 46 A. with respect to any objection to or other failure to answer an interrogatory.

B. Use at trial; scope. Answers to interrogatories may be used to the extent permitted by rules of evidence. Within the scope of discovery under Rule 36 B. and subject to Rule 36 C., interrogatories may be used to obtain the following facts:

B.(1) The names, residence and business addresses, telephone numbers, and nature of employment, business or occupation of persons or entities having knowledge, and the source of such knowledge.

B.(2) The existence, identity, description, nature, custody, and location of documents (including writings, drawings graphs, charts, photographs, motion pictures, phono-records, and other data compilations from which information can be obtained), tangible things and real property.

B.(3) The name, address, subject matter of testimony and qualifications of expert witnesses to be called at trial.

B.(4) The existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy all or part of a

judgment which may be entered into the action or to indemnify or reimburse for payments made to satisfy the judgment.

B.(5) The nature and extent of any damages or monetary amounts claimed by a party in the action; the nature, extent, and permanency of any mental or physical condition forming the basis of such claim; all treatments for such physical condition; all tests and examinations relating to such condition; and, all preexisting mental, physical, and organic conditions bearing upon such claims.

B.(6) The address, registered agents, offices, places of business, nature of business, names, and addresses of board of directors and officers, names and addresses and job classifications and duties of agents and employees, names and addresses of stockholders or partners, and dates and places of incorporation or organization of any corporation or business entity.

B.(7) The date of birth, and the present addresses, business addresses, telephone numbers, employment or occupation or business, and marital status of any party or the employees, agents, or persons under the control of a party.

B.(8) The location, legal description, present and prior ownership, occupation and use, purchase or sale price, value, nature of improvements, interests affecting title, and records of deeds and instruments relating to title of any real property involved in an action ~~or proceeding~~.

B.(9) The custody, use, location, description, present and prior ownership, purchase or sale price, value, recording of instruments relating to title and security interests, interests claimed in such property, license numbers, registration numbers, model numbers, serial numbers, make, model, delivery and place of manufacture, and manufacturer of any tangible property involved in an action ~~or proceeding.~~

B.(10) The items of an account set forth in a pleading.

C. Option to produce business records or experts' reports. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, or from examination of reports prepared by experts in the possession of a party upon whom the interrogatory has been served, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records or reports from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records of reports and to make copies, compilations, abstracts, or summaries. The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

D. Form of response. The interrogatories shall be so arranged that a blank space shall be provided after each separately numbered interrogatory. The space shall be reasonably calculated to enable the answering party to insert the answer or objections within the space. If sufficient space is not provided, the answering party may attach additional papers with the answers and refer to them in the space provided in the interrogatories.

E. Limitations.

E.(1) Duty of attorney. It is the duty of an attorney directing interrogatories to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.

E.(2) 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, 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.

COMMENT

No single rule provoked more debate within the Council than this rule. It was finally determined that interrogatories could serve a useful function, but the unlimited federal approach invited abuse in the form of excessive interrogatories. The Council decided to develop a rule that would preserve the useful aspects of interrogatories, while controlling abuse. The control provisions are contained in sections 42 B. and E. Section 42 E. combines a specific duty upon attorneys to avoid abuse with a limitation upon number. The numerical limitation was adapted from the New Hampshire rules. In determining what constitutes an interrogatory, it was the intent of the Council that in compound questions, each element of the question be considered as constituting a separate interrogatory, e.g., "What is the present home address, business address and telephone number of X?", equals three interrogatories.

The limitations of subject matter in section 42 B. are entirely new. The scope of interrogatories is, of course, subject to the general requirement that the information sought be relevant to the claims or defenses of a party. Subsection B.(10) was included because an interrogatory would replace the request for particulars on an account, presently provided by ORS 16.470.

The interrogatory procedure provided in section 42 A. and C. is based upon Federal Rule 33. The Council added the specific option in section 42 C. to respond to an interrogatory by producing a report prepared by an expert.

Section 42 D. is designed to avoid shuffling between two separate documents and is based upon the New Jersey procedure.

RULE 43

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

A. Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, ~~phonorecords;~~ and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36 B. and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

B. Procedure. The request may be served upon the plaintiff after commencement of the action ~~or proceeding~~ and upon any other party with or after service of the summons upon that party.

The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related acts before the expiration of ~~60~~ 45 days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 A. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

C. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

D. Persons not parties. This rule does not preclude an independent action ~~or proceeding~~ against a person not a party for production of documents and things and permission to enter upon land.

COMMENT

This rule is based primarily upon ORS 41.616, which is similar to Federal Rule 34. In section 43 B., the federal rule requires a written response to the request to produce, and ORS 41.616 simply requires that the party comply with the request, or object. The language of ORS 41.616 was modified slightly because it was ambiguous in providing that the request would specify the time for production, but the party receiving the request would have 30 days to object. If the time for response was less than 30 days, it was unclear whether a compliance order could be sought until the 30-day period elapsed. This rule requires any objections to be filed before the time specified for production. If the person seeking discovery specifies an unreasonably early date for production, a protective order is available under Rule 36 C.

Section C. does not appear in the federal rules and is based upon ORS 41.620. Section D. was not included in the ORS sections and was taken from the federal rule.

RULE 44

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

A. Order for examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

B. Report of examining physician. If requested by the party against whom an order is made under section A. of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician setting out such physician's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

C. Reports of claimants for damages and injuries. In a civil action ~~or proceeding~~ where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

D. Report; effect of failure to comply. (1) If an obligation to furnish a report arises under sections B. or C. of this rule and the examining physician has not made a written report,

the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examining physician's fee, necessary to prepare such a report.

D.(2) If a party fails to comply with sections B. and C. of this rule, or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician prepare a written report within a reasonable time, the court may require the physician to appear for a deposition or may exclude the physician's testimony if offered at the trial.

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with the hospitalization of the injured person for such injuries. ~~Any person having custody of such records and who unreasonably refuses to allow examination and copying of such records shall be liable to the party seeking the records and reports for the reasonable and necessary costs of enforcing the party's right to discover.~~

COMMENT

This rule is a combination of ORS sections and Federal Rule 35. Section 44 A. comes from the federal rule and extends the possibility of a medical examination from personal injury

cases to any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody or under the legal control of a party would authorize court-ordered blood tests in paternity disputes.

Section 44 B. is also adapted from the federal rule. It provides for a more complete exchange of reports than that contemplated by the existing ORS sections. In one respect the rule is narrower than existing practice; it only allows the examined party to secure a copy of the report, as opposed to any party.

Section 44 C. is based on ORS 44.620(2).

Section 44 D. is based on ORS 44.630 but the language was modified to specifically cover the situation where the party obligated to furnish a report does not have a written report.

Section 44 E. is based upon ORS 441.810. Despite its location in ORS, the provision is a discovery rule. As enacted, the provision was apparently intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the codification did not make this clear. See State ex rel Calley v. Olsen, 271 Or 369 (1975). The language was modified to conform to the original intent.

The liability for failure to allow access to hospital records set out in ORS 441.810 is a substantive provision and is left as a statute.

RULE 45

REQUESTS FOR ADMISSION

A. Request for admission. After commencement of an action, 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. 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. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

B. Response. The request for admissions shall be preceded by the following statement printed in capital letters of the type size in which the request is printed: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP 45 B. WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS." Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the

party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon ~~him~~ such defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason failure to admit or deny unless the answering party states that reasonable inquiry has been made and that the information known or readily obtainable by the answering party is insufficient to enable the answering party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 46 c., deny the matter or set forth reasons why the party cannot admit or deny it.

C. Motion to determine sufficiency. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order than an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a designated time prior to trial. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

D. Effect of admission. Any matter admitted pursuant to this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the case will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice such party in maintaining such party's case or his defense on the merits. Any admission made by a party pursuant to this rule is for the purpose of the pending action only, and neither constitutes an admission by such party for any other purpose nor may be used against such party in any other action.

E. Form of response. The request for admissions shall be so arranged that a blank space shall be provided after each separately numbered request. The space shall be reasonably

calculated to enable the answering party to insert the admissions, denials, or objections within the space. If sufficient space is not provided, the answering party may attach additional papers with the admissions, denials, or objections and refer to them in the space provided in the request.

F. Number. A party may serve more than one set of requested admissions upon an adverse party, but the total number of requests shall not exceed thirty, unless the court otherwise orders for good cause shown after the proposed additional requests have been filed. In determining what constitutes a request for admission for the purpose of applying this limitation in number, it is intended that each request be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another request, and however the requests may be grouped, combined or arranged.

COMMENT

This rule is a combination of ORS 41.626 and Federal Rule 36. The principal variations from the ORS section, which were taken from the federal rule are: elimination of any restrictions on when requests for admissions may be served in section 46 A. and the additional time to respond for defendants served with requests; the specific language in section 46 A. allowing requests as to "facts or opinions of fact, or the application of law to fact"; and, the addition of a requirement in 46 B. that lack of information and belief may only be used as a response where "the answering party states that reasonable inquiry has been made."

The Council also added several provisions that appear neither in the ORS section or the federal rule. The Council also added sections 46 E. and F. Section 46 E. replaced ORS 41.626 (3) and provides that space shall be left for responses in the admissions form, rather than requiring that the request be retyped on a separate response. It was felt this would be consistent with the approach in the interrogatories rule and would minimize total typing time involved. Section 46 F. provides a number limitation on requests for admissions similar to the rule governing interrogatories.

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action ~~or proceeding~~ is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of a circuit or district court in the county ~~judicial district~~ where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the county ~~judicial district~~ where the deposition is being taken.

A.(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or a party fails to answer an interrogatory submitted under Rule 42, or if a party in response to a request for inspection submitted under Rule 43 (one), fails to permit inspection as requested, the discovering party may move for an order compelling discovery ~~inspection~~ in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered

to make on a motion made pursuant to Rule 36 C.

A.(3) Evasive or Incomplete answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

A.(4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

B.(1) Sanctions by court in the county where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or

district court judge in the ~~judicial district~~ county in which the deposition is being taken, the failure may be considered a contempt of ~~that~~ court.

B.(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this Rule or Rule 44, the court in which the action ~~or proceeding~~ is pending may make such orders in regard to the failure as are just, including ~~and~~ among others the following:

B.(2)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

B.(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

B.(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action ~~or proceeding~~ or any part thereof, or rendering a judgment by default against the disobedient party;

B.(2)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical

or mental examination.

B.(2)(e) Where a party has failed to comply with an order under Rule 44 A. requiring ~~such~~ the party to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this subsection, unless the party failing to comply shows inability to produce such person for examination.

B.(3) Payment of expenses. In lieu of any order listed in subsection (2) of this section or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified, or that other circumstances made an award of expenses unjust.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified, or that other circumstances make an award of expenses unjust.

C. Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter, as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions the reasonable expenses

incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B. or C., or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that ~~he~~ such party might prevail on the matter, or (4) there was other good reason for the failure to admit.

D. Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the officer who is to take ~~his~~ the deposition of that party or person, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 42, after proper service of the interrogatories, or (3) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, or (4) to ~~advise~~ inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage, the court in which the action or ~~proceeding~~ is pending on motion may make such orders in regard to the failure as are just, ~~and~~ including among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.

(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

COMMENT

For failure to identify expert witnesses when requested, see ORCP 36 B.(4). For failure of a person taking deposition or witness to appear at deposition, see ORCP 39 H. For failure to furnish medical reports when requested, see ORCP 44 D.

This rule is based upon Federal Rule 37 and incorporates most sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered through ORS Chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear procedure to be followed when a party or witness fails to comply with discovery requirements. The federal language was modified slightly to fit existing ORS sections and these rules. In subsection A.(2) a reference to failure to respond to a request for insurance policy under ORCP 36 was included. In subsection A.(4) the court "may" award expenses, and in subsection B.(2) the court "shall" award expenses which conforms to ORS 41.617(2), 41.631, 41.626(5) and 41.617(4). Failure to advise a party seeking discovery under ORCP 36 B. of the existence of a coverage question was added to section 46 D.

RULE 47

SUMMARY JUDGMEMT

A. For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits, for a summary judgment in that party's favor upon all or any part thereof.

B. For defending party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits, for a summary judgment in that party's favor as to all or any part thereof.

C. Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affdavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

D. Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of ~~his~~ that party's pleading, but his response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If ~~he~~ the adverse party does not so respond, summary judgment, if appropriate, shall be entered against ~~him~~ such party.

E. When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that ~~he~~ such party cannot, for reasons stated, present by affidavit facts essential to justify ~~his~~ the opposition of that party, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

F. Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

G. Multiple parties or claims; final judgment. In any action involving multiple parties or multiple claims, a summary judgment which is not entered in compliance with ORS 18.125 shall not constitute a final judgment.

COMMENT

This is ORS 18.105 without change.

RULE 48 (RESERVED)

RULE 49 (RESERVED)

RULE 50

JURY TRIAL OF RIGHT

The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate.

COMMENT

The elimination of procedural distinctions between actions at law and suits in equity cannot affect the constitutional right to jury trial.

RULE 51

ISSUES; TRIAL BY JURY OR BY THE COURT

A. Issues. Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other.

B. Issues of law; how tried. An issue of law shall be tried by the court.

C. Issues of fact; how tried. The trial of all issues of fact shall be by jury unless:

C.(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial without a jury, or

C.(2) The court, upon motion of a party or on its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state.

D. Advisory jury and trial by consent. In all actions ~~or proceedings~~ not triable by right to a jury, the court, upon motion of a party or on its own initiative ~~or of its own initiative~~, may try an issue with an advisory jury or it may, with the consent of all parties, order a trial to a jury whose verdict shall have the same effect as if trial by jury had been a matter of right.

COMMENT

This rule preserves the procedures covered by ORS 17.005 to 17.015, 17.030, 17.035 and 17.040. ORS 17.020, 17.025 and 17.045 are eliminated as unnecessary. The language of the existing ORS sections was modified to eliminate archaic language and to conform to these rules. Note that the Council retained the existing Oregon procedure of having jury trial waivable only by affirmative action of the parties rather than the federal system of requiring a demand for jury trial. Jury trial procedure in district court remains different in several respects. ORS 46.180 and 46.190 are not superseded. They provided for 6-person juries, require a jury demand, and provide only 2 peremptory challenges. See ORCP 1.

RULE 52

POSTPONEMENT OF CASES

A. Postponement. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a postponement. The court may in a proper case, and upon terms, reset the same.

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.

COMMENT

Section 52 A. is new. Section B. generally preserves the procedure set forth in ORS 17.050.

RULE 53

CONSOLIDATION; SEPARATE TRIALS

A. Joint hearing or trial; consolidation of actions. When more than one action involving a common question of law or fact is pending before the court, the court may order a joint hearing or trial of any or all of the matters in issue in such actions; the court may order all such actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

B. Separate trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, crossclaim, counterclaim, or of any separate issue or of any number of claims, crossclaims, counterclaims, or issues, always preserving inviolate the right of trial by jury as declared by the Oregon Constitution or as given by statute.

COMMENT

This rule is identical to the existing ORS sections except for the elimination of the words, "upon motion of any party", from sections 53 A. and B. to allow a court to consolidate or separate on its own initiative and the addition of the last clause of section 53 B. relating to jury trial.

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E., and of any statute of this state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and serving such motion on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismisssed in any court of the United States or of any state an action against the same parties on or including the same claim. Upon notice of dismissal or stipulation under this section, the court shall enter a judgment of dismissal.

A.(2) By order of court. Except as provided in subsection (1) of this section, an action shall not be dismissed at the plaintiff's instance save upon judgment of dismissal ordered by the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the judgment of dismissal, a dismissal under this paragraph is without prejudice.

B. Involuntary dismissal.

B.(1) Failure to comply with rule or order. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a judgment of dismissal of an action or of any claim against such defendant.

B.(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment of dismissal against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment or dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

B.(3) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own initiative, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice, that a judgment of dismissal will be entered in each such case by the court for want of prosecution, unless on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why

it should be continued as a pending case. If such application is not made or good cause shown, the court shall enter a judgment of dismissal in each such case. Nothing contained in this subsection shall prevent the dismissal by the court at any time, for want of prosecution, of any action upon motion of any party thereto.

B.(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication with prejudice.

C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third party claim.

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

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 to 17.085, the party against whom a claim is asserted may, at any time before trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the

property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

COMMENT

This rule governs all dismissals, including judgments of dismissal for insufficiency of evidence at the close of the plaintiff's case in an action tried to the court. It is a combination of Federal Rule 41 and existing ORS provisions.

Sections 54 A. and C. are based on the federal rule but preserve the right to take a non-prejudicial dismissal until 5 days before trial unless a counterclaim is filed as specified in ORS 18.210 and 18.230. The next to the last sentence of subsection 54 A.(1) is designed to prevent harassment by repeated filings and dismissals. The words, "against the same party", were added to the language of the federal rule to make clear this only applied to repeated filings against the same person.

Subsection 54 B.(1) comes from the federal rules and covers a judgment of dismissal for failure to comply with rules or court orders. Subsection 54 B.(2) covers a judgment of dismissal at the close of a claimant's case for insufficiency of the evidence. Existing ORS sections speak in terms of equity cases. This rule deals with sufficiency of evidence in cases tried without a jury. The former equity rule that a party could move for dismissal, at the close of the plaintiff's case, only at the price

of waiving the right to present evidence, is specifically changed. This rule also changes the former rule that a judgment of dismissal at the close of the plaintiff's case did not bar another suit; the judgment of dismissal is with prejudice unless the court specifies otherwise. There is no provision in the rule for a motion to dismiss in a non-jury case at the close of all the evidence. Since the judge decides the case at that point, no such motion is necessary. A decision of the case at the close of all the evidence would have prejudicial effect; a judge who, for some reason, wished to grant a non-prejudicial dismissal at the close of all the evidence would either reserve ruling on a motion to dismiss at the close of the plaintiff's case, if there was such a motion, or grant a non-prejudicial voluntary dismissal under section 54 A. The last sentence of subsection B.(1) requires findings only when they would be required for a judgment under Rule 62. Subsection 54 B.(3) is ORS 18.260 Note, that by virtue of subsection 54 B.(4), a dismissal for failure to prosecute is with prejudice, unless the judgment of dismissal specifies otherwise. Subsection B.(4) is from the federal rule, but the language of the federal rule in the last sentence was changed to define prejudicial effect of judgments of dismissal covered by section 54 B. only, and not all judgments of dismissal.

Section 54 D. comes from the federal rule.

Section 54 E. is ORS 17.055; 17.065 through 17.085 and 17.990 are left as statutes because they are not procedural rules.

RULE 55

SUBPOENA

A. Defined; form. ~~The process by which attendance of a witness is required is a subpoena.~~ A subpoena is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. Every subpoena shall state the name of the court and the title of the action.

B. For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance. C.(1) A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action ~~or proceeding~~ pending therein: (i) it may be issued by the clerk of the court in which the action ~~or proceeding~~ is pending, or if there is no clerk, then by a judge or justice of such

court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C., or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

C.(2) Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

D. Service; service on law enforcement agency; proof of service. (1) Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person over 18 years of age. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance.

The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

D.(2)(a) Every law enforcement agency shall designate an individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D.(2)(b) If a peace officer's attendance at trial is required as a result of ~~his~~ employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D.(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to ~~actually notify~~ the officer whose attendance is sought of the date, time and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall contact the court promptly and a postponement or continuance may be granted to allow the officer to be personally served.

D.(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department or a municipal police department.

D.(3) Proof of service of a subpoena is made in the same manner as proof of service of a summons.

E. Subpoena for hearing or trial; ~~witness~~ obligation of witness to attend; prisoners. (1) A witness is not obliged to attend for trial or hearing at a place outside the county in which the witness resides or is served with subpoena unless the residence of the witness is within 100 miles of such place, or, if the residence of the witness is not within 100 miles of such place, unless there is paid or tendered to the witness upon service of the subpoena: (a) double attendance fee, if the residence of the witness is not more than 200 miles from the place of examination; or (b) triple attendance fee, if the residence of the witness is more than 200 miles and not more than 300 miles from such place; or (c) quadruple attendance fee, if the residence of the witness is more than 300 miles from such place; and (d) single mileage to and from such place.

E.(2) If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F. Subpoena for taking depositions; place of examination.

F.(1) Proof of service of a notice to take a deposition as provided in Rules 39 C. and 40 A., or a certificate that such notice will be issued if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 36 B., but in that event the subpoena will be subject to the provisions of Rule 36 C. and section B. of this rule.

F.(2) A resident of this state may be required to attend an examination only in the county wherein such person resides or is employed or transacts business in person, or at such other convenient place as is fixed by an order of court. A non-resident of this state may be required to attend only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

G. Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action ~~or proceeding~~ is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, such party's ~~his~~ complaint, answer or reply may be stricken.

H. Hospital records.

H.(1) Hospital. As used in this section, unless the context requires otherwise, "hospital" means a hospital licensed under ORS 441.015 to 441.087, 441.525 to 441.595, 441.810 to 441.820, 441.990, 442.300, 442.320, 442.330, and 442.340 to 442.450.

H.(2) Mode of compliance with subpoena of hospital records. (a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action ~~or proceeding~~ in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases, to the officer or body conducting the hearing at the official place of business.

H.(2)(c) After filing, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H.(3) Affidavit of custodian of records. (a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating

in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H.(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H.(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H.(4) Personal attendance of custodian of records may be required. (a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H.(5) Tender and payment of fees. Nothing in this rule requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

COMMENT

This rule is a combination of existing ORS provisions and Federal Rule 45. The existing ORS provisions contain some archaic language and do not clearly cover deposition subpoenas.

Section 55 A. is based upon ORS 44.110. Section 55 B. comes from the federal rule.

Section 55 C. retains the basic procedure of ORS 44.120, but the language of the ORS section is awkward and was modified, relying upon California Civil Practice Code, Sec. 1986.

Section 55 D. is based on ORS 44.140 and 44.160.

Subsection 55 E.(1) is based upon ORS 44.171 but applies only to trial subpoenas. Subsection E.(2) replaces ORS 44.230. It leaves the question of production of a prison inmate to the discretion of the court. The existing ORS provisions allowed production only if trial was in the county where the inmate was held or when the inmate was a party. ORS 44.240 is left as a statute.

Section 55 F. is based upon Federal Rule 45 (d). It provides that a clerk may issue a subpoena or a certificate that a notice of deposition will be issued; this would allow a party to see if the subpoena can be served before service of a notice of deposition. It limits the place where a deposition may be taken rather than simply allowing a party to serve a subpoena for a deposition anywhere, with enhanced witness fees if the witness had to travel a long distance, which is the approach under ORS 44.171. Choice of place of trial is relatively limited but this is not true for depositions. The second paragraph of Federal Rule 45 (d)(1) was intentionally omitted, and a witness who objects to a subpoena must seek a protective order.

Section 55 G. is based upon ORS 44.190 with some modifications because of provisions already incorporated in the discovery rules. ORS 44.180 and 44.200 to 44.210 are eliminated as unnecessary.

Section 55 H. is based upon ORS 41.915 to 91.940. ORS 41.930 is left as a statute because it is a rule of evidence. To the extent ORS 41.945 applies beyond courts, it would remain as a statute. The only change from the existing language is in paragraph which allows inspection of the sealed documents by parties or attorneys prior to the trial or deposition.

55 H. (2)(c)

RULE 56

TRIAL BY JURY DEFINED; NUMBER OF JURORS

A trial jury in the circuit court is a body of twelve persons drawn as provided in Rule 57. The parties may stipulate that a jury shall consist of any number less than twelve or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

COMMENT

This is based upon the existing ORS section. The last sentence was added. Note that the six-person jury provision of ORS 46.180 would continue to be applicable in district courts. Under Rule 1, the ORS section is a rule or statute providing a special procedure.

RULE 57

JURORS

A. Challenging compliance with selection procedures.

A.(1) Motion. Within 7 days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief, on the ground of substantial failure to comply with ORS 10.010 to 10.490 in selecting the jury.

A.(2) Stay of proceedings. Upon motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with ORS 10.010 to 10.490, the moving party is entitled to present, in support of the motion, the testimony of the clerk or court administrator, any relevant records and papers not public or otherwise available used by the clerk or court administrator, and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply

with ORS 10.010 to 10.490, the court shall stay the proceedings pending the selection of the jury in conformity with ORS 10.010 to 10.490, or grant other appropriate relief.

A.(3) Exclusive means of challenge. The procedures prescribed by this section are the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with ORS 10.010 to 10.490.

B. Jury; how drawn. When the action is called for trial the clerk shall draw from the trial jury box of the court, one by one, the ballots containing the names of the jurors until the jury is completed or the ballots are exhausted. If the ballots become exhausted before the jury is complete, the sheriff, under the direction of the court, shall summon from the bystanders, or the body of the county, so many qualified persons as may be necessary to complete the jury. Whenever the sheriff shall summon more than one person at a time from the bystanders or the body of the county, the sheriff shall return a list of the persons so summoned to the clerk. The clerk shall write the

names of such persons upon separate ballots, and deposit the same in the trial jury box, and then draw such ballots therefrom, as in the case of the panel of trial jurors for the term.

C. Examination of jurors. The full number of jurors having been called shall thereupon be examined as to their qualifications. The court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.

D. Challenges.

D.(1) Challenges for cause; grounds. Challenges for cause may be taken on any one or more of the following grounds:

D.(1)(a) The want of any qualifications prescribed by ORS 10.030 for a person competent to act as a juror or improper summons under ORS 10.030 (3).

D.(1)(b) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

D.(1)c) Consanguinity or affinity within the fourth degree to any party.

D.(1)(d) Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor, to the adverse party; or being a memeber of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of, the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

D.(1)(e) Having served as a juror on a previous trial in the same action ~~or proceeding~~; or in another action ~~or proceeding~~ between the same parties for the same cause of action, upon substantially the same facts or transaction.

D.(1)(f) Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

D.(1)(g) Actual bias, which is the existence of a state of mind on the part of the juror, in reference to the action ~~or proceeding,~~ or to either party, which satisfies the court, in the exercise of a sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging. A challenge for actual bias may be

taken for the causes mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

D.(2) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude such juror. Either party shall be entitled to three peremptory challenges, and no more. Where there are multiple parties plaintiff or defendant in the case or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to a total of three peremptory challenges, except ~~that if the court finds there is a good faith controversy existing between multiple plaintiffs or multiple defendants,~~ the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

D.(3) Conduct of peremptory challenges. After the full number of jurors have been passed for cause, peremptory challenges shall be conducted as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the said order of alternation shall not defeat the adverse party of ~~his~~ such adverse party's full number of challenges, and such refusal by a party to exercise ~~his~~ a challenge in proper turn shall conclude that party as to the jurors once accepted by that party, and if ~~his~~ that party's right of peremptory challenge be not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted, but nothing in this subsection shall be construed to increase the number of peremptory challenges allowed.

E. Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give according to the law and evidence as given them on the trial.

F. Alternate jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retired to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged as the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled, two peremptory challenges if

three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

COMMENT

Section 57 A. allows a challenge to jury selection procedures. It is not the common law challenge to the array but a specific method of insisting upon compliance with jury selection procedures before trial. It was taken from Section 12 of the Uniform Jury Selection Act. The procedure is limited to questioning validity of jury selection methods. Any defect must be "substantial", and the court can refuse to stay proceedings when only a technical defect is involved.

Section 57 B. comes from ORS 17.110.

The first sentence of section 57 C. comes from ORS 17.160. The second sentence is new but is intended to retain existing practice; that is, the parties' existing right to conduct voir dire remains the same.

Section 57 D. combines the grounds for challenge for cause. Reference to general and particular causes of challenge and actual and implied bias are eliminated as archaic and unnecessary. The order of challenges in ORS 17.165 is eliminated. The Council intended to retain the same grounds for challenge for cause existing in ORS. The elaborate provisions relating to trials of challenges for cause of ORS 17.170 through 17.180 are eliminated.

Section 57 D.(2) is new and clarifies the number and exercise of peremptory challenges in multiple party situations. The procedure for conduct of peremptory challenges in 57 D.(3) is the same as in ORS 17.160. Note, the number of peremptory challenges in district court is govered by ORS 41.190.

Section 57 F. clarifies the procedure relating to alternate jurors.

RULE 58

TRIAL PROCEDURE

A. Order of proceedings on trial by the court. Trial by the court shall proceed in the order prescribed in subsections (1) to (5) of section B. of this rule, unless the court, for special reasons, otherwise directs.

B. Order of proceedings on jury trial. When the jury has been selected and sworn, the trial, unless the court for good and sufficient reason otherwise directs, shall proceed in the following order:

B.(1) The plaintiff shall concisely state plaintiff's case ~~cause of action~~ and the issues to be tried; the defendant then in like manner shall state defendant's case based upon any ~~his~~ defense or counterclaim or both.

B.(2) The plaintiff then shall introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.

B.(3) The parties respectively then may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense or counterclaim.

B.(4) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant

then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.

B.(5) Not more than two counsel shall address the jury in behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours/. ~~and the court may extend such time beyond two hours~~.

B.(6) The court then shall charge the jury.

C. Separation of jury before submission of cause; admonition. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

D. Proceedings if juror becomes sick. If, after the formation of the jury, and before verdict, a juror becomes sick, so as to be unable to perform the duty of a juror ~~or does not obey~~, the court may order such juror to be discharged. In that case, unless an alternate juror, seated under Rule 57 D., is available to replace the discharged juror or unless the parties agree to proceed with the remaining jurors, a new juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards formed.

COMMENT

This rule is based upon ORS 17.205, 17.210, 17.220 and 17.225. ORS 17.215, 17.235, 17.240 and 17.245 (except the last sentence, which appears in ORCP 59) were eliminated as unnecessary. ORS 17.230 and 17.250 were deemed so closely related to evidentiary rules that they were left as statutes.

RULE 59

INSTRUCTIONS TO JURY AND DELIBERATION

A. Proposed instructions. Unless otherwise requested by the trial judge on timely notice to counsel, proposed instructions shall be submitted at the commencement of the trial. Proposed instructions upon questions of law developed by the evidence, which could not be reasonably anticipated, may be submitted at any time before the court has instructed the jury. The number of copies of proposed instructions and their form shall be governed by local court rule.

B. Charging the jury. In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict. Whenever the knowledge of the court is by statute made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it as conclusive. If in the opinion of the court it is desirable, the charge shall be reduced to writing, and then read to the jury by the court. The jury shall take such written instructions with it while deliberating upon the verdict, and then return them to the clerk immediately upon conclusion of its deliberations. The clerk shall file the instructions in the court file of the case.

C. Deliberation.

C.(1) Exhibits. Upon retiring for deliberation the jury may take with them all exhibits received in evidence, except depositions.

C.(2) Written statement of issues. Pleadings shall not go to the jury room. The court may, in its discretion, submit to the jury an impartial written statement summarizing the issues to be decided by the jury.

C.(3) Copies of documents. Copies may be substituted for any parts of public records of private documents as ought not, in the opinion of the court, to be taken from the person having them in possession.

C.(4) Notes. Jurors ~~who have taken~~ may take notes of the testimony or other proceeding on the trial and may take such notes into the jury room.

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

C.(6) Juror's use of private knowledge or information. A juror shall not communicate any private knowledge or information that the juror may have of the matter in controversy to other jurors, except when called as a witness, nor shall the juror be governed by the same in giving his or her verdict.

D. Further instructions. After retirement for deliberation, if the jury requests information on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given either orally or in writing in the presence of, or after notice to, the parties or their counsel.

E. Comments upon evidence. The judge shall not instruct with respect to matters of fact, nor comment thereon.

F. Discharge of jury without verdict.

F.(1) The jury shall not be discharged after the cause is submitted to them until they have agreed upon a verdict and given it in open court unless:

F.(1)(a) At the expiration of such period as the court deems proper, it satisfactorily appears that there is no probability of an agreement; or

F.(1)(b) An accident or calamity requires their discharge;

F.(1)(c) A juror becomes ill as provided in Rule 58 D.

~~F.(2) When jury is discharged without giving a verdict,~~

F.(2) Where the jury is discharged without giving a verdict, either during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court directs.

G. Return of jury verdict.

G.(1) Declaration of verdict. When the jury have agreed upon their verdict, they shall be conducted into court by the officer having them in charge. The court shall inquire whether they have agreed upon their verdict. If the foreperson answers in the affirmative, it shall be read.

G.(2) Number of jurors concurring. In civil cases three-fourths of the jury may render a verdict.

G.(3) Polling the jury. When the verdict is given and before it is filed, the jury may be polled on the request of a party, for which purpose each juror shall be asked whether it is his or her verdict. If a less number of jurors answer in the affirmative than the number required to render a verdict, the jury shall be sent out for further deliberations.

G.(4) Informal or insufficient verdict. If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be required to deliberate further.

G.(5) Completion of verdict, form and entry. When a verdict is given and is such as the court may receive, the clerk shall file the verdict. Then the jury shall be discharged from the case.

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

COMMENT

This rule is based upon existing ORS sections. Some archaic language was clarified in most sections. In section A. the provision requiring submission of instructions at commencement of trial was added. Section B. changes ORS 17.255(2) to provide that instructions will be given to the jury in writing entirely at the discretion of the court and to specify that the written instructions shall be read to the jury by the court before being submitted to them. Subsection C.(2) changes 17.320 to make the written statement of the issues at the discretion of the court. Subsection C.(5) changes ORS 17.305 to require that the just must retire before announcing a verdict and has been redrafted. Section 59 E. was added to codify the existing rule. In section G.(2) the rule does not cover application to 6-person juries in district court under ORS 46.180. It has generally been assumed that 5 jurors must agree on a verdict in order to have three-fourths of a 6-person jury render a verdict.

Section 59 H. is based on ORS 17.510 and 17.515 (1) and (2). The section is included as it does describe conduct in the trial court. It also provides a basis for new trial in ORCP 64 B.(7). The Council cannot make rules of appellate procedure, and the question of preserving error on appeal is one determined by the appellate courts. On the question of whether failure to give a requested instruction preserves error in instructions given, see Holland v. Sisters of Saint Joseph, Seely, 270 Or 129 (1974), and Becker v. Beaverton School District, 25 Or App 879 (1976).

RULE 60

MOTION FOR A DIRECTED VERDICT

Any party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If a motion for directed verdict is made by the defendant, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict.

COMMENT

Rule 60 is based upon Federal Rule 50(a). These rules eliminate the device of nonsuit completely. The proper motion to test sufficiency of the evidence in a jury case, at the close of the plaintiff's case, or any other time before submission to the jury, is for directed verdict. The major change from the nonsuit practice is that a directed verdict at the close of the plaintiff's case would be a dismissal with prejudice, whereas the nonsuit was not. For a dismissal in a non-jury case under Rule 54, the judge may direct that dismissal be without prejudice. In a jury case, if a judge feels that a plaintiff should be given a chance to refile when the evidence presented by the plaintiff is insufficient, the trial judge can grant a judgment of dismissal without prejudice under Rule 54 instead of directing a verdict. ORS 18.240 was eliminated.

RULE 61

VERDICTS, GENERAL AND SPECIAL

A. General verdict.

A.(1) A general verdict is that by which the jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant.

A.(2) When a general verdict is found in favor of a party asserting a claim for the recovery of money, the jury shall also assess the amount of recovery. A specific designation by a jury that no amount of recovery shall be had complies with this subsection.

B. Special verdict. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury

retires such party demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

C. General verdict accompanied by answer to interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and the answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

D. Assessment of amount of recovery. In an action for

the recovery of specific personal property where any party who alleges a right to possession of such property is not in possession at the time of trial, in addition to any general verdict or other special verdict, the court shall require the jury to return a special verdict in the form of a special written finding on the issue of the right to possession of any parties alleging a right to possession and assessment of the value of the property.

COMMENT

Section 61 A. combines the definition of general verdict in ORS 17.405 with a redraft of ORS 17.425. The language of ORS 17.425 is very confusing, and subsection 61 A.(2) preserves the essential procedure. The last sentence of 61 A.(2) allows a jury properly to return a verdict in favor of a plaintiff asserting a right to recover damages in the amount of "zero" damages. See Fischer v. Howard, 201 Or 426 (1954).

Sections 61 B. and C. are based upon Federal Rule 49(a) and (b). Section 61 D. is based upon ORS 17.410.

RULE 62

FINDINGS OF FACT

A. Necessity. Whenever any party appearing in a civil action ~~or proceeding~~ tried by the court so demands prior to the commencement of the trial, the court shall make special findings of fact, and shall state separately its conclusions of law thereon. In the absence of such a demand for special findings, the court may make either general or special findings. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact or conclusions of law appear therein.

B. Proposed findings; objections. Within 10 days after the court has made its decision, any special findings requested by any party, or proposed by the court, shall be served upon all parties who have appeared in the case and shall be filed with the clerk; and any party may, within 10 days after such service object to such proposed findings or any part thereof, and request other, different or additional special findings, whether or not such party has previously requested special findings. Any such objections or requests for other, different, or additional special findings shall be heard and determined by the court within 30 days after the date of the filing thereof; and, if not so heard and determined, any such objections and requests for such other, different, or additional special findings shall conclusively be deemed denied.

RULE 63

JUDGMENT NOTWITHSTANDING THE VERDICT

A. Grounds. When a motion for a directed verdict which should have been granted has been refused and a verdict is rendered against the applicant, the court may, on motion, render a judgment notwithstanding the verdict, or set aside any judgment which may have been entered and render another judgment, as the case may require.

B. Reserving ruling on directed verdict motion. In any case where, in the opinion of the court, a motion for a directed verdict ought to be granted, it may nevertheless, at the request of the adverse party, submit the case to the jury with leave to the moving party to move for judgment in such party's favor if the verdict is otherwise than as would have been directed or if the jury cannot agree on a verdict.

C. Alternative motion for new trial. A motion in the alternative for a new trial may be joined with a motion for judgment notwithstanding the verdict, and unless so joined shall, in the event that a motion for judgment notwithstanding the verdict is filed, be deemed waived. When both motions are filed, the motion for judgment notwithstanding the verdict shall have precedence over the motion for a new trial, and if granted the court shall, nevertheless, rule on the motion for a new trial and assign such reasons therefor as would apply had the motion for judgment notwithstanding the verdict been denied, and shall make and file an order in accordance with said ruling.

D. Time for motion and ruling. A motion for judgment notwithstanding the verdict shall be filed not later than 10 days after the filing of the judgment sought to be set aside, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days of the time of the filing of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

E. Duties of the clerk. The clerk shall, on the date an order made pursuant to this rule is entered or on the date a motion is deemed denied pursuant to section D. of this rule, whichever is earlier, mail a copy of the order and notice of the date of entry of the order or denial of the motion to each party who is not in default for failure to appear. The clerk also shall make a note in the docket of the mailing.

F. Motion for new trial after judgment notwithstanding the verdict. The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 64 not later than 10 days after entry of the judgment notwithstanding the verdict.

COMMENT

ORCP 63 is based upon ORS 18.140. The reference to failure to state a cause of action in a pleading as a ground for judgment NOV was eliminated as unnecessary and inconsistent with the pleading rules. Section 63 F. is based upon Federal Rule 50 (c)(2).

RULE 64

NEW TRIALS

A. New trial defined. A new trial is a re-examination of an issue of fact in the same court after judgment.

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action ~~or proceeding~~ where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

B.(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.

B.(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.(7) Error in law occurring at the trial and objected to or excepted to by the party making the application.

F. Time of motion; counteraffidavits; hearing and determination. A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed not later than 10 days after the filing of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits, such party shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the filing of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

G. New trial on court's own initiative; review. If a new trial is granted by the court on its own initiative, the order shall so state and shall be made within 30 days after the filing of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

COMMENT

This rule is based upon existing ORS sections. Section 64 C. is based on 17.435, but the language is modified to refer to a case tried without a jury rather than a suit in equity, and the last sentence is new. The last sentence of ORS 17.630 is not included and will remain as a statute as it relates to appellate procedure. Subsections 64 B.(5) and (6) were retained in the language of ORS 17.610, although they have been severely limited by Article VII, Section 3 of the Oregon Constitution. Van Lom v. Schneiderman, 187 Or 89 (1949); Bean v. Hostetler, 182 Or 518 (1948).

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: FINAL DRAFT OF RULES

DATE: November 26, 1978

Enclosed is the final draft of the rules for your careful examination and consideration. In addition to the previously directed changes, I made several conforming modifications:

1. Rule 4 L. The Council directed that the first sentence of 4 L. be eliminated. I had to change the remaining sentence and title.

2. Rule 4 O. was added because of the discussion relating to parties and persons at the last meeting.

3. I changed "real property" in Rule 7 D.(5)(e) to "property" because of the changes in Rule 20 I. and J. I added a title to Rule 7 D.(5)(a), F.(2)(a)(i), F.(2)(a)(ii), and F.(2)(a)(iii). I also changed the lead-in sentence of Rule 7 F.(2)(a) to be consistent with the text of the rule.

4. Rule 9 A. I eliminated language in the fourth line because of the elimination of former section 9 C. relating to service on less than all the parties.

Justice Lent raised a question whether, when a judgment on the pleadings was equivalent to a late motion to dismiss for failure to state a claim, the party asserting the claim could re-plead or re-file if the motion were sustained. Under Rule 23 D., the motion for judgment on the pleadings is treated the

same as a motion to dismiss or a motion to strike in terms of ability to amend. In all three cases, if the court does not allow amendment or if a party declines to amend and a final judgment is entered, the question of res judicata effect is not covered by these rules.

At the last meeting, the Council questioned how a party would seek a dismissal for lack of a real party in interest as referred to in Rule 26, Line 10. Present Rule 21 A. makes no reference to real party in interest. Under the federal rules, there is no clear procedure for initially raising a lack of a real party in interest, and there has been some confusion in the federal courts. The general practice is to either raise it by motion to dismiss for failure to state a claim, or assert the defense in an answer. See, 6 Wright & Miller, Federal Practice and Procedure, § 1554. Under prior practice in Oregon, the defense was raised by general demurrer for failure to state a cause of action if it appeared on the face of the complaint or by a plea in abatement if it did not so appear. See, Title and Trust Company v. U.S. Fidelity and Guaranty, 147 Or 255, 263 (1934); Waters v. Bigelow, 210 Or 317 (1957).

We could do two things: (1) leave the rules as they are and indicate in the comment to Rule 26 that the defense may be raised by motion under Rule 21 A.(7) or by answer; (2) add a new 21 A.(6) as follows:

> "That the party asserting the claim is not the real party in interest".

and renumber the subsequent defenses. This would also require changing the

last sentence of Rule 21 A. to refer to defenses (1) through (7); changing 21 C. to refer to defenses (1) through (9) and adding "that the claimant is not the real party in interest" at the end of the fifth line of Rule 21 G.

I think the second alternative is probably better. A real party in interest objection and a failure to state a claim are not exactly the same thing. Real party in interest does not go to the merits and would be a nonprejudicial dismissal. The second approach would also be more consistent with prior Oregon practice. Under present rules, if the real party in interest problem did not appear in an opponent's pleading, it would only be asserted in an answer. To have a preliminary determination on the issue, the party raising the objection would have to ask for a separate trial under Rule 53. Rule 21 C. refers only to defenses specifically denominated in Rule 21 A. The most important problem in retaining the present rule would be that the waiver provision of Rule 21 G.(2) could be interpreted to say that a lack of a real party in interest was not waived until entry of a final judgment. Both state and federal cases have held that the defense must be asserted promptly.

I am enclosing a letter from a Legal Aid attorney dealing with the constitutional problem where an indigent is required to publish in a divorce case. I believe our redraft of Rule 7 D.(5)(a) takes care of the problem by authorizing the court to order mailing instead of publication.

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: ORS SECTIONS SUPERSEDED

DATE: November 29, 1978

The legislature in establishing the Council did not clearly define the Council's power to promulgate rules "repealing" ORS sections, as opposed to "superseding" ORS sections. ORS 1.735 says the Council shall promulgate rules and "the rules thus adopted and any amendments which may be adopted from time to time, together with a list of statutory sections superseded thereby", shall be submitted to the legislature. The legislature may "by statute, amend, repeal, or supplement any of the rules." ORS 1.750 says that all rules relating to pleading, practice, and procedure remain in effect until they are "modified, superseded, or repealed" by rules which become effective under ORS 1.735.

The question is whether there is a difference between "superseding" and "repealing" ORS sections. I could not find any Oregon cases on the meaning of "superseded." According to the dictionary, "supersede" means to make void, to make superfluous or unnecessary, to cause to be supplanted in position or function, to take the place of, or to take precedence over. "Repeal" means to rescind, revoke, abrogate, or annul. On its face, supersede is capable of being interpreted to mean something less than complete repeal. Other jurisdictions have interpreted "supersede" in statutes to either mean the same thing as "repeal", Randle v. Payne,

39 Ala. App. 652, 107 So.2d 907 (1958), or to mean that application of a statute has been eliminated for specific areas. See, City of Canon City v. Merris, 37 Colo. 169, 323 P.2d 614 (1958)(home rule charter superseding state statutes). The differing interpretation results from the context and history of the different statutes.

Looking at ORS 1.735 and 1.750, it seems the legislature wanted to give the Council power to promulgate new rules of civil procedure as a substitute for existing ORS sections which had been made rules of civil procedure in civil cases in courts of the state. It did not give the Council any control over ORS or general power to repeal statutes. Changes to the Oregon Revised Statutes are only authorized upon certificate of Legislative Counsel that such change is based on an enrolled bill. ORS 173.170 and 174.510.

I suggest, therefore, that the superseded ORS sections are superseded in the sense that they no longer apply in civil actions in courts where Rule 1 makes the Oregon Rules of Civil Procedure applicable. To make this clear, we should use a short introduction to the ORS sections superseded. Whether to repeal ORS sections not completely superseded in function by ORCP is up to the legislature. Whether ORS sections which are completely superseded in function should be retained in ORS is up to Legislative Counsel.

Section II

The following ORS sections are superseded by the Oregon Rules of Civil Procedure. The Oregon Rules of Civil Procedure replace the superseded ORS sections as the rules of pleading, practice, and procedure in those civil actions and courts where the Oregon Rules of Civil Procedure are made applicable by ORCP 1 A.

Chapter 11

11.010, 11.020, 11.050, 11.060.

Chapter 13

13.010, 13.020, 13.030, 13.041, 13.051, 13.060, 13.070, 13.080, 13.090, 13.110, 13.120, 13.130, 13.140, 13.150, 13.161, 13.170, 13.180, 13.190, 13.210, 13.220, 13.230, 13.240, 13.250, 13.260, 13.270, 13.280, 13.290, 13.300, 13.320, 13.330, 13.340, 13.350, 13.360, 13.370, 13.380, 13.390.

Chapter 14

14.010, 14.020, 14.035.

Chapter 15

15.010, 15.020, 15.030, 15.040, 15.060, 15.070, 15.080, 15.085, 15.090, 15.110, 15.120, 15.130, 15.140, 15.150, 15.160, 15.170, 15.180, 15.190, 15.200, 15.210, 15.220.

Chapter 16

16.010, 16.020, 16.030, 16.040, 16.050, 16.060, 16.070, 16.080, 16.090, 16.100, 16.110, 16.120, 16.130, 16.140, 16.150, 16.210, 16.221, 16.240, 16.250, 16.260, 16.270, 16.280, 16.290, 16.305, 16.315, 16.320, 16.325, 16.330, 16.340, 16.360, 16.370, 16.380, 16.390, 16.400, 16.410, 16.420, 16.430, 16.460, 16.470, 16.480, 16.490, 16.500, 16.510, 16.530, 16.540, 16.610, 16.620, 16.630, 16.640, 16.650, 16.660, 16.710, 16.720, 16.730, 16.740, 16.760, 16.765, 16.770, 16.780, 16.790, 16.800, 16.810, 16.820, 16.830, 16.840, 16.850, 16.860, 16.870, 16.880.

Chapter 17

17.005, 17.010, 17.015, 17.020, 17.025, 17.030, 17.033, 17.035, 17.040, 17.045, 17.050, 17.055, 17.105, 17.110, 17.115, 17.120, 17.125, 17.130, 17.135, 17.140, 17.145, 17.150, 17.155, 17.160, 17.165, 17.170, 17.175, 17.180, 17.185, 17.190, 17.205, 17.210, 17.215, 17.220, 17.225, 17.235, 17.240, 17.245, 17.255, 17.305, 17.310, 17.320, 17.325, 17.330, 17.335, 17.340, 17.345, 17.350, 17.355, 17.360, 17.405, 17.410, 17.415, 17.420, 17.425, 17.431, 17.435, 17.441, 17.505, 17.510, 17.515, 17.605, 17.610, 17.615, 17.620, 17.625, 17.630.

Chapter 18

18.020, 18.105, 18.140, 18.210, 18.220, 18.230, 18.240, 18.250, 18.260, 18.310.

Chapter 20

20.030.

Chapter 23

23.010.

Chapter 29

29.040, 29.510.

Chapter 30

30.350.

Chapter 35

35.225.

Chapter 41

41.616, 41.617, 41.618, 41.620, 41.622, 41.626, 41.631, 41.635, 41.915, 41.925, 41.935, 41.940.

Chapter 44

44.110, 44.120, 44.130, 44.140, 44.160, 44.171, 44.180, 44.190, 44.200, 44.210, 44.220, 44.230, 44.610, 44.620, 44.630, 44.640.

Chapter 45

45.030, 45.110, 45.120, 45.140, 45.151, 45.161, 45.171, 45.185, 45.190, 45.200, 45.230, 45.240, 45.280, 45.320, 45.325, 45.330, 45.340, 45.350, 45.360, 45.370, 45.410, 45.420, 45.430, 45.440, 45.450, 45.460, 45.470, 45.910.

Chapter 46

46.110, 46.155, 46.160.

Chapter 174

174.120.

Chapter 441

441.810.

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: MISCELLANEOUS QUESTIONS REGARDING FINAL DRAFT

DATE: December 1, 1978

I. RULE 44 E.

I indicated in a previous memorandum that the last sentence of Rule 44 E., relating to a cause of action for failure to provide access to hospital records, came from the existing statute, ORS 441.810. The Council voted at the last meeting to leave that portion of the rule as a statute. In rechecking I have discovered that the sentence did not come from the Oregon statute but was added to the rule in drafting. I suggest that we simply eliminate it. Rule 44 E. makes discovery available despite a physician - patient privilege in the circumstances described. The mechanism to carry out the discovery would be a subpoena duces tecum and deposition. The rules already contain a sanction for failure to comply with the subpoena. See 55 G. Note, although we supersede the statute when an action is pending, the ORS section should not be repealed as it would provide a basis for a separate proceeding to secure production by the party against whom the claim is asserted but before any action is pending.

II. COMMENTS OF BOB LACY

I received the following suggestions from Bob Lacy relating to the rules. He asked about the relationship between Rule 26 and Rule 27 in terms of actions brought by a guardian. Rule 26 refers to an action

being brought in a guardian's own name, and Rule 27 refers to a guardian bringing an action in the name of a minor or incapacitated person. The prior real party in interest statute, ORS 13.030, did not refer to guardians, and under the case law, it appears that a guardian was required to sue in the name of the minor or incapacitated person. See Everart v. Fischer, 75 Or 316 (1915), and Peters v. Johnson, 124 Or 237 (1928). Under our rules, the guardian would have the option of either suing in his own name under Rule 26 or bringing an action in the name of the minor under Rule 27.

In Rule 55 F., second line, he suggests we add a cross reference to Rule 38 C.(1). This would allow a party taking an out-of-state deposition to secure a subpoena to compel attendance without court order. As things stand, it is unclear how a witness may be "compelled to appear" under 38 C.(1).

He also suggested that we add the following language which comes from Federal Rule 13(c) to our Rule 22 A.:

> "A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party."

This is consistent with ORS 16.305, which is subsection A., and eliminates the possibility of an attorney relying on old case law limiting the availability of counterclaims. See Mack Trucks v. Taylor, 227 Or 376 (1961).

He also asks whether Rule 22 B.(3) is necessary in light of Rule 9. He suggests that Rule 22 B.(3) could be read to prevent the assertion of a cross-claim against a co-defendant who refuses to enter an appearance.

MEMORANDUM

TO: Don McEwen
Charles Paulson
Mike King

FROM: Fred Merrill

DATE: December 11, 1978

I believe you were appointed as the "final polish" committee at the last meeting.

I. MATTERS RELATING TO FINAL RULES. In addition to the changes directed at the last meeting, the following are some additional matters relating to the final form of the rules for your approval. (By the way, the enclosed paragraph was inadvertently omitted from Page 4 of the minutes of the meeting held December 2, 1978).

1. Although I suggested the addition to ORCP 7 D.(5)(a), on Pages 3 and 4 of the minutes, the language did not work. In the Boddie case, the court did not particularly say posting, publication, or other service methods of this type were reasonably calculated to apprise the defendant of anything. The court only says that these methods are better than nothing and that posting is probably as good as publication. I suggest that we merely add: "or by any other method". I also suggest an additional sentence as follows: "If service is ordered by any manner other than publication, the court may order a time for response". ORCP 7 C.(2) refers to either publication or non-publication and for some other method such as posting, responding within 30 days from "service" may not make sense.

2. To comply with the Council's direction relating to Rule 22 on Pages 4 and 5 of the minutes, the following language was added to ORCP 21 D., Page 62:

> "If an amended pleading is filed, the party filing the motion does not waive any defenses or objections asserted against the original pleading by filing a responsive pleading or failing to reassert the defenses or objections."

The following language was also added to 21 E., Page 63:

> "If an amended pleading is filed, the party filing the motion to strike does not waive any defense or objection asserted against the original pleading by filing a responsive pleading or failing to reassert the defense or objection."

Actually, 21 F. and G. probably cover this anyway, but the new language would make the situation absolutely clear.

3. I think I told the Council at one point that no provision relating to transfer was included in the draft of Rule 34 because none existed in the Oregon statute. I found that ORS 13.080(4) does cover transfer. It simply says the court on motion may allow the action to be continued against the successor in interest. The provision from the federal rule which we included as 34 E., Page 88, is more flexible and I would suggest is better.

4. I put the words "upon motion of any party" at the beginning of Rule 53 A., Page 148, rather than in the third line as suggested at the meeting. They appear at the beginning of the section in ORS 11.050

and if placed in the third line would only modify joint trials and not consolidation.

5. In ORCP 54 A.(1), last sentence, Page 149, I changed "section" to "subsection" and in ORCP 54 A.(2), last sentence, Page 149, I changed "paragraph" to "subsection".

6. In ORCP 55 F.(1), Page 158, second line, I changed "notice will be issued" to "notice will be served".

7. In ORCP 58 A., Page 173, third line, I changed "(5)" to "(4)". A limitation on time to address the jury does not fit a court trial. In ORCP 63 F., Page 188, fourth line, I changed "entry" to "filing" to be consistent with ORCP 64 F.

II. APPROVAL OF SECTION III; RULES AMENDED. At the last meeting, you were given copies of some of the miscellaneous changes to rules remaining in ORS sections as follows:

1. ORS 35.255 is changed because section (2) is probably unconstitutional in authorizing publication merely because a defendant is a non-resident.

2. ORS 52.140 is changed to conform service in justice courts to the rules. This would be a case where the ORCP was made specifically applicable under Rule 1 to a court other than a district or circuit court.

3. ORS 97.900 is changed because (a) it is probably unconstitutional in providing that no notice need be given to nonresidents, (b) no special publication provision is necessary in light of Rule 7, and (c) the time for response should be consistent with Rule 7. Note, in section (1) I am not sure what "known" means. Should this say, "If such owners and holders can be served in the county in which the action is filed"?

4. ORS 105.230 is changed because it is probably unconstitutional in authorizing service by publiation upon nonresidents.

5. ORS 109.330 is changed as it may be unconstitutional in authorizing publication of citation on someone not found in the state. In any case, why requiring publication, plus mailing, if mailing is the effective service? The suggested change would require mailing if possible before publication is required.

6. ORS 174.160 and 174.170 probably should be included in the bills prepared by Legislative Counsel and not in our rule changes. The sections are not limited to civil procedure.

7. ORS 226.590 is changed because making publication the only service method is probably unconstitutional except for unknown defendants. Note the words "within the State of Oregon" should also be removed from the fourth line of section (1).

8. ORS 305.130 is changed to conform to the time for response in ORCP 7.

9. ORS 520.175 is changed to be consistent with Rule 7 relating to who may serve summons.

10. ORS 12.010 was changed to be consistent with Rule 21, which provides that a statute of limitations defense may be raised by motion, and with Rule 47, which allows such defense to be raised by summary judgment motion.

11. ORS 20.210 was changed to eliminate the requirement of verifying cost bills as previously directed by the Council.

12. ORS 30.610 was changed to eliminate verification of actions brought in the name of the state.

13. ORS 111.205 was changed to eliminate the necessity of verifying petitions in probate courts. Note, the state is also one which requires a law equity change through the bills which the Legislative Counsel will prepare. Perhaps our change should only eliminate "petitions".

14. ORS 44.320 is changed to conform to Rule 38 relating to who may administer an oath for deposition.

15. ORS 17.630 should perhaps be part of the material being pprepared by the Legislative Counsel. The reason we did not include the last sentence in ORCP 64 G. is that it is a rule of appellate procedure. ORS 17.630 is listed as superseded.

16. ORS 30.230 is changed because the ORCP eliminates non-suits.

Please let me know if you object to any of these changes. I am searching the OLIS print-out for any other modifications and will try to have them to you around December 18.

For the changes in SECTION I, I need to have them AS SOON AS POSSIBLE because we hope to have the final rules typed and proof-read by December 15.

I am also enclosing a letter from Eric Carlson. The matters marked with a check or an "X" either had already been or were changed in the final set of rules.

Enclosure

cc: Council members (Encl.)

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ROBERT F. MAGUIRE
(1886-1976)
ROY F. SHIELDS
(1888-1966)

November 17, 1978

The Honorable William M. Dale
Multnomah County Courthouse
Room 340
Portland Oregon

Re: Proposed Rule 42, Limited Interrogatories

Dear Judge Dale:

At the time of the meeting of the Council on November 3, 1978, it seemed to be recognized by almost all of those expressing themselves that the use of interrogatories, as a matter of right in every case, would lead to abuses and to a complicating of the judicial process. Experiences in the Federal Courts with Rule 33 of the Federal Rules of Civil Procedure indicate that the concerns expressed by those speaking on the subject is not without some foundation.

It also seemed to be recognized by almost all of those who addressed the matter that there were cases and circumstances in which the use of interrogatories was desirable and could aid in the economical and the efficient disposition of litigation.

It was suggested by the writer that the Council not propose a Rule which would permit the automatic use of interrogatories in every case, but that it provide for the use of limited interrogatories only in the discretion of the trial court on a showing of good cause.

Pursuant to that suggestion, and mindful of the questions proposed by members of the Council, there is attached a suggested draft of rule which would make interrogatories available in cases in which there is a showing that their use is necessary and desirable.

Some question was raised with respect to imposing of the determination of good cause upon the trial court, but that decision is little different from the determination which is required to be made under Rule 36 B.(4)(b) (Trial preparation; experts); or the discretion which is required to be exercised under Rule 36 C Court Order Limiting Extent Of Disclosure. It is felt that the exercise of this discretion would not be burdensome.

Proposed Rule 40, Depositions on Written Interrogatories

At the time of the November 3 meeting, a question was also raised with respect to a possible duplication of proposed Rule 42, Limited Interrogatories, by proposed Rule 40 Depositions Upon Written Interrogatories. Rule 40 is patterned after Rule 31 of the Federal Rules of Civil Procedure and is intended to provide for those situations in which a party is willing to take the deposition of a witness, any witness, on the basis of prepared written questions.

Rule 31 of the Federal Rules and a somewhat similar Oregon Statutory provision have been in effect for an extended time, but have had almost no use either under the Federal Rule or the Oregon Statute.

Very truly yours,

COSGRAVE & KESTER

Walter J. Cosgrave

WJC:db

LIMITED INTERROGATORIES

A. Availability; procedure for use. Upon a showing of good cause, by reason of the particular nature or particular circumstances of the case, the court may order that a

[~~A. Availability; procedures for use~~]. [Any] party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action or proceeding and upon any other party with or after service of the summons upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer.. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 46 A. with respect to any objection to or other failure to answer an interrogatory.

B. Use at trial; scope. Answers to interrogatories may be used to the extent permitted by rules of evidence. Within

the scope of discovery under Rule 36 B. and subject to Rule 36 C., interrogatories may be used to obtain the following facts:

B.(1) The names, residence and business addresses, telephone numbers, and nature of employment, business or occupation of persons or entities having knowledge and the source of such knowledge.

B.(2) The existence, identity, description, nature, custody, and location of documents (including writings, drawings graphs, charts, photographs, motion pictures, phono-records, and other data compilations from which information can be obtained), tangible things and real property.

B.(3) The name, address, subject matter of testimony and qualifications of expert witnesses to be called at trial.

B.(4) The existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy all or part of a judgment which may be entered into the action or to indemnify or reimburse for payments made to satisfy the judgment.

B.(5) The nature and extent of any damages or monetary amounts claimed by a party in the action; the nature, extent and permanency of any mental or physical condition forming the basis of such claim; all treatments for such physical condition; all tests and examinations relating to such condition; and, all preexisting mental, physical and organic conditions bearing upon such claims.

B.(6) The address, registered agents, offices, places

of business, nature of business, names and addresses of board of directors and officers, names and addresses and job classifications and duties of agents and employees, names and addresses of stockholders or partners and dates and places of incorporation or organization of any corporation or business entity.

B.(7) The date of birth, and the present addresses, business addresses, telephone numbers, employment or occupation or business, and marital status of any party or the employees, agents, or persons under the control of a party.

B.(8) The location, legal description, present and prior ownership, occupation and use, purchase or sale price, value, nature of improvements, interests affecting title, and records of deeds and instruments relating to title of any real property involved in an action or proceeding.

B.(9) The custody, use, location, description, present and prior ownership, purchase or sale price, value, recording of instruments relating to title and security interests, interests claimed in such property, license numbers, registration numbers, model numbers, serial numbers, make, model, delivery and place of manufacture, and manufacturer of any tangible property involved in an action or proceeding.

B.(10) The items of an account set forth in a pleading.

C. Option to produce business records or experts' reports. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection

of such business records, or from a compilation, abstract or summary based thereon, or from examination of reports prepared by experts in the possession of a party upon whom the interrogatory has been served, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records or reports from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records of reports and to make copies, compilations, abstracts or summaries. The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

D. Form of response. The interrogatories shall be so arranged that a blank space shall be provided after each separate numbered interrogatory. The space shall be reasonably calculated to enable the answering party to insert the answer or objections within the space. If sufficient space is not provided, the answering party may attach additional papers with the answers and refer to them in the space provided in the interrogatories.

E. Limitations.

E.(1) Duty of attorney. It is the duty of an attorney directing interrogatories to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.

E.(2) Number. Upon obtaining permission of the court a

[E.(2) ~~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, 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.

BACKGROUND NOTE

ORS sections superseded: 16.470.

COMMENT

No single rule provoked more debate within the Council than this rule. It was finally determined that interrogatories could serve a useful function, but the unlimited federal approach invited abuse in the form of excessive interrogatories. The Council decided to develop a rule that would preserve the useful aspects of interrogatories, while controlling abuse. The control provisions are contained in sections 42 B. and E. Section 42 E. combines a specific duty upon attorneys to avoid abuse with a limitation upon number. The numerical limitation was adapted from the New Hampshire rules. In determining what constitutes an interrogatory, it was the intent of the Council that in compound questions, each element of the question be considered as constituting a separate interrogatory, e.g., "What is the present home address, business address and telephone number of X?", equals three interrogatories.

The limitations of subject matter in section 42 B. are entirely new. The scope of interrogatories is, of course, subject to the general requirement that the information sought be relevant to the claims or defenses of a party. Subsection B.(10) was included because an interrogatory would replace the request for particulars on an account, presently provided by ORS 16.470.

The interrogatory procedure provided in section 42 A. and

OREGON LEGAL SERVICES CORPORATION

St. Helens Regional Office

115 N. 21st Street

ST. HELENS, OREGON 97051

★

Phone (503) 397-1871

November 22, 1978

Council On Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403

Re: Service of Publication in Dissolution Suits by Indigent Petitioners

Dear Sir/Madam:

I am writing to your Council to suggest an amendment to ORS 15.120. By the terms of ORS 21.605, Oregon permits indigents access to the courts in a suit for dissolution of marriage by waiver of all filing fees, service fees and court costs. Under ORS 15.120 and 15.130(2), when the respondent cannot be personally served, service may be made by publication. Although this statutory scheme enables indigents initial access to the courts, those petitioners who cannot have their spouses personally served are unable to proceed under either ORS 21.605 or ORS 15.120 because the statutes are silent as to any suitable process. In light of Boddie v. Connecticut, 401 US 371 (1971), to be discussed below, some method of service must be provided indigent petitioners in dissolution suits.

In Boddie, women receiving state welfare assistance and seeking to obtain divorces, brought a class action suit for declaration that the state statute requiring payments of fees and costs was unconstitutional. The Court, in ruling that all filing fees and service fees were unconstitutional impediments to access to the courts by indigent plaintiffs in divorce proceedings, held:

> Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means of legally dissolving this relationship, due process does prohibit the state from denying, solely because of inability to pay, access to its courts to individuals who seek dissolution of the marriage. Id at 374.

The majority of cases since Boddie have held that requiring indigent plaintiffs to pay the cost of service by publication was unconstitutional. The courts have used two approaches to remove the financial barrier of service by publication. The majority of courts in considering the question have met the requirement of Boddie by ordering the payment of publication costs out of public funds. Phipps v. Phipps, Circuit Court of the State of Oregon for the County of Multnomah, No. 373-920, (1971). Hart v. Superior Court in and for Pima County, Arizona, 392 P2d 433 (Ariz. 1972). Monroe v. Monroe, 294 NE 2d 250 (Ohio 1972). McCandless v. McCandless, 327 NYS 2d 896 (1972). Deason v. Deason, 334 NYS 2d 236 (1972). Thompson v. Thompson, 286 NE 2d 657 (Ind. 1972).

The second line of cases has followed a suggestion from Boddie and allowed substitute service. The Court, in addressing the problem of alternative means of service stated:

> [W]e think that reasonable alternatives exist to the service of process by a state-paid sheriff if the State is willing to assume the cost of official service. This is perforce true of service by publication which is the method least calculated to bring a potential defendant's attention to the pending of judicial proceedings. See Mullane v. Central Hanover Trust Co., supra. We think, in this case, service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper. 401 US at 382.

See, for example, Ashley v. Superior Court in and for Pierce County, Washington, 521 P2d 711, (Wash. 1974); Brown v. Brown, 296 A 2d 898 (N. Hamp. 1972); King v. King, 316 NE 2d 555 (Ill. App. 1974); 52 ALR 3d 865.

The waiver of the requirement of publication and allowing service by sending a copy of the summons and complaint to the last known address or his parents' address by registered letter might be an appropriate approach given how unlikely it would be

that the respondent would receive actual notice by publication of the summons.

This letter reflects a summary of research our office has done on this issue. If I may be of any assistance to your Council in considering this matter, please advise me.

Very truly yours,

David Hatton

David Hatton
Attorney at Law

DH:nw

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November 27, 1978

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

Dear Mr. Merrill:

As a trial attorney, I would like to express my objections to Rule 42 (Limited Interrogatories) in the proposed Oregon Rules of Civil Procedure.

The request for answers to written interrogatories and the need to answer written interrogatories is one of the most time consuming and one of the most expensive procedures used by the Federal Court. The procedure is custom-made for the larger firms and I am told that in some of the larger firms in the East they have lawyers and clerks who are trained to prepare interrogatories and are trained to prepare answers to interrogatories, the questions being designed to trap the other side and the answers being designed to not provide any real information.

I can see a limited need for interrogatories but I feel that the time, effort and expense and particularly to a small lawfirm does not justify the authorization for their use.

I would suggest as a compromise that if a party is in receipt of written interrogatories that that party tender a witness to answer the interrogatories and that the interrogatories be held in abeyance until the deposition of that witness is

Mr. Fred Merrill
Executive Director of Counsel on
Court Procedures
University of Oregon School of Law

taken. If the questions are answered by that witness, then the interrogatories need not be answered.

Very truly yours,

Carrell F. Bradley

CFB:mh

Ringo, Walton, Eves and Gardner, P.C.

Attorneys at Law

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

November 27, 1978

Mr. Stanton F. Long
Attorney at Law
101 E. Broadway, Suite 400
Eugene, OR 97401

RE: Practice and Procedure Committee
Oregon State Bar

Dear Mr. Long:

I understand that you are the chairman for the Practice and Procedure Committee.

On behalf of the Oregon Trial Lawyers Association, I was on a committee which reviewed the proposed Oregon Rule of Civil Procedure as drafted by the Council on Court Procedures. We reviewed these rules in depth and would strongly recommend and urge that your committee ask the Board of Bar Governors that it go on the record that they should not be implemented or submitted into the legislature at the present time.

It is our position that many of these rules will bring a great deal of additional expense to the practice of law, which should be avoided; and even more important, we have found that few persons fully understand these rules. It is true that we all have a responsibility for them, but at their present status, we strongly oppose their adoption.

I will be glad to review this matter with you personally.

Very truly yours,

Robert G. Ringo

mlb
cc: Charles Burt
Thomas E. Cooney

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RALPH R. BAILEY (1902-1974)

November 28, 1978

Fred Merrill
Attorney at Law
School of Law
University of Oregon
Eugene, Oregon 97403

Dear Mr. Merrill:

I urge that the Council on Court Procedure delay submitting any of the procedural changes to the 1979 legislature, until there has been an opportunity for greater circulation, consideration and input from the members of the Bar. It cannot hurt to have these proposed rules more carefully studied by lawyers who can, with time, give good suggestions.

Very truly yours,

Thomas E. Cooney

Thomas E. Cooney

TEC:jnp

The Supreme Court

THOMAS H. TONGUE
JUSTICE

November 28, 1978

Salem, Oregon
97310

Hon. Donald W. McEwen
Chairman
Oregon Council on Court Procedures
1408 Standard Plaza
1100 S.W. 6th Avenue
Portland, Oregon 97204

RE: Proposed Oregon Rules of Civil Procedures

Dear Don:

It is my understanding that at a meeting of the Council on Court Procedures on December 2, 1978, final action will be taken by it on the adoption or modification of its Tentative Draft of Proposed Oregon Rules of Civil Procedure, as published in the Advance Sheets of the Oregon Supreme Court Reports dated November 1, 1978.

Although I have not had the time to review the proposed rules in detail, I am impressed with the great amount of time that obviously has been devoted by all of the members of the Council to the important task assigned to it and with the fact that during the comparatively short time since its organization the Council has been able to draft a complete set of proposed rules for submission to the Oregon legislature at its next session in January.

Speaking solely as an individual, however, I have two concerns which are of such importance to me that I feel it necessary to communicate them to you.

I. It had been my hope that during this initial period the Council would concern itself primarily with "cleaning up" the outworn incongruities of our present Code of Civil Procedure -- matters as to which there is no substantial controversy. Such a task alone is not a simple one, as you know better than I, and would, in my opinion, have well justified the existence of the Council during this initial period. It had been my hope, however, that

no major changes would be made in our present civil procedure, particularly those of a controversial nature, until there had been an opportunity for consideration of such proposals not only by individual lawyers and judges, but by the Oregon State Bar and by the Oregon Judicial Conference as the only organizations authorized to speak on behalf of Oregon lawyers and judges.

As you know, the Tentative Draft of the Rules proposed by the Council was not published in time to make it possible for either the Oregon State Bar or the Oregon Judicial Conference to consider and act upon that proposal before the convening of the next legislative session in January.

I can understand the impatience of the Council with the fact that so few lawyers have appeared at its various public hearings. What I am trying to say, however, is that even if more individual lawyers had appeared, they could not have done so as representatives of the lawyers of this state. The problem of conveying to the Council the views of Oregon judges is even more difficult. Most Oregon judges have probably felt that it would be unseemly, if not improper, to appear before the Council to advocate or oppose any of the proposed rules, unless invited to do so. And, again no judge appearing before the Council could convey to it the views of the judges of this state.

Wholly aside from these difficulties, however, I strongly believe that your Council should be interested and willing to consider the views of Oregon lawyers and judges, speaking through the organizations authorized to represent them, before adopting for recommendation to the legislature any controversial major changes and that it would be a most unfortunate precedent for the Council to do otherwise, particularly in making its initial report and recommendations. For these reasons, I strongly believe that the initial report and recommendations of the Council should be confined to the preparation of a proposed rules of civil procedure that will not include controversial major changes. I do not believe that

there is any present urgency or crises in the administration of justice in civil cases in Oregon as to require the adoption of controversial changes now rather than two years hence. After all, "Rome was not built in a day."

II. My second concern is also one which represents a personal philosophy which may or may not be shared by others. It has been truly written that in our search for "perfect justice" in criminal litigation our system of criminal procedure has become so complicated that it may fall of its own weight. In my opinion, the same is true of our search for "perfect justice" in civil litigation. Of equal concern to me is the constantly increasing cost of litigation, to the point that only the rich and the poor (through Legal Aid) can afford to become involved in litigation.

My hope has been that the Council can, if not immediately, develop a uniquely "Oregon" approach to this problem in the form of more simple, rather than more complicated, rules of procedure for the ordinary "run-of-the-mill" civil case, while recognizing that more sophisticated procedures may be appropriate for complicated or "major" litigation.

Having these views, I seriously question the advisability fo your proposed rules 42, 40 and 36(B)(4) under which 30 written interrogatories, depositions on written questions (without limitation to 30 questions), and depositions of expert witnesses and written "reports" summarizing their testimony, would be permitted in all civil cases. Without attempting to argue the merits of these proposals, as applied to <u>all</u> civil cases, I would nevertheless suggest that these proposals are controversial; that there is no such urgency as to compel their immediate adoption, and that their adoption should be postponed until the lawyers and judges of Oregon have an opportunity to study these proposals and be heard upon them through action of the Oregon State Bar and the Oregon Judicial Converence -- an oppcrtunity which will otherwise be denied to them.

Thanking you for your consideration of this lengthy letter and with best wishes for the success of the new Council of Civil Procedures and for your term as its first chairman, I remain

Very truly yours,

THOMAS H. TONGUE

THT:lre
cc: All members of Council

P.S. Justice Howell has requested that I inform the Council that he concurs in the views expressed in this letter.

Justice Holman has also requested that I inform the Council that he joins in my concern relating to the added time and expense to litigation which will undoubtedly result from the adoption of the proposed rules specifically mentioned in this letter.

JOHNSON, HARRANG & MERCER
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ORVAL ETTER
OF COUNSEL

November 29, 1978

Professor Fred Merrill
University of Oregon Law School
Eugene, Oregon 97401

Dear Fred:

At the November 18th meeting of the Council on Court Procedures I spoke on behalf of the Procedure & Practice Committee. I attempted to illustrate the lack of opportunity for the Bar as an organization to comment upon the rules through the use of its long established committee system. I tried to make clear the distinction between the position of an individual lawyer or an individual committee and an act of the Bar as a whole. I understand your comments concerning the need that was felt to accomplish something with the funds and confidence bestowed on the Council by the Legislature. Nevertheless, at least with respect to two controversial items, the Procedure & Practice Committee felt compelled to speak out.

We were unanimously opposed to the expert witness rule. The indication you provided on the 28th that the rule has been substantially modified to eliminate the possibility of the taking of depositions of expert witnesses seems to me to make it unnecessary to repeat the comments I made to the Council at its last meeting.

In appreciation of the fact that the other controversial item, namely the proposed rule on interrogatories will be finally acted upon by the Council on December 2nd, I want to set forth verbatim the Procedure & Practice Committee's statement on proposed Rule 42. The statement is as follows:

1. That Rule 42 not be submitted to the Legislature in its present form or any comparable broad form.

2. Any provision for an interrogatory must include the following limitations:

(a) It may be utilized only in Circuit Court;

(b) It may not be utilized in any instance in which the information sought can be obtained in an economically practicable way using any other method authorized by the remaining Oregon Rules of Civil Procedure;

(c) It may only be utilized by order of a Circuit Judge in response to a Motion,

(1) Such motion shall be supported by a showing that the material sought would be legitimately discoverable on a deposition taken under Oregon Rules of Civil Procedure.

a. Such showing shall be by affidavit accompanied by such other material as the movant shall submit,

b. A copy of each proposed interrogatory shall be attached to the motion.

The benefits we believe of this proposed alternative are that it includes a fairly narrow test by which to measure an application for permission to use interrogatories. Whether the information can be obtained in another "economically practicable way" would not involve the Court in an early assessment of the entire case. Obviously this proposal is based upon the idea that ordinarily interrogatories would not be used. It does however respond to that occasional instance in Circuit Court where deposition and Motion to Produce would not be effective. The proposal does not authorize the use of interrogatories in District Court because the Committee believed that such a discovery technique is disproportionate to the issues present in District Court.

The Committee also felt that requiring the proposed interrogatories to be attached to the application to the Court for an Order permitting their use would facilitate resolution by attorneys of such requests. Obviously, it requires the person seeking information by interrogatory to be serious enough to put his request before the Court. We see that as a different matter than an attorney simply sending off some interrogatories that must be responded to unless opposing counsel has the time and energy to initiate an objection. This puts the burden on the person seeking the information, which seems just and reasonable. Furthermore, it is probable that responsible trial counsel will by negotiation resolve many legitimate requests for interrogatories.

Finally, instead of tinkering with the scope of discovery, this Rule has the advantage of referring to that which is discoverable on deposition. Most attorneys are already familiar with that standard and there should be few problems in those few instances where interrogatories would be justified.

As a final comment, I hope that the Council appreciates that the Procedure & Practice Committee's concern centered around the economic effect on clients that can result from creating new and we believe unnecessary procedures. Many lawyers are simply timid about deciding not to follow a procedure that is available for fear of reading critical comments about themselves in subsequent Advance Sheets. Similarly, emotionally involved clients and certain institutional clients will simply insist that every available procedure be followed without regard to the expense. Add to those realities the unfortunate fact that there are members of the Bar who sometimes behave irresponsibly, a clear case is made for not submitting Rule 42 in its present or any comparable broad form to the Legislature.

The Procedure & Practice Committee recognizes that the Council has the legal right and responsibility to address these questions, and thus if a rule is deemed necessary, and there is to be no opportunity for the Bar Association to take a position, our proposed alternative should be seriously considered.

Very truly yours,

Stanton F. Long

SFL:jw

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November 29, 1978

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

Dear Dr. Merrill:

I wish to comment on three of the proposed rules: 36 B(1), 42 B(5) and 44E.

Rule 36 B(1) proposes to change the scope from "relevant to the subject matter involved in the pending action . . ." to "relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .". I submit that it is a mistake for any change to be made narrowing the scope of discovery. It is true, of course, that in those jurisdictions having notice pleading, wherein only the barest elements of a cause of action need be stated, there is an opportunity for discovery limited only to "the subject matter involved" to be abused. However, judging from the descriptions I have heard of such abuse, a substantial factor is the broad generalities that suffice for notice pleading and thereby impose little limit on what is "relevant to the subject matter involved in the pending action". That problem should not exist in Oregon since the Council decided to not adopt notice pleading and to retain the present requirements of a complete and specific statement of a cause of action.

While I have heard it asserted, in a discussion of this change, that "relevant to the claim or defense of the party" is not substantially narrower than "relevant to the subject matter", it seems unlikely that trial judges and courts are going to make that same assumption. It would seem almost certain that the average judge, faced with a change of language which purportedly narrows the scope of discovery, is going to assume that the change was intended to do just that--and not just in the unusual case such as an antitrust case, but in any case, big or small. While younger lawyers have usually been trained that the broad scope of discovery is appropriate, that is not so true of some of the longer established members of the bench or bar. It seems to me there is considerable risk that some judges may construe the new test relatively narrowly, and that it is unnecessary to encourage such narrowing in Oregon where the present scope of discovery is working satisfactorily in the vast majority of cases.

Rule 42 B(5) pertains to the scope of interrogatories and, in the last phrase, authorizes interrogatories for "preexisting mental, physical and organic conditions bearing upon such claims." There is no logical reason to limit interrogatories to pre-existing conditions, for subsequent mental, physical and organic conditions can just as easily bear upon a personal injury claim. As used in Rule 42 B(5) the word "preexisting" is a limiting word, not a broadening word. Would it not be better to simply eliminate the word?

Rule 44 E, "Access to hospital records", is an extremely narrow rule. The first sentence authorizes examination by a party

> ". . . against whom a claim is made for compensation or damages for injuries . . . of all records . . . in reference to and connected with the hospitalization of the injured person for such injuries." (Emphasis added.)

A literal reading of that sentence is that it limits examination to records of hospitalizations for only the injury for which the claim is asserted. It thereby excludes hospital records of prior similar injuries to the same part of the body; records of hospitalization for other conditions which may still have much medical information directly relevant to the bodily injury in question; records of subsequent hospitalizations for other injuries which, in the course of their history, demonstrate a recovery from the injury in question; other hospitalizations with pertinent history. In short, it is a much narrower test for examination than is the test for admissibility.

The most obvious mistake would appear to be to prevent discovery of prior similar injuries or diseases of the same part of the body. One would think that hardly needs further discussion.

Limiting the production of hospital records to those pertaining solely to the particular injury for which claim is sought assumes that there is no other relevant injury or medical information, but that very frequently is simply not true. Even limiting hospital records to

similar injuries would omit a great amount of medical information which will be highly relevant. Please consider the following. Virtually every admission to a qualified hospital contains information about the patient's medical history, current medications and complaints and a brief general physical examination of the major portions of the body, including such things as blood pressure, a brief look into the eye, comments on muscular or skeletal problems, congenital conditions, etc.. Studies of the body for limited purpose, such as x-rays, may later become relevant for physical conditions not pertinent at the time of admission. Health problems before or after an accident, unrelated to the injury, may bear on the causation of the accident itself. The admitting and final diagnosis shown on the cover sheet of a hospital admission frequently does not refer to many medical conditions noted by the doctors during the patient's stay simply because they are not the major problems at the time; and someone looking at the records cannot know this if the right of discovery is based on the major problem shown on the summary sheet.

The following are just a few of many, many examples of critically relevant medical information found in hospital records for apparently unrelated problems.

(1) Probably the most striking example I personally know of involved an elderly women who claimed to have two lumbar compression fractures as the result of a fall. Her first x-rays after the fall were taken about ten months later and showed two then healed compression fractures. Her complaints were not inconsistent. The court rules (Cleveland, Ohio) provided automatic production of all hospital records. Among her many hospitalizations were a series, about ten years before, for repeated gastrointestinal problems, and none had low back problems. One admission for gastrointestinal problems referred to a "GI" series, which in her case was a series of barium x-rays of the colon. The x-ray report referred only to the condition of the colon. However, such GI study x-rays may, if of good quality, also adequately show the corresponding area of the spinal column. When the actual GI series x-ray plates of the colon were obtained, they also incidentally showed the same two healed compression fractures of the vertebrae--compression fractures which had apparently incurred years before and the plaintiff may not even have known about. The point is that the hospital admission for gastrointestinal problems ten years before the accident had, on its face, no apparent connection with the low back problem, and the analysis of the barium studies had not referred to the compression fractures since the analyst was only interested at the time in the colon; yet these x-rays taken as a matter of normal hospital routine proved to be of the utmost relevance to our lawsuit.

(2) In a Lane County case plaintiff complained of severe, lasting low back problems. She was treated by an orthopedist unfamiliar with

her history, in his office. Hospital records of a few years before were concerned solely with neck and shoulder problems from other accidents, but consultation reports and progress notes in the records amply demonstrated that the plaintiff consistently showed a great amount of functional overlay. When shown to the orthopedist who treated her later low back problems, these records substantially changed his diagnosis and prognosis.

(3) In a case in which a plaintiff incurred a sudden drastic loss of vision five months after a blow to the head, a number of causation theories were possible. Relevant medical factors could include high blood pressure--both long duration or recent sharp increase, deterioration of the inner eye and severe emotional upset. A series of past hospitalizations for gastric problems contained relevant blood pressure readings; and an admission for unrelated chest pain two weeks before the vision loss contained a routine opthalmascope eye exam which was normal, a history of family crisis and fluctuating blood pressure readings--all highly relevant.

(4) In a slip and fall case with orthopedic injuries, an admission nine months later for drug withdrawal complaints showed two things: That at the time of the fall the patient had been taking excessive amounts of a drug which had side-effects of dizziness and loss of balance, and that at the time of the admission she no longer had orthopedic complaints.

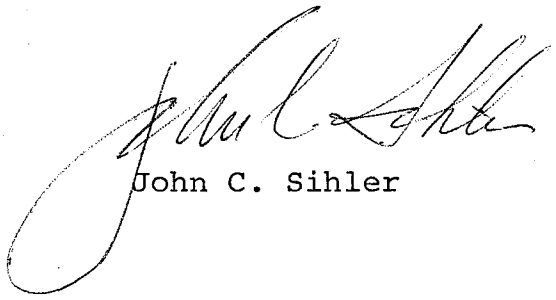
My estimate is that in approximately a quarter of the personal injury cases there is a prior or subsequent hospitalization which appears unrelated but in fact has relevant and admissible medical evidence; that it frequently is impossible to predict which hospitalization it will be by relying on the summary sheet, and that therefore they simply have to be examined; that lawyers and judges many times are wrong in their estimate of what may be relevant, and sometimes doctors too.

Therefore, I suggest the standard for access to hospital records should be the same as the general scope of discovery in Rule 36 B(1).

If the Council feels that it is limited by ORS 441.810 and State ex rel Calley v. Olsen, 271 Or 360, then perhaps this discussion is in vain. But if the Council feels that the legislation authorizing its creation and the formulation of these proposed rules empowers it to define the scope of discovery, then it should include hospital records as well. It is my understanding that these rules will hereafter themselves attain the status of

statutes unless the legislature objects. If so, cannot the rules be stated more broadly than existing statutes and simply have the affect of expanding them. If the opportunity to do so exists, I would suggest Rule 44 E be broadened as indicated above.

Very truly yours,



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November 30, 1978

OUR FILE NUMBER

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

Re: Proposed Court Rules

Dear Fred:

I have reviewed the proposed rules and believe that they will be useful to the kind of practice that most lawyers have in Oregon. I do have a few comments based on one reading.

Sections 7C.(4)(b) and G.(2) indicate that in cases in which service of summons is by publication the defendant's time to answer begins to run from the date of first publication. However, paragraph G.(7) states that service shall be complete at the date of the last publication. Perhaps this kind of procedure has been upheld in other states, but it does not seem appropriate to me that the defendant's time to respond should be measured from a date which is prior to the date on which service is complete. In addition, if a defendant saw only the fourth published notice, he would have only eight days in which to file a response.

In Section 51A, I would suggest replacement of the word "maintained" with the word "alleged" or some similar term.

In Section 51C.(2), the word "of" in the first line should be "or on." X

In Section 59C.(3), the word "of" should be the word "or."

The bottom line of page 159 can be stricken as it is repeated at the top of page 160.

In Section 59G.(1), the language would be more consistent if the term "jury" was changed to "jurors." That way all of the nouns and verbs would be in the plural.

As I indicate, I am generally pleased with the work you and the council have done. I particularly like the addition of limited interrogatories and the restriction on discovery to material which is relevant to the claim or defense of the party seeking discovery.

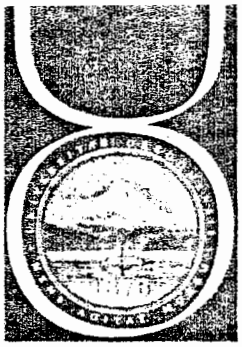
I would hope that the comments to the sections would be officially adopted by the council so that there will be some formal explanatory matter for the courts to consider when they must interpret these rules.

Thank you for the time and effort you have put into this proposal.

Very truly yours,

Eric

Eric H. Carlson



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503/686-3837

November 30, 1978

Mr. Robert W. Lundy
Legislative Counsel Committee
5101 State Capitol
Salem, Oregon 97310

Dear Mr. Lundy:

This is to confirm the understanding reached yesterday at the meeting with Ms. Godwin, Ms. Robinson, and Mr. Clifford. As you know, the Council will be submitting new Rules of Civil Procedure before January 1, 1979, pursuant to ORS 1.735. Our submission will probably consist of the new Oregon Rules of Civil Procedure numbered 1 through 64, ORS sections superseded, and some miscellaneous changes to procedural rules which will remain in ORS sections; i.e., the new rules, sections superseded, and rules amended referred to by ORS 1.735. These would go into effect under that statute unless repealed or modified by the legislature. This still leaves the following cleanup material which either must be or would best be accomplished by statute passed by the legislature.

1) Language changes required by elimination of the procedural distinctions between suits in equity and actions at law. You have the changes that we were able to identify by using OLIS (approximately 530). You suggested it would be inadvisable to submit a bill containing 530 ORS sections amended simply to clean up language and also that a general catch-all statute authorizing you to make such changes would not work because of the variety of language involved. You also suggested that the main problem with the continued existence of references to actions and suits and judgments and decrees lies in a potential interpretation that there was some intent to retain procedural distinctions between law and equity. The suggested approach then is legislation which would make clear that such language does not have significance or must be interpreted consistent with ORCP 2.

2) For cross references to ORS sections being superseded by the rules, you suggest that this would best be handled by a statute actually changing the ORS sections to correct the cross references. We have identified some of these using OLIS, but you suggest that your office has a more complete index system.

3) For other changes to ORS sections, primarily references to courts of equity, procedure as in equity, and powers of a court of equity, you suggest that many of the sections involved are substantive and the best approach would be a statute amending the ORS sections. We have identified most of these through OLIS (approximately 100).

4) The Council is superseding ORS sections in the sense they will no longer apply when the new Oregon Rules of Civil Procedure apply. You suggest that this still leaves the question open as to whether such provision should be left in ORS as they are not being repealed and that the best approach would be to have a statute repealing those ORS sections that have no further application.

5) The suggested change of effective date of the Oregon Rules of Civil Procedure from 90 days after adjournment to January 1, 1980, would have to be in the form of a statute.

You have agreed to prepare the necessary bills to accomplish the statutory changes described above for submission to the legislature if you receive a request to that effect from a member of the legislature. The bills probably would not be ready by January 1, 1979, but could be prepared in sufficient time to be introduced as a bill sponsored by a legislator or a legislative committee. I will, of course, provide any assistance in preparation of these bills which you request.

I plan to discuss this with the Council on Saturday, December 2, 1978, and if they wish to proceed in this fashion, we will try to arrange a request for drafting of the bills sometime next week.

Thank you for your valuable suggestions and assistance.

Very truly yours,

Fredric R. Merrill
Executive Director
COUNCIL ON COURT PROCEDURES

FRM:gh
cc: Thomas Clifford
Joan Robinson
Diana Godwin

FROM THE DESK OF
DAVE FROHNMAYER
HOUSE OF REPRESENTATIVES

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12/2/77

To Legislative Counsel

Please prepare the bill draft requested ~~that~~ by Mr. Merrill for my introduction and pursuant to the description in the attached letter.

Many thanks.

Dave Frohnmayer