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February 2, 1978

Fredric R. Merrill
Executive Director
Court Procedures Committee
University of Oregon
School of Law
Eugene, Oregon 97403

Gentlemen:

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

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

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

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

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Those of us who have been exposed to the third party joinder statute passed a couple of years ago, hope that it will be repealed.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

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

Very truly yours,

President
Harney County Bar Association

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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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PLEASE REFER TO
OUR FILE NUMBER:

March 2, 1978

Charles Paulson
1605 Standard Plaza
1100 S.W. 6th Avenue
Portland, OR 97204

Dear Mr. Paulson:

This letter is written to you in your capacity as a member of The Council on Court Procedures. I hope to appear at your public hearing March 4, 1978, at Eugene, and testify. If events prevent my attendance, please present this letter to the Council in lieu of my personal appearance.

Probably you have read *Kirkpatrick* Procedural Reform in Oregon; it appears in 56 Or L Rev 539, and I particularly invite attention to page 551. It seems that a vocal group favors beinging Oregon even closer to the Federal Rules of Civil Procedure than these people were able to achieve through the 1977 Legislature. The adoption of any more Federal Rules would compound what I believe will prove to have been the gestation of judicial anarchy.

Enclosed is a copy of an article from Business Week concerning problems that have arisen because of Rule 34 FRCP, which appears in our Code as ORS 41.616. Though the article reports these problems in the context of "big" cases, they also plague litigants in "average" and in "small" cases. I say this from personal experience.

It would be difficult to dispute the suggestion that a court system has no justification for existence unless it serves those who resort to it for settlement of their disputes. It would be equally difficult to dispute that in order to serve those members of the public, the system must be designed to (1) assure an equitible disposition of each case, (2) assure uniformity, that is, consistent and uniform treatment of issues and persons, and (3) be accessible both in the sense of being readily available to anybody wherever he lives, and in the sense of being within the financial means of every member of the public whom the system purports to be available to serve.

Any court system which prices itself out of reach of any substantial number of those for whose benefit it ostensibly exists fails to (1) assure an equitible disposition of each case - it prevents an equitable disposition of many cases, (2) fails to assure uniformity - those who can afford their day in court may have it but those who cannot afford litigation have only the alternative of paying under circumstances faintly redolent of extortion, and (3) fails to be readily available to anybody - but is instead only available to those who can endure the cost.

Not only Rule 34, but much of the Federal system defeats these criteria (and I fear the same effect for Oregon). Litigation in Federal courts is beyond the financial means of the "small" or "average" litigant, who simply cannot afford the cost of the time and effort required to cope with the "paper blizzard" which commences with"discovery" and terminates with a rehash of the case in the form of a Pretrial Order which amounts to no more than a rehash of the paperwork that has gone before and which serves no useful function beyond a (sometimes imprecise and confusing) *first* and essential statement of the issues and theories, which could and should have been framed at the beginning through responsive fact pleadings as is the present practice in Oregon.

Probably the problem under Rule 34 could be ameliorated but not eliminated (and the inevitable future problem under ORS 41.616 will be slowed if there is no additional tinkering with the Code) if the Federal cases commenced with responsive fact pleadings. No system of civil procedure should be permitted to commence with such a hodge-podge that, as is often the situation in Federal cases, even the plaintiff's attorney feels he must resort to voluminous "discovery" in an effort to identify the theories of his case and the ultimate facts which will constitute his contentions.

Historically, the so-called federal "notice pleading" was designed to eliminate "technicalities." This word actually was used as an euphemism for "he isn't sufficiently competent to prepare a pleading." In other words, the actual justification for notice pleading is that the proponents of it have adopted as their *credo* "make it easy." in the place of "get it right.". This was done without consideration of the ultimate waste in attorney time, court time and litigants' money that inevitably resulted from the need, real or imagined, to flail away with interrogatories, demands for documents, etc., in an effort to identify the subject matter and ultimate issues of the controversy.

Once the parties have gone through all the "simple, liberal" (and horribly expensive) procedures, they then must face up to the undeniable proposition that the alternative to anarchy is a judicial record which demonstrates the existence of jurisdiction to adjudicate the controversy and from which it can be told what it is that has been adjudicated. This is necessary to assure that the litigants have been afforded their constitutional rights. Any system that sanctions a judgement entry without a supporting record would ammount to a threat to, and a repudiation of, due process. Accordingly, the participants are brought full circle and finally compelled to do by Pretrial Order what should have been done initially: Plead legally sufficent causes and defenses.

I wonder if "reform" is an appropriate word to use in discussing any movement to overhaul the Oregon Code of Civil Procedure by seeking to ape the Federal system, because "reform" carries with it the connotation of making better by stopping abuses and introducing better procedures. Considered in light of practical experience, the recent "reforms" have stopped no abuses nor introduced better procedures. We already have, heedless of the potential consequences, proceeded too far in the adoption of an alien system of jurispurdence which is ill suited to securing to the citizens of Oregon the rights to which they are entitled under their organic law. Is the "reform" movement an activity carried on for the sake of the activity itself? Do those who suggest we ape the Federal system lack an understanding of that which they seek to "reform" and do they lack an appreciation of the burdensom economic consequences that accompanied the Federal system? Are they actuated by other considerations, perhaps personal convenience? I have neither seen nor heard any real reasons supporting any cry for "reform" of Oregon Civil Procedure. It is true there has been strident, but isolated, criticism in the form of epithets directed at the Oregon Code of Civil Procedure, but no one has made available for me a reasoned criticism which would consist of (1) enumeration of the things for which changes are suggested, (2) a collation of recommended alternatives, (3) a reasoned discourse on why the substitute is preferable to the original, and (4) a feasibility statement which would necessarily include an analysis in terms of such bourgeois considerations as time and expense.

Sincerely,

HUGH B. COLLINS/kmc

enc.

LEGAL AFFAIRS

A quicker route to court

Speeding pretrial discovery to save huge costs and prevent long delays

Lawyers are becoming increasingly worried about the costly and time-consuming pretrial maneuvering that is now routine in major lawsuits. The problem centers on "discovery," the legal procedure by which each party to a lawsuit demands documents and depositions from the other side before trial. In recent years discovery has extended to millions of documents and hundreds of hours of depositions in a single case.

Lately, however, there are signs that some kind of reform is on the way. At the recent annual conference of the U. S. Second Circuit Court of Appeals in New York, the federal circuit with the nation's heaviest docket of civil cases, Chief Judge Irving R. Kaufman told some prominent New York attorneys that "litigation too often resembles the duels of the young gentlemen of San Francisco in the last century, who matched each other tossing gold coins into the bay until one cried 'Enough!'" Judge Kaufman urged consideration of six proposals to "bring reason and measure to the opening notes of a trial." Last month he named a private commission of jurists, lawyers, and legal scholars to find ways to implement the proposals. And a special committee of the American Bar Assn. appointed last year to study "discovery abuse" has just released a report calling for several major changes in the Federal Rules of Civil Procedure.

Al Satterwhite/Camera 5

Chief Judge Kaufman: Six proposals for "reason and measure" in pretrial routine.

An Ohio case. The difficulties with the current pretrial procedures are illustrated by the angry fight now going on between Arthur Andersen & Co., the accounting firm, and the state of Ohio. In April, 1972, Ohio sued Andersen to recover $8 million that the state had invested in notes of King Resources Co.

Ohio says that it had relied on allegedly false and misleading statements and opinions that Andersen prepared for KRC, which collapsed in 1971 and is now in bankruptcy proceedings. Ohio contends that the financial statements did not show the extent of KRC's dependence on—and likelihood of losing—a single customer, Fund of Funds Ltd., a mutual fund controlled by Investors Overseas Services Ltd., of Geneva.

To prove its case, Ohio sought papers relating to the KRC-IOS connection. Discovery rules provide for judicial intervention only as a last resort when cooperation among the lawyers for the parties breaks down, but Ohio claimed that Andersen was being uncooperative and appealed to U. S. District Judge Sherman G. Finesilver in Denver in April, 1976. It asked Finesilver to order the accountants to turn over about 1,000 pages of documents that were in their Geneva office. Andersen objected, citing Swiss law that prohibits disclosure of such information.

That led to a round of litigation that is still going on. So far, there have been several hearings before Judge Finesilver, two appeals to the 10th Circuit Court of Appeals, and one unsuccessful attempt to appeal to the U. S. Supreme Court—all over this relatively narrow issue. Ohio has spent $60,000 on attorneys' fees and other costs on this phase of the litigation alone, and Andersen says it has spent more than $71,000 "solely in connection with compliance efforts."

Losing patience. Such costs and prolonged delays do not make the case unusual. What does make it unusual is

that Judge Finesilver finally lost patience with what he characterized as Andersen's "inordinate" delays and ordered Andersen to pay Ohio's legal costs. In an even rarer act, he declared that the accountants would not be permitted to oppose two of Ohio's damaging key contentions about what information the accounting firm possessed.

Andersen is bitterly contesting Judge Finesilver's orders in the U. S. appeals court. It claims that the judge has disregarded its good faith, ignored the Swiss law, and failed to note that the firm had turned over all the documents by last June. Most of the delay about which the judge complains, Andersen says, was the result of a court of appeals stay in 1976 of his order to produce the documents. The current appeal is still pending.

Overseers proposed. To end this kind of fruitless contention, Judge Kaufman has proposed a "voluntary masters' project," in which practicing lawyers would give part of their time to oversee the initial stages of major lawsuits. The need for special masters, or judges' assistants,

In one pretrial battle, Ohio has spent $60,000 and Arthur Andersen $71,000

arises because there are too few federal judges to handle the enormous caseloads, explains Alan J. Hruska, partner in Cravath, Swaine & Moore and co-chairman of the new commission. "If a judge had time," Hruska says, "he could more easily call the litigants in and say, 'We can treat this case like World War II or find a simpler way out.' "

The master's chief method of "breaking through the war mode," Hruska says, would be to help narrow the issues. A major criticism of the current discovery process is that it permits, in the words of Francis R. Kirkham, partner in the San Francisco firm of Pillsbury, Madison & Sutro, an "endless, purposeless, wandering journey" through the files and minds of the parties.

Such discovery can be excruciatingly expensive. Arthur L. Liman, partner in the New York firm of Paul, Weiss, Rifkind, Wharton & Garrison, estimates that the cost of a deposition in New York is $3,000 per lawyer per day. "Easily more than half the cost of a commercial case goes into discovery," says Edwin J. Wesely, partner in the New York firm of Winthrop, Stimson, Putnam & Roberts and chairman of the bar association's committee on discovery.

"An early definition of the issues would expose and highlight claims and defenses that could be resolved quickly," Thomas D. Barr told the audience at the recent Second Circuit conference. Barr, a partner at Cravath, Swaine & Moore, is chief defense counsel for International Business Machines Corp. in the Justice

Dept.'s monopolization suit now pending in federal court in New York—a suit that may hold the record for the millions of documents produced in discovery. Barr concedes that lawyers often "waste our own clients' time and money as well as our opponents'."

Supposed to save time. It is ironic that discovery has led to so many blind alleys. It was first introduced in 1938 to shed more light on each case and avoid "trial by ambush," Wesely says. But because the federal procedural rules permit discovery of any document "relevant to the subject matter involved" in the lawsuit, rather than relevant to the more limited area of "issues raised by" the suit, endless searches result.

The special ABA committee recommends that the federal rules be formally amended to include this more limited standard. It also wants to limit the right of lawyers to send out written questions to the parties. "There is horrendous abuse in this area," Wesely says. "In one afternoon a young lawyer can set adver-

A call for lawyers to devote part of their time to overseeing discovery

saries off on months of work." The special committee's suggested reforms are tentative; the ABA as a whole has not yet approved them. Federal rule changes themselves would have to come from the U. S. Supreme Court.

Nader's opposition. The various proposals for reforms have not found universal approval. At the Second Circuit conference, Ralph Nader criticized the masters idea, saying that the "appearance of conflict" would be "irremediable." Lawyers, says Nader, cannot divorce their professional lives from the task of acting as impartial referees. Instead, he recommended a closer look at lawyers' incentives in big cases, especially their practice of billing by the hour.

Hruska responds that Nader's fears are exaggerated. "No good lawyer enjoys the sort of things that do waste money and time," he says. "If they could avoid them, they would." Moreover, Hruska asserts, the lawyer serving as master would have no motive to give one side or another the edge. His role would simply be to reduce delays. Unlike the ABA special committee's proposals, the voluntary masters project would not require formal rule changes by the Supreme Court. Hruska's commission hopes to submit detailed plans to Chief Judge Kaufman next spring.

Whatever reforms ultimately go through, most knowledgeable lawyers expect some changes during the coming year. "We don't want to go back to trial by ambush," says Wesely. "We don't want to lose what we have, but we will if we can't stop the abuse of it." ■

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(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

CIRCUIT COURT OF OREGON
SECOND JUDICIAL DISTRICT
EUGENE

EDWIN E. ALLEN
JUDGE

October 30, 1978

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

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

Dear Professor Merrill:

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

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

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

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

Sincerely yours,

Edwin E. Allen,
Circuit Judge

EEA:rem
cc: Hon. Wm. H. Dale
Darst B. Atherly
Hon. John M. Copenhaver
Hon. Alan F. Davis
Laird Kirkpatrick
Hon. Val D. Sloper
Hon. Wendell H. Tompkins
Hon. William W. Wells

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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

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 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. 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

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NATHAN L. COHEN
F. BROCK MILLER
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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

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AREA CODE 503
276-3331

June 14, 1978

Mr. Fredric R. Merrill
Executive Director
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University of Oregon
School of Law
Eugene, Oregon 97403

Re: Trial Practice Section

Dear Fred:

Thanks for your letter of June 6 which was discussed at the meeting of the Trial Practice Executive Committee in Portland last week.

I had first understood that a tentative draft of the Council would be available at the time of the Bar Convention. Your letter would indicate however that you do not expect that a draft will be available to circulate before October 1.

Our Executive Committee would like to have you appear at the annual meeting of the Section which is scheduled for Wednesday afternoon, September 20, at the Convention headquarters in Portland, to give us a report on the activities of the Section even though the draft of the rules will not be available. Would this be possible?

We will be appointing a committee to study the tentative draft as soon as it is completed.

Thank you for your cooperation.

Sincerely yours,

COREY, BYLER & REW

By

GHC:mf

cc: Mr. Tom Sponsler
Mr. Donald W. McEwen

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TELEPHONE
AREA CODE 503
276-3331

October 19, 1978

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

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

Dear Don:

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

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

Sincerely yours,

George H. Corey

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

THE SUPREME COURT
ARNO H. DENECKE
CHIEF JUSTICE

SALEM, OREGON 97310

27 June 1978

Professor Fredric R. Merrill
School of Law
University of Oregon
Eugene, OR 97403

Dear Fred:

Enclosed is a copy of an opinion in Rhone v. Louis. As indicated on the last page, we need a uniform statute governing the allowance of attorney fees.

Sincerely,

Arno H. Denecke

AHD:rm
Enclosures: 1

679

27 June 1978

___ Or ___

___ P2d ___

IN THE SUPREME COURT OF THE STATE OF OREGON

Department 2

Theodore R. Rhone,

Respondent,

v.

Johnny E. Louis,

Defendant,

Guaranty National Insurance Co.,

Appellant.

No. A7601-00618
SC 25458

Appeal from Circuit Court, Multnomah County.

Phillip Roth, Judge.

Argued and submitted March 9, 1978.

Gerald R. Pullen, Portland, argued the cause and filed the brief for appellant.

John F. Reynolds, of McCormick & Reynolds, Portland, argued the cause and filed the brief for respondent.

Before Denecke, Chief Justice, Bryson, Linde, Justices, and Thornton, Justice Pro Tempore.

DENECKE, C. J.

Affirmed in part; reversed in part.

DENECKE, C. J.

The principal question concerns the coverage of the garnishee-insurance company's liability policy.

Plaintiff sustained injuries in an automobile accident while riding as a passenger in an automobile driven by defendant. Plaintiff obtained a judgment against defendant for $49,717.97. The automobile had been rented by plaintiff from Parquit Corporation. Parquit had a liability insurance policy issued by garnishee-Guaranty National Insurance Co. After obtaining judgment, plaintiff garnished Guaranty National seeking to recover under the liability insurance issued to Parquit. Guaranty National raised as a defense in its answer to plaintiff's allegations that the policy provided coverage on rented automobiles only when they were being driven by the rentee, i.e., plaintiff. The plaintiff filed exceptions to the answer and this defense was held inadequate by the trial court. Garnishee refused to plead further, and judgment was entered for plaintiff.

Garnishee raises numerous "questions on appeal," but assigns only two errors. Garnishee first contends there was no coverage for the driver because he was not the rentee.

Plaintiff relies upon Portland City Ordinance No. 139316 which regulates businesses providing motor vehicles for hire. One portion of the ordinance requires such businesses to obtain liability insurance. It further provides that:

> "* * * Where the insurance covers a drive-yourself vehicle, it shall expressly provide coverage during the time such vehicle is rented out and shall cover the liability of the driver of such vehicle whether or not such vehicle is retained beyond the expected time of return to the licensee." Portland City Ordinance No. 139-316, § 16.48.090.

In a number of circumstances the requirements of statutes and ordinances have been deemed covered by insurance policies that were procured for the purpose of complying with those requirements, adding to or displacing contrary provisions of the policy itself. N.W. Amusement Co. v. Aetna Co., 165 Or 284, 288, 107 P2d 110, 132 ALR 118 (1940). See, also, Couch, Cyclopedia of Insurance Law, § 45.673 (2d ed 1964); ORS 743.-759. We need not here examine how far this rule extends, because garnishee concedes both in its brief and on oral argument that it applies to its situation.

Garnishee's contention is that we should interpret the portion of the ordinance which requires the insurance to cover "the driver of such vehicle" to mean "the rentee-driver of such vehicle." Garnishee relies in part upon the definition of drive-yourself vehicle which provides that it applies to a business "hiring out vehicles for the use of a person to whom such vehicles are hired." Portland City Ordinance No. 139316, § 16.48.060(5). However, we find nothing inconsistent between this definition and a requirement that insurance be provided for the driver of the vehicle regardless of whether the driver is the rentee.

Garnishee also argues that the purpose of the ordinance

is to place responsibility on the renter of the vehicle, thereby providing incentive for the renter to evaluate the driving ability of potential rentees. Thus, garnishee argues, renters will not do business with drivers who would endanger the safety of the public. In support of this position, garnishee cites Covey Garage v. Portland, 157 Or 117, 70 P2d 566 (1937). Covey involved the constitutionality of a 1936 Portland ordinance regulating rental car companies. That ordinance also required the companies to procure liability insurance for drivers of rented vehicles. We explained the purpose of that ordinance as follows:

> "* * * The primary purpose of the ordinance is not to render damages collectible, but to induce the owner to refrain from renting his cars to the irresponsible and negligent. * * *." 157 Or at 129.

That may have been the purpose for the 1936 Portland ordinance at issue in Covey Garage; however, we are of the opinion that the purpose for the Portland ordinance we are construing as well as the purpose for various, more recent ordinances and statutes requiring insurance for car renting concerns as well as other types of businesses is different. In State Farm Ins. v. Farmers Ins. Exch., 238 Or 285, 292-293, 387 P2d 825, 393 P2d 768 (1964), after referring to the Financial Responsibility Act and the uninsured motorist statute we stated: "* * * These legislative declarations reflect a governmental

policy in favor of protecting the innocent victims of vehicular accidents * * *." 238 Or at 293. We conclude the primary purpose of Portland's requiring liability insurance with coverage for "the driver" was for the protection of injured persons.

We are fortified in this opinion by the language of the ordinance that the insurance shall cover the driver "whether or not such vehicle is retained beyond the expected time of return." This provision would not cause the rental concern to rent only to responsible drivers. It is to protect persons injured by drivers who possibly are irresponsible by failing to return the vehicle within the expected time.

We interpret the ordinance to mean what it says: that the liability insurance shall cover the driver of the vehicle.

Garnishee contends that this interpretation leads to an absurd result because the insurer cannot control the risks it insures, and might be liable if the car were stolen, or driven by a child. Whether this result would necessarily follow is not involved in this case. The defendant driver was not in one of these categories.

The case was decided upon exceptions to the answer which is, in effect, a demurrer. ORS 29.340. Guaranty National contends it was entitled to an evidentiary hearing. We find the

ordinance requires coverage for the driver, as a matter of law, and evidence was unnecessary.

The judgment for the amount of plaintiff's judgment against defendant is affirmed.

The trial court also awarded plaintiff attorney fees in the amount of $10,000. National Guaranty assigns the award as error.

Plaintiff seeks attorney fees pursuant to ORS 743.114 which provides for attorney fees to be awarded as costs in actions on insurance policies. Plaintiff asked for attorney fees in his allegations. After the trial court sustained plaintiff's exceptions to National Guaranty's answer National Guaranty elected not to plead further. Plaintiff moved in writing for judgment "for $49,717.97 [the principal sum] plus interest * * *." However, attorney fees were not mentioned. Judgment was entered for the principal sum "plus an attorney fee of $10,000.00 and for costs and disbursements taxed at $25.00." A cost bill had been served on National Guaranty the day before the judgment was entered. The cost bill was on the usual printed form which had printed, among other items, "Attorney's Fees," but nothing was filled in the blank. The parties had no stipulation on attorney fees.

Plaintiff contends the trial court acted pursuant to ORS 18.080(1)(a) concerning default judgments in contract

cases. ORS 18.090 concerns judgments "upon failure to answer." National Guaranty answered and the section does not apply.

Plaintiff relies upon three cases to support the award of attorney fees. Tiano v. Elsensohn, 268 Or 166, 520 P2d 358 (1974), does not assist plaintiff. We held that the party claiming to be entitled to an attorney fee should insert a specific amount in the cost bill and if the other party was dissatisfied it should file an objection. The party claiming the fee then has the burden of proving the reasonableness of the fee. As stated, no claim for a fee was inserted in the cost bill.

Hillsboro v. Maint. & Const. Serv., 269 Or 169, 523 P2d 1036 (1974), likewise is of no aid to plaintiff. Plaintiff sought attorney fees, although not in proper form. The defendant filed objections, a hearing was held, but plaintiff did not put on evidence to support its claim. We affirmed the trial court's denial of fees upon the ground there was no supporting evidence.

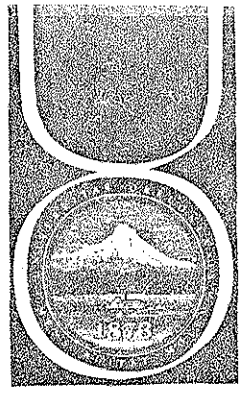
Reeder v. Kay, 276 Or 1111, 557 P2d 673 (1976), while not as clearly unhelpful to plaintiff, nevertheless does not support plaintiff. Two defendants, the Tabers, were dismissed as parties by plaintiff. The Tabers filed a cost bill in which they claimed attorney fees but did not specify an amount. Apparently, no objection was filed but a hearing was held and on the same

day a judgment entered for attorney fees. The plaintiff-appellant did not bring to this court a record of any of the proceedings. Under these circumstances we affirmed the award of attorney fees.

In the present case National Guaranty never had an opportunity to object. Neither the motion for judgment nor the cost bill gave it notice that plaintiff was going to ask the trial court for attorney fees when the judgment was entered. That the judgment recites a hearing was held, plaintiff was present and the court found the attorney fees were reasonable does not cure the defect because the defendant was not apprised any hearing was to be held on attorney fees.

The procedure for awarding attorney fees has caused considerable appeals which would have been unnecessary if there was a comprehensive statute governing the procedure.

The judgment for attorney fees is reversed.



School of Law
UNIVERSITY OF OREGON
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503/686-3837

July 5, 1978

Chief Justice Arno H. Denecke
The Supreme Court
Salem, Oregon 97310

Dear Justice Denecke:

The Rhone v. Louis problem to which you refer in your letter of June 27, 1978, will be before the Council on July 28, 1978, in the form of a proposed revision to ORS Chapter 20, as developed in the enclosed memorandum.

I will keep you informed of the Council's action.

Very truly yours,

Fredric R. Merrill
Executive Director

COUNCIL ON COURT PROCEDURES

FRM:gh

Enclosure

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WENDELL GRAY
OF COUNSEL

November 14, 1978

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

Re: Proposed Civil Rule 45

Dear Professor Merrill:

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

John Dudrey

JD:fjw

cc: Donald W. McEwen, Esq.

STEPHEN D. FINLAYSON
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November 3, 1978

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

Re: Proposed Oregon Rules of Civil Procedure

Dear Council Members:

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

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

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

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

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

Thank you for your consideration.

Very truly yours,

Stephen D. Finlayson

SDF:lw

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

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JOHN H. OTTING
JONATHAN K. ENZ
S. WARD GREENE

November 15, 1978

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

Re: Council on Court Procedures

Dear Professor Merrill:

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

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

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

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

Very truly yours,

OTTING & ENZ, P.C.

S. Ward Greene

SWG:rb

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—
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November 7, 1978

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

Reference: Court procedures

Dear Fred:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

Burl L. Green

e
cc: Donald McEwen

STOLL & STOLL

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N. ROBERT STOLL
ROBERT M. GREENING, JR.
GARY I. GRENLEY
ALAN S. LARSEN
GARY M. BERNE

November 6, 1978

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

Re: Proposed Oregon Rules of Civil Procedure

Dear Professor Merrill:

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

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

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

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

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

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

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

> E(2) Scope and Number. A party may serve more than one set of interrogatories upon an adverse party, but the total number of interrogatories shall not exceed thirty and the scope of interrogatories shall comply with Rule 36B, unless the court otherwise orders for good cause shown after the proposed additional interrogatories have been filed. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined or arranged. However, interrogatories requesting the identity of persons, entities, expert witnesses, corporations, business entities, parties or persons controlled by parties under Rule 36B(1), (3), (6), and (7), shall be considered but one interrogatory for each individual or entity so identified.

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

that it may have more than five officers or directors.

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

Very truly yours,

GARY I. GRENLEY

GIG:jlf

OREGON LEGAL SERVICES CORPORATION

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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

In a state with pleading and practice rules as archaic as those of Oregon, it is easy to jump to the conclusion that wholesale adoption of the federal rules will eliminate the problems associated with civil pre-trial practice. But beware. I suggest that the real problem is that our system is administered by judges and lawyers who are human. The parochial interests of litigants tend to undercut the noble objectives of the Federal Rules.

For example, take Rule 16, Federal Rules of Civil Procedure. No one can doubt that it makes so much more sense to formulate and narrow the issues, to disclose witnesses and exhibits by means of a pre-trial order, than to hassle over a complaint, drafted before any discovery has occurred. And when properly administered and when lawyers try to make it work (usually with some necessary arm-twisting by the judge), Rule 16 is a gem. Yet as often as not I have seen subterfuge used to defeat its purpose. For example, a pre-trial order containing twenty-five factual contentions, twenty-four of which, while specious, are designed to hide the thrust of the case, is no great improvement over the present system. Similarly, a pre-trial order containing a single factual contention, so vague as to permit a party to advance any theory at trial, is not my idea of progress, either. A witness list of 750 names and twenty-five experts is not likely to give opponents a fair opportunity to prepare for trial.

In short, I view the rule itself as almost neutral, neither good nor bad but only as good as the bar and the court are determined to make it. This is equally true of other rules, particularly those relating to discovery.

2. <u>The Federal Rules On Discovery Are Great For Big, Expensive Cases Or Clients, But May Make It Impossible For The Average Person To Go To Court.</u>

As an abstract principle, who can oppose the concept that free and open discovery will reduce surprise in the courtroom, promote settlement, and achieve more just results in litigation? Not I. In handling aviation cases for the federal government I attempt to make use of all the discovery tools available under the Federal Rules. They're great. As soon as I receive a complaint, I go to our sets of interrogatories. Our office has drafted specialized forms for aviation wrongful

death, aviation personal injury, and aviation property and hull damage. A sample of our pre-1970 forms is enclosed. Each set is about 50 pages long, and with editing, tailoring, and adding particular questions for each case, the marvelous mag card machine can crank it out in no time at all. I don't even have any guilt about foisting them on opposing counsel. When answered (perhaps only after a motion to compel), I can begin to evaluate the case and to know when (and whether) to take depositions.

There is a catch, however. The smallest case in my files has a judgment value of about $300,000.00. When my section chief decided I was ready to try my first case, he gave me a wrongful death case with a judgment value of $350,000.00. He couldn't help it; monetarily it was one of the smallest cases in our office. In that context, we not only can afford to use all discovery tools available, we can't afford not to.

Of course, federal practice generally tends to attract cases of larger value, and the federal discovery rules, while perhaps pricing federal court out of reach of the ordinary citizen, are well suited to the type of civil litigation handled therein.

The simple fact is that while liberal discovery sounds nice, and even works, it assumes that money is no object. I am concerned at the potential use of federal discovery practices, chiefly written interrogatories, requests for admission and production, by large clients or law firms to gain leverage and to maximize their economic advantage in litigation over the average or less fortunate private citizen. I wonder whether such discovery procedures are as appropriate for the contested property settlement or child custody case, or the $500.00 auto property damage case.

Can these discovery methods be made available where cases (or clients) are big enough to afford them, while eliminating the potential for abuse? I do not know. One possible suggestion would be to take guidance from the federal establishment of a judicial panel on multi-district litigation, but for a totally different objective. Permit a panel of judges to establish criteria and to denominate certain cases as "complex litigation," in which pleading, venue and discovery rules could be specially tailored to the particular needs of such cases.

3. What The Federal Rules Hath Given, The Local Court Rules Often Hath Taken Away.

The federal discovery rules have apparantly increased the time spent by judges in supervising pre-trial matters. Some courts have gotten to the point where they lack the time to hear pre-trial discovery motions and such motions are actively discouraged.

I am enclosing a local rule from the Eastern District of California. The practical effect of such a rule is that a party who objects to an interrogatory, gives an evasive or incomplete answer, or directs a witness not to answer a deposition question has about one chance in a hundred of ever getting his wrist slapped by the court. Lawyers quickly learn to disclose nothing, since the discovering party will never get into court to compel a more complete answer. The federal rules have thus opened discovery up to the point that local courts have reacted, and have in effect taken us back to square one. If federal-style discovery is to be established in Oregon, I would hope we could curtail such local court rules and/or hire more judges.

That's all for now. I am no fan of code pleading, and I hope you will come up with a comprehensive revision of the present system. I only caution that the federal rules are no panacea.

Could you send me copies of any specific proposed procedural reforms? If I can be of any further assistance, please let me know.

Very truly yours,

JONATHAN M. HOFFMAN
Trial Attorney
Aviation Unit, Civil Division

Enclosure

United States Department of Justice

UNITED STATES ATTORNEY
DISTRICT OF OREGON
506 UNITED STATES COURTHOUSE
POST OFFICE BOX 71
PORTLAND, OREGON 97207

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

November 13, 1978

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

Re: The Proposed Oregon Rules of Civil Procedure

Dear Laird,

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

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

2. Rule 3. "Commenced" is misspelled.

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

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

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

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

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

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

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

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

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

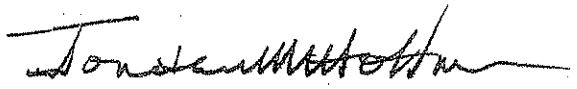
questions arise: first, is the party filing such a cross-claim or third-party claim a "plaintiff" for purposes of this rule? I believe that Rule 54(C) was designed to answer this question in the affirmative; however, the use of the word "plaintiff" in 54(A)(1) makes the answer somewhat unclear. Second,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

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

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

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

Very truly yours,



JONATHAN M. HOFFMAN
Assistant United States Attorney

questions arise: First, is the party filing such a cross-claim or third-party claim a "plaintiff" for purposes of this rule? [illegible] Rule [illegible] (C) are designed to answer this question in the affirmative. However, the use of the word "plaintiff" in 54(A)(1) makes the answer uncertain. [illegible] hypothetical given, then, if anything, is the [illegible] [illegible] [illegible] all parties who have appeared to date [illegible] raised under Rule 54(A)(1)(B) [illegible] defendant filing a cross-claim or third-party claim [illegible] the plaintiff [illegible] defendants [illegible] cross-claim or third-party claim [illegible] [illegible] dants.

[illegible] Rule 54(C). [illegible] as [illegible] of the third [illegible] matter of the [illegible] third [illegible] of the rule, and probably more [illegible] 54(C)(?).

12. Rule 59(D). [illegible] Courts are [illegible] to [illegible] the [illegible] [illegible] court [illegible] necessary [illegible] [illegible] a jury [illegible] [illegible] any other [illegible] [illegible] made during the course of [illegible] to a proposed [illegible] in my opinion, [illegible] [illegible] [illegible] particularly [illegible] administration of justice.

Thank you again for giving [illegible] the opportunity to comment. I hope [illegible] of these [illegible] may be of [illegible] to the committee.

Very truly yours,

JO

JOHN [illegible] O'BRIEN
Assistant [illegible] Attorney

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HAROLD V. JOHNSON (1920-1975)

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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RICHARD P. NOBLE
R. LADD LONNQUIST

TELEPHONE
(503) 222-0201

May 31, 1978

Fred Merrill
Executive Director
University of Oregon Law School
Eugene, Oregon 97401

Dear Mr. Merrill:

The May Oregon State Bar Bulletin printed an article on the council on court procedures and specifically referenced a number of rules. Included in those rules is "to adopt a rule making information held by expert witness discoverable". I would appreciate receiving a copy of that rule and any other information which was used as a model for that rule.

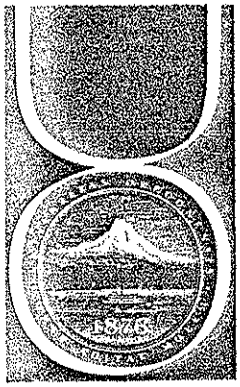
Frankly, I am concerned that, in many cases, such rule would result in substantially increased pre-trial costs in behalf of injured plaintiffs and am thus interested in what policy considerations were considered both pro and con in suggesting a proposed rule.

Thank you for your courtesy and cooperation.

Very truly yours,

R. LADD LONNQUIST

RLL:dbr
cc: Chuck Paulson
Honorable William M. Dale
Honorable Berkley Lent



School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

June 6, 1978

Mr. R. Ladd Lonnquist
Attorney at Law
Jackson Tower
806 S.W. Broadway
Portland, Oregon 97205

Dear Mr. Lonnquist:

I am enclosing the original proposal on expert discovery submitted to the Council by Dick Bodyfelt and a staff analysis of the problem. The proposal has been referred back to the discovery subcommittee for submission of a recommended rule. We would, of course, welcome any suggestions or comments that you may have in this area.

Very truly yours,

Fredric R. Merrill
Executive Director
COUNCIL ON COURT PROCEDURES

FRM:gh

Encl.

cc: Charles P. A. Paulson
William M. Dale, Jr.
Berkeley Lent
Donald W. McEwen

LAW OFFICES

SWAN, BUTLER & LOONEY, P. C.

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VALE, OREGON 97918
AREA CODE 503 • PHONE 473-3111

October 23, 1978

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

Re: Bodyfeldt Rule

Dear Carl:

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

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

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

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

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

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

Very truly yours,

SWAN, BUTLER & LOONEY, P.C.

By H. Clifford Looney

HCL:sj

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ANTHONY YTURRI
GENE C. ROSE
CARL BURNHAM, JR.
GARY J. EBERT
CLIFF S. BENTZ

AREA CODE 503
889-5368

October 28, 1978

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

Dear Cliff:

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

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

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

Very truly yours,

YTURRI, ROSE & BURNHAM

By
Carl Burnham, Jr.

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

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November 8, 1978

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

Gentlemen:

RE: Public comment on Rule 18B

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

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

Yours truly,

Philip H. Lowthian
PHL:nb

FREDRICKSON, WEISENSEE & COX
ATTORNEYS AT LAW

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LLOYD W. WEISENSEE
EUGENE D. COX
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WENDELL GRAY
OF COUNSEL

November 15, 1978

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

Re: Proposed Oregon Rules of Civil Procedure

Gentlemen:

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

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

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

Query:

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

Query:

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

Query:

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

Very truly yours,

PETER C. McCORD

PCM:lb
Enclosures

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

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

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

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

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

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

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

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

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

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

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TELEPHONE 221-1440
AREA CODE 503

October 31, 1978

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

Dear Don:

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

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

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

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

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

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

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

Very truly yours,

Don H. Marmaduke

DHM:vm
cc: Fred Merrill

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 6, 1978

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

Dear Mr. Merrill:

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

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

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

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

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

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

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

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

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

Very truly yours,

Robert G. Ringo

jas

Ringo, Walton, Eves and Gardner, P.C.

Attorneys at Law

ert 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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OREGON TAX COURT
106 STATE LIBRARY BUILDING
SALEM, OREGON 97310

CARLISLE B. ROBERTS
JUDGE

MRS. LILLIAN M. DONKIN
CLERK

October 27, 1978

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

Dear Professor Merrill:

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

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

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

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

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

Your advice will be appreciated.

Very truly yours,

Carlisle B. Roberts

Carlisle B. Roberts
Judge

CBR/hm

encl.

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

November 1, 1978

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

Dear Judge Roberts:

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

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

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

Very truly yours,

Ffedric R. Merrill
Executive Director

FRM:gh
Encl.

cc: Donald W. McEwen, Esq.

COUNCIL ON COURT PROCEDURES

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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.

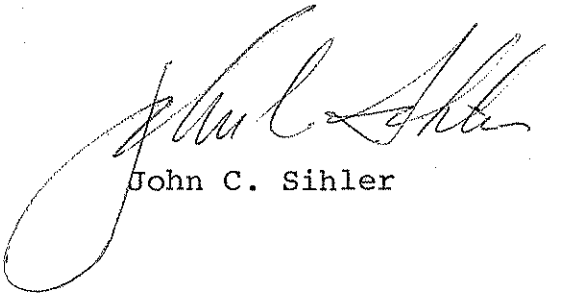
My estimate is that in approximately a quarter of the personal injury cases there is a prior or subsequent hospitalization which appears unrelated but in fact has relevant and admissible medical evidence; that it frequently is impossible to predict which hospitalization it will be by relying on the summary 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,



John C. Sihler

JCS:dlr

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January 3, 1979

Mr. Fredric R. Merrill
Executive Director
University of Oregon School of Law
Eugene, Oregon 97403

Dear Fred:

This concerns your minutes of the December 2, 1978, meeting of the Council on Court Procedures.

As you know, I was interested in the changes to Rule 44 E, Hospital Records, and my understanding is that one of the changes that was voted at the December 2, 1978 meeting was the elimination of the words "for such injuries" from the end of the first sentence in proposed Rule 44 E.

You were kind enough to send me a copy of the minutes of that meeting, and you may remember that I called you and pointed out that your minutes regarding the changes in Rule 44 E omitted a reference to the removal of "for such injuries." As I remember it, you said you realized there was an oversight in the minutes in not referring to that change and that there would be amended minutes sent out, or that some type of written record would be made so that the proposed rules as submitted to the legislature would not include the words "for such injuries."

Simply because I had not heard anything more, I was wondering whether there had been amended minutes or, if not, whether some steps are being taken so that proposed Rule 44 E no longer contains the words "for such injuries" at the end of its first sentence.

Thanks for your attention.

Very truly yours,

THWING, ATHERLY & BUTLER

JOHN C. SIHLER

JCS:dlg

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WILLIAM F. JOHNSON (1913-1976)
CHARLES A. TELFER (1924-1967)
WILLIAM M. SLOAN
BRIAN J. HAWKINS
GERALD C. NEUFELD

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

November 9, 1978

IN REPLY, PLEASE REFER TO:

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

RE: Proposed Oregon Rules of Civil Procedure

Gentlemen:

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

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

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

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

Very truly yours,

SLOAN, HAWKINS & NEUFELD

William M. Sloan

WMS:sj

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

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.

FREDRICKSON, WEISENSEE & COX
ATTORNEYS AT LAW

FLOYD A. FREDRICKSON
LLOYD W. WEISENSEE
EUGENE D. COX
PETER C. McCORD
JOHN R. DUDREY
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WENDELL GRAY
OF COUNSEL

November 9, 1978

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

Re: Proposed Oregon Rules of Civil Procedure

Dear Sir:

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

I. Rule 4 Jurisdiction

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

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

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

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

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

II. Rules 28 and 29 - Joinder

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

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

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

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

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

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

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

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

III. Rule 29 - Joinder/Venue

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

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

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

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

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

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

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

VI. Rule 55 Subpoena

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

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

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

IV. Rule 33 - Intervention

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

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

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

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

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

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

VII. Rule 21 - Motions

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

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

Very truly yours,

Lloyd W. Weisensee

Lloyd W. Weisensee

LWW:fjw

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

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WENDELL GRAY
OF COUNSEL

November 14, 1978

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

Dear Professor Merrill:

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

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

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

Very truly yours,

Lloyd W. Weisensee

Lloyd W. Weisensee

LWW/bsw
cc: Justice Berkeley Lent

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TELEPHONE
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December 21, 1977

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

Dear Mr. Merrill:

Please include, among the agenda of proposed changes to the Oregon Rules of Civil Procedure, the possibility of service of summons by mail. It appears that such service is permitted in California, California Code of Civil Procedure §415.10 to 415.30, and Oklahoma, 12 Oklahoma Statutes §1547.

Very truly yours,

COREY, BYLER & REW

By: Peter H. Wells

Peter H. Wells

PHW:jm

January 4, 1977

Mr. Peter H. Wells
Corey, Byler & Rew
Attorneys at Law
222 S. E. Dorion Avenue
P. O. Box 218
Pendleton, Oregon 97801

Dear Mr. Wells:

Thank you for your letter of December 21, 1977, relating to service of summons by mail. I am hoping at the next meeting the council will decide which areas it will be considering at future meetings. I am sure at some point the entire area of service of process will be considered, and at that time I will submit your suggestion of service of summons by mail to the council. I will try to notify you as to the date of that meeting.

Very truly yours,

Fredric R. Merrill
Executive Director
Oregon Council on Court Procedures

FRM:gh

January 24, 1978

Mr. Peter H. Wells
Attorney at Law
222 S. E. Dorion Avenue
P. O. Box 218
Pendleton, Oregon 97801

Dear Mr. Wells:

The Council has set up a special subcommittee on process and procedure. The chairman of that is Judge Sloper. I am referring your suggestion on to him.

Very truly yours,

Fredric R. Merrill
Executive Director

FRM:gh

cc: Hon. Val D. Sloper (Encl.)

School of Law
UNIVERSITY OF OREGON
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503/686-3837

June 6, 1978

Mr. Peter H. Wells
Attorney at Law
222 S. E. Dorion Avenue
P. O. Box 218
Pendleton, Oregon 97801

Dear Mr. Wells:

The subcommittee has met and tentatively rejected service of process by mail. The principal objection raised was the uncertainty that attends use of the mails in this day and age.

I recently found a suggestion for the federal courts being proposed to the Federal Judicial Conference along the same line. I am enclosing a copy of the proposed draft and comments, which I will bring to the subcommittee's attention, and they may reconsider the matter.

Very truly yours,

Fredric R. Merrill
Executive Director
COUNCIL ON COURT PROCEDURES

FRM:gh

Encl.

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ORVAL ETTER
OF COUNSEL

November 3, 1978

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

Dear Fred:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART II. STYLISTIC PROBLEMS WITH THE DRAFT RULES.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the introduction, second paragraph, line 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

PART III. SUBSTANTIVE PROBLEMS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Michael L. Williams

MLW:sp

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

MORTON A. WINKEL
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November 6, 1978

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

Dear Fred:

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

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

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

Very truly yours,

Morton A. Winkel

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TELEPHONE
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October 24, 1978

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

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

Gentlemen:

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

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

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

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

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

Sincerely yours,

Norman K. Winslow

NKW:jm