MEMORANDUM

TO: Council on Court Procedures

FROM: Fred Merrill

RE: Distinction between law and equity

DATE: November 29, 1977

BACKGROUND

The distinction between law and equity is historically rooted in the separate development of the common law courts and the Chancery court in England. As early as 1250, the English Chancellor began to provide litigants with assistance because of the inflexibility of the existing English common law courts. By approximately 1600 this practice developed into an entirely separate equity court which applied a separate body of substantive law through flexible remedies. Because of this differing function, the chancery court developed a completely different procedural system.[1]

In the United States, the dual court system did not develop uniformly. Some colonies set up separate courts of law and equity, others had only one court with a rigid separation between cases brought in law and cases brought in equity and still others adjudicated equity claims through common law courts and forms of action.[2]

All retained a fairly clear distinction between law and equity. This was required by the fact that the common law system of forms of action could not function without the separation and common law procedure was so technical that it was inappropriate for equity. In 1846 New York adopted a new constitution

1. Millar, Civil Procedure in the Trial Courts in Historical Perspective (1952), 23-26, James and Hazard, Civil Procedure (2nd ed. 1977), section 1.4, page 1215.

2. James and Hazard, supra, page 18.

which abolished their separate equity court and in 1848 a new civil procedure code (the Field code) was adopted. The most significant aspects of the Field code were the abolition of the common law forms of action and elimination of the procedural distinction between law and equity.[3] The Field code was ultimately adopted in 29 states. Four of these states (including Oregon) adopted most of the procedures in the Field code and abolished the forms of action but expressly retained a formal distinction between law and equity.[4] Another state, Illinois, retained only a requirement that pleadings be labeled as law or equity but with no other procedural distinctions between law and equity cases.

In the federal system there was no separate court of equity but until 1938 a distinction was maintained between the equity and the law side of the federal trial courts. In 1938, the federal rules of civil procedure were promulgated which abolished the distinction between law and equity.[5]

At the present time only two states have separate courts in law and equity.[6] Nine states preserve some distinction between law and equity although there is no prohibition against combining legal and equitable issues in one case.[7] Illinois continues to require a labeling of pleadings as legal or equitable. The recent trend is clearly to abolish any procedural distinction between law and equity.[8]

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3. Clark, "Code Pleading" (2nd ed. 1947), page 21-22, 78. "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action." N.Y. Laws 1848, c. 379 §62.

4. Clark, supra, page 82.

5. FRLP 1 "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or inequity or in admiralty...", FRLP 2, "There shall be one form of action to be known as a 'civil action'."

6. Delaware and Mississippi, (The present status of the states comes from Barron and Holtzoff, Federal Procedure and Practice, Sections 9.1-9.53, pages 46-80).

7. Florida, Illinois, Iowa, Maryland, Massachusetts, New Hampshire, New Jersey, Pennsylvania and Virginia.

8. This can be clearly seen by comparing the number of states retaining a separate law and equity side (15) and the number of states with separate courts of

OREGON

The Oregon statute reads as follows:

> 11.010 Distinction abolished; but one form of action. The distinction heretofore existing between forms of actions at law is abolished, and hereafter there shall be but one form of action at law, for the enforcement of private rights or the redress of private wrongs.
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> 11.020 Cases when suits are maintainable. The enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate and complete remedy at law, and may be obtained thereby in all cases where courts of equity have been used to exercise concurrent jurisdiction with courts of law, unless otherwise specially provided by statute.

This is unchanged from the Oregon Code of 1854 which was based upon the Field code. As noted above, Oregon was one of four states adopting the Field code that abolished the forms of action but retained a distinction between actions at law and suits in equity. According to one of the drafters of the 1854 code, this was done by a 2 to 1 vote of the three commissioners who drafted the code and the only reason given was an interpretation of some provisions of the Organic Act of 1848 which referred to "chancery" as requiring separate equity procedure.[9] A more basic explanation may lie in the training of the drafters in common law procedures which required the distinction between law and equity and the uncertainty in 1854 whether the Field code procedure would truly eliminate any such need.[10] 123 years later, the lack of any need for a procedural distinction between law and equity is clear. In fact, any meaningful distinction between the law and equity sides of the Oregon court has been eliminated by the amendments allowing free joinder of legal and equitable claims,[11] and assertion of equitable defense in

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8. (cont'd.) law and equity (4) in 1957 (as shown in appendix A of Joinder and Geddes, The Union of Law and Equity, a Prerequisite to Procedural Revision, 55 Mich. L. Rev. 1059, 1111, (1957)) with the present situation.

9. Kelly, History of the Preparation of the First Code of Oregon, 4 Qly. Or. Hist. Soc'y. 82, 190 (1903)

10. Clark, supra, 83.

11. ORS 16.220 as amended by 1977 Oregon laws, chapter 356, ORS 16.305.

cases at law and the elimination of any substantial penalty for mislabeling a case.[12] The law-equity distinction remains only as a requirement that pleadings be labeled as equity or law and a few random procedural distinctions.

CONSIDERATIONS IN ABOLISHING LAW EQUITY DISTINCTION

There are four considerations in deciding whether any final distinction between law and equity should or could be eliminated:

1. Right to jury trial.

The right to jury trial is controlled by the legal or equitable nature of the issues presented. This is a Constitutional right under Article I, Section 17 of the Oregon Constitution and not controlled by statute. Any abolition of statutory references to law and equity would not affect the right to a jury trial. The right is not controlled by a labeling of a case as legal or equitable nor by the application of any particular procedures but by a historical test of whether the issue would have been tried to a jury under the procedures in effect when the Oregon constitution was adopted.[13] The test is the same whether or not the jurisdiction makes any procedural distinctions between law and equity.

The elimination of procedural distinctions between law and equity does raise several incidental questions. The first is whether the statutes should make any provision for right to jury trial. ORS 17.033 says that the right to jury trial shall be preserved in actions at law. Even with a formal elimination of law-equity distinctions in other respects this would be a correct statement of the situation. Other states have attempted to describe the type of cases where jury trial is allowed (Actions for money damages, etc.). A few states have avoided the problem by granting a right to jury trial in any case. Neither

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12. ORS 16.460.

13. Moore Mill and Lumber Company v. Foster, 216 Or. 204, 336 P.2d 39, 337 P.2d 810 (1959).

approach seems desirable. The question is ultimately a constitutional one and very complex; any attempt to categorize cases in a statute is usually incorrect. To grant a jury trial in every case seems too extreme. A better approach followed in Federal Rule 38 and a number of states is to simply make specific reference to a right to jury trial existing as granted by the Constitution.[14]

The second question is when the jury trial question is presented. The labeling of a case as legal or equitable at the outset arguably gives the parties a rough indication of the availability of jury trial. However, since the right is constitutional, the labeling is not controlling and could in fact be extremely misleading.

The label attached to the case may, however, raise the jury trial question before trial. In the federal system and many state courts, a jury trial demand is required within 10 days of the last pleading relating to an issue.[15] The jury trial issue can be raised in advance of trial by moving to strike the jury demand. Under the Oregon system, where no demand is required and the jury trial right can only be waived by affirmative action of the parties,[16] without labeling a case as law or equity, there may be no occasion to consider the right to jury trial until the time of trial. The Council could consider the merits of a demand-waiver system. Even without a demand-waiver system, the trial courts could avoid scheduling problems by requiring the parties to docket the case for jury or non-jury trial. If a pretrial conference procedure is adopted, the issue could be settled at that time. In terms of the law equity merger, the raising of the issue of right to jury trial at an early date by labeling a case as legal or equitable seems neither important enough nor real enough to justify retaining the distinction between law and equity.

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14. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." See Clark, supra, 95-102.

15. FRLP 38.

16. ORS 17.035.

2. Remedies.

The present procedural merger of law and equity does not affect the nature and availability of remedies. The further elimination of remaining distinctions would not do so either. It is of course necessary to consider whether a given remedy has a legal or historical background in order to define its availability, but this is a matter of substantive law.

3. Trial de novo.

The scope of review in suits in equity is much broader than review in actions at law. Equity cases are reviewed de novo.[17] Since rules of appellate procedure are beyond the rulemaking power of the Council,[18] the question is whether elimination of a trial level distinction between law and equity would be limited by the different scope of review in equity cases.

The labeling of a case as legal or equitable in the pleadings or the conduct of the parties and the trial court during trial, are not binding on the appellate court decision of scope of review based on existence of an equitable suit.[19] The parties are required to establish the nature of the case to the appellate court at the time of the appeal and would be in no better or worse shape in that regard without the existing distinctions between law and equity at the trial court level. Even in an equity case mistakenly tried to a jury, the appellate court can take the jury verdict as advisory and review de novo.[20]

In appellate procedure, the main difference is the necessity for assignments of error.[21] Again, this is required by the nature of the case and not the label at the trial court level.

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17. ORS 19.125(3).

18. House Bill 2316, Section 3.

19. In re Wakefield's Estate, 161 Or. 330, 87 P.2d 794, 89 P.2d 592 (1939).

20. Paul v. Mazzocco, 221 Or. 411, 351 P.2d 709 (1960).

21. Supreme Court and Court of Appeals Rule of Procedure 2.35, 2.40.

4. Differing procedures applied to law and equity cases.

Most of the differences between law and equity cases seem to be either historical accidents or the result of some drafting error occasioned by the difficulty of keeping track of existing distinctions between law and equity.[22] In some cases, however, the designation of suits in equity or actions at law specifies the application of a particular procedure to the mode of trial appropriate in law or equity.[23] Neither of these classes provides any good reason for retaining the distinction. The first type of distinction serves no procedural purpose and generates confusion and should be eliminated. The second can be eliminated by simply specifying particular procedures as appropriate to jury or non-jury trials or for particular remedies or proceedings without the intervening confusion of labeling as law or equity.

At least some law equity procedural distinctions are found in Chapter 12 (Statute of Limitations), Chapter 13 (Parties), Chapter 14 (Venue), Chapter 15 (Process), Chapter 16 (Pleading), Chapter 17 (Trial), Chapter 18 (Judgments), Chapter 23 (Enforcements of Judgments), Chapter 29 (Provisional Remedies), and Chapter 45 (Discovery and Referees). There is also some ambiguity created in Chapter 26 (Confession of Judgment) and Chapter 31 (Receivership) and Chapter 33 (Special Proceedings) by references to suits and actions.

An examination of these statutes suggests that some care is required in eliminating references to law and equity or suits and actions. The procedural

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22. For example, the ambiguity created for summary judgments and third party practice by the failure to amend the statutes specifying procedures to be followed in equity, ORS 18.020 and 16.010 to specifically include ORS 16.315 and 18.105.

23. For example, references to decrees or judgments to specify use of non-suit or judgment NOV for jury trials. See ORS 18.210-.250 and 18.140.

distinctions that are used to indicate certain desired results would require careful conversion. It is also possible that some unanticipated results might result from a wholesale abolition of distinction between law and equity without careful consideration of specific statutes.[24]

CONCLUSION

The remaining procedural distinctions between law and equity should generally be abolished. Law and equity are already procedurally merged in all respects except the retention of labels and some remaining unnecessary procedural distinctions. The existence of the distinction is cumbersome, confusing and generates drafting mistakes and unnecessary ambiguity.

The elimination of distinctions should involve two steps.

A. Adoption of a General Statute.

ORS 11.110 and 11.020 should be replaced by a general statute that both abolishes the forms of action and any general procedural distinction between law and equity. This could be done in several alternative forms:

Alternative One

"There shall be one form of action known as a civil action." (This is based on federal rule 2. It does not seem to clearly state what is intended, but is used in most of the recent states merging law and equity together with the rule statement of application of uniform rules in all cases.)

Alternative Two

"There is only one form of civil action. The distinctions between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." (This is based on the former New York CPLR Section 103. It may be overly broad considering the retention of de novo appeal and does not clearly limit the merger to procedural practices.)

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24. For example, ORS 17.045 refers to a different procedure to preserve the record in law and equity trials which may have some validity in light of the potential of de novo review in an equity case.

Alternative Three

"There shall be one form of action known as a civil action. Any distinction between pleading, practice and procedure in actions at law and in suits in equity is abolished except to the extent specifically retained by other provisions of these rules." (The use of the language from HB 2316 would abolish the distinction to the extent of the rulemaking power of the Council and the last clause would protect against any unforeseen consequences. On the other hand, the use of "pleading practice and procedure" seems awkward. The use of the federal rule language seems more appropriate than ORS 11.110 to recodify the abolition of the forms of action because that statute makes reference to forms "heretofore existing" and at the time of the re-enactment there would be no existing forms of action.)

B. Changing the Language of Specific Statutes.

The second step should be a careful chapter by chapter review of the existing statutes referred to above and the changing of statutory language making reference to actions at law or suits in equity or actions and suits to simply speak of a civil action. Those statutes where the use of action or suit achieves a desired procedural objective should be changed to specify the exact objective sought.

The results of the language modifications could be considered individually to be sure that no unanticipated problems are created.

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: PROCESS COMMITTEE

RE: SUMMONS AND PROCESS RULES

DATE: July 16, 1978

The process committee has met and considered in detail the specific rules relating to the form and manner of service of summons and process, as well as general introductory rules covering application of the rules, commencement of actions, service and filing of papers subsequent to the summons and computation of time. A copy of these rules, numbered 1 through 7, as approved by the committee, is attached. Those portions of the rules marked with an asterisk involve issues which the committee felt should be considered by the full Council, as discussed below. A staff commentary on each of these rules was furnished to the committee and is available to Council members upon request.

The committee is also considering rules governing bases for personal jurisdiction. A copy of a memorandum furnished to the committee, relating to rule-making authority in this area and jurisdictional rules numbered 4 A. through D., with staff commentary, is attached. The committee will report its recommendations on these rules at the meeting to be held July 28, 1978.

1. BASIC ISSUES

The committee considered the question of whether the Council has rule-making authority in the area of specifying the basis for jurisdiction. It was decided that, although the issue is not free from doubt, rules should be promulgated governing bases for personal jurisdiction. It is extremely difficult to make extensive revisions in the rules governing service of process without complementary changes relating to jurisdiction. The ultimate question should be left to the Legislature, as recommended on the last page of the staff memorandum.

Secondly, in the area of service of process under Rule 4, the committee felt that the present approach to service of summons was over-technical and placed too much emphasis on correctness of form. The basic question is whether the service of summons and complaint provides notice to the defendant. In an attempt to avoid over-technical interpretation of summons statutes, the draft accepted by the committee includes provisions 4 E.(3) and 4 H. which should be carefully examined by the Council. The committee also discussed the possibility of going even further in replacing the detailed provisions of Rule 4 F.(3), relating to the manner of service, with the following provisions:

> 4 F.(3) Summons shall be served in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

The language used is the constitutional standard of Mullane v. Hanover Trust Company, 339 U.S. 306 (1950. If this approach is adopted, the following changes would also be necessary:

1. Add, "or serve in any manner other than publication," before the last clause of Paragraphs 4 C.(4)(a) and (b) and add a new subsection, 4 C.(5) as follows:

> "For paragraphs (a) and (b) of subsection (4) of this section, the date of service shall be the date when summons was personally delivered to defendant or some person on defendant's behalf; the date of service by mail shall be as provided in subsection (2), section F., of this Rule; and the date of service by any other method shall be the date upon which the final step is taken to provide notice of the existence and pendency of the action to the defendant."

2. Change section E.(2)(a) as follows:

> "Personal service or mailing or service by any other method than publication shall be proved by (i) the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer or director of a corporate party to the action, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. If the summons is served in any other manner, the affidavit shall describe in detail the manner and circumstances of service. (ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the summons and complaint was left. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. If the summons is served in any other manner, the affidavit shall describe in detail the manner and circumstances of service.

3. Change 4 G.(1) to say:

"On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action, the court may order..."

2. OTHER QUESTIONS

4 F.(3)(a). There is no present Oregon statute covering service of process on partnerships and unincorporated associations. This paragraph fills that gap. The issue is whether to include the existing language of ORS 15.100 relating to joint obligors. Although they are made so by existing statute, there may be some question whether one joint obligor should be the agent for service of process upon another.

4 G.(3). The language in the last sentence is designed to avoid a possible interpretation of the existing statutory language, "not less than once a week for four consecutive weeks," to require five publications.

7 B. At common law, a judgment could be modified by a court within the same term of court but not beyond that time. It is unclear whether this common law rule still applies in Oregon, but subsection (2) of this section reciting an ability of the court to relieve someone of a mistake due to excusable neglect would literally allow a judge to vacate a judgment long after it was entered by allowing late filings of motions for NOV and new trial, etc. Federal rules prohibit this by making the subsection inapplicable to those post judgment motions described in this rule. The issue is whether the Council wishes to follow the same pattern or further limit a judge's ability to allow an untimely act based on excusable neglect.

M E M O R A N D U M

TO: PROCESS COMMITTEE

FROM: FRED MERRILL

RE: RULE-MAKING POWER AND PERSONAL JURISDICTION

DATE: June 28, 1978

The Council is authorized to promulgate rules of "pleading, practice and procedure." The question has been raised whether this includes rules relating to personal jurisdiction.

For analysis, it is necessary to separate different aspects of the concept of jurisdiction over the person. Jurisdiction over the person deals with the authority of a court to issue orders and judgments which are binding upon a particular person in a particular case. For a state court to have such authority, the following requirements must be met: (1) the proper formalities provided by state rules must be followed; generally, this involves the proper form of process, served by the proper person in a prescribed way; (2) the defendant must be amenable to the court's authority under state rules defining who shall be subject to a binding order of the court, and (3) the formalities and amenability to authority described by the state rules must meet federal constitutional standards of due process in terms of notice and minimum contacts.

The last aspect of personal jurisdiction is clearly not a matter under the rule-making power. The first is generally regarded as procedural and proper for rule-making and every jurisdiction with procedural rules has rules relating to service of process. The difficult question presented is whether the second aspect of jurisdiction, amenability to process, is substance or procedure. Could the Council promulgate rules that specify amenability to process as well as the manner of service of process? Could the Council promulgate a comprehensive long arm statute?

Unfortunately, there is no clear answer to these questions. The problem may result from a lack of separate consideration of the form of process and the amenability aspects of jurisdiction. Amenability is frequently defined by the form of process available. Even where amenability is defined separately, a Legislature often will incidentally make someone amenable to the authority of its courts in a process statute. For example, the non-resident motor vehicle statute in this state not only provides a method of service on a non-resident driver but creates a basis for jurisdiction through use of state highways. Another example in the process chapter is ORS 15.080 which provides a method of service of process on an agent for an individual, whereas ORS 14.020, dealing with amenability, only creates a basis for jurisdiction when a corporation appoints an agent. Since the Legislature is not limited to dealing with procedure this makes little practical difference; but for the Council, distinction may be important.

The failure to separate form of process and amenability to service of process was clearly pointed out in the Lacy article previously furnished to the committee. Lacy dealt with the problem in terms of over-emphasizing process requirements by confusing this with the more basic amenability question. Lacy also strongly suggests that jurisdiction is a matter of procedure. He is primarily advocating a modification in the technicality of the rules for service of process and in that respect, he correctly indicates that the Council could deal with the problem. To the extent the article suggests that amenability also is procedure, the argument is much less persuasive.

Lacy points out that both aspects of personal jurisdiction were codified as part of the original civil procedure section of the Deady Code. The problem is that Deady was simply arranging a set of statutes not distinguishing between substance and procedure for purposes of defining rule-making power. The statutes of limitations were codified in the same procedural section.

Lacy also relies upon the precedent in the federal system. The Federal Rules Enabling Act, 28 USCA 2072, says that the Supreme Court may "prescribe by general rule, the forms of process, writs, pleadings, and motions, and the practice and procedure of the District Courts of the United States in civil actions." Federal Rule 4 is on its face only intended to prescribe the manner and method of service of process. The rule is entitled "Process" and Wright and Miller says that Rule 4 specifically does not deal with jurisdiction over the person and if it did, it would be of doubtful validity under the Rules Enabling Act. See 4 Wright and Miller, Federal Practice and Procedure, § 1063, p. 204. Despite this, Rule 4 does create amenability to service of process beyond the territorial jurisdiction of Federal District Courts and in situations where there is no federal statute creating amenability. Rule 4(d)(7) and Rule 4(e) specifically provide that process may be served under circumstances and in the manner specified by the statutes of the state in which the District Court is located. This includes using any state long arm statute or quasi in rem statute of the state. Rule 4(f) also provides that process can be served outside the district anywhere in the state where the District Court is located. The Advisory Committee drafting the rules never attempted to explain why this does not exceed the rule-making power. The notes to the original version of 4(e) simply say that while this enlarges the area where service may be made, it does not enlarge jurisdiction. The notes to the 1963 revisions to Rule 4(d)(7) and 4(e) show clearly that these rules were intended to incorporate state long arm statutes but never analyzed why this is part of practice and procedure.

The United States Supreme Court, however, has indicated that at least the 4(f) extension is not beyond the rule-making power. In Mississippi Publishing Company v. Murphree, 326 U.S. 438 (1926), a corporation had appointed

a registered agent in Mississippi. Suit was filed in the Northern District of Mississippi but the agent resided in the Southern District and was served there under Rule (f). Service was challenged on the basis that the rule exceeded the powers granted by the Rules Enabling Act, but the court held that the service was proper. The opinion is not completely clear in stating that amenability to service is an aspect of procedure. Basically, the court focused upon the question of whether the substantitve rights involved had been affected and says that all the rule did was to provide a method or manner of service where the court was clearly authorized to determine the rights of the defendant. The opinion never faces the question of how the authority to deal with a person who had appointed a local agent is conferred upon a Federal District Court. The answer perhaps is that this ground of amenability was so obvious and so well accepted that no specific statute or rule was required. Any court could probably deal with the rights of the party voluntarily appearing before it without specific statutory authorization.

Rule 4(d)(7) and 4(e), incorporating state long arm statutes, seem to be on more tenuous ground. The authority of a court to proceed against a person based upon one minimum contact with the state, such as the sale of one life insurance policy, is not automatically assumed. A state court would not assume authority to the full constitutional limits; a long arm statute is required. By incorporating state long arm statutes, Rules 4(d)(7) and 4(e) go beyond manner of service of process for a clearly accepted basis of jurisdiction and create a new amenability to service of process. Nonetheless, on the authority of the Murphree case, challenges to incorporation of state long arm service in federal courts have failed in the lower federal courts. See U.S. v. Montreal Trust, 35 FRD 216, Southern Dist. of N.Y. (1964); Metro Sanitary District of Chicago v. General Electric, 35 FRD 131 (1964).

It may also be dangerous to transfer the meaning of substance and procedure in defining rule-making power from the federal system to the Oregon Council on Court Procedures. The Federal Rules Enabling Act is subject to interpretation based upon the situation existing in federal courts at the time of passage. The Enabling Act for the Council was passed at a different time and place, applies to a state court, and must be interpreted against a statutory back-drop that does draw a distinction between amenability to process and service of process.

From a general analytical standpoint, amenability to service seems to be more than procedure. The one analysis that could be found of the meaning of substance and procedure in relation to jurisdiction is Joiner and Miller, Rules of Practice and Procedure, A Study of Judicial Rule Making, 55 Mich.L.Rev. 623 (1957). They suggest that the distinction between substance and procedure in defining rule-making power depends upon whether an area

relates to the orderly and efficient administration of court business or goes beyond this and brings in other aspects of public policy. See p. 635. Applying this test to the basis for exercising jurisdiction, they say the following:

> "The same can be said of the relationship with the state of the person or property involved in an action as the basis for jurisdiction over that person and property. Whether or not that relationship is sufficiently close to subject the person or property to the jurisdiction of a court of the state is something that involves fundamental policy considerations beyond those matters essential for the orderly dispatch of judicial business. On the other hand, how such persons and property should be brought before the courts clearly is practice and must be so considered. If the legislature makes the determination that a certain class of persons or property should be subjected to the power of the courts of this state, the supreme court has the obligation to establish rules prescribing how and in what manner such persons or property shall be brought before the courts." p. 645-646

Other than the Joiner and Miller article, there has been remarkably little specific discussion of whether amenability to service of process is substance or procedure. As indicated above, Wright and Miller say that the federal rules cannot create jurisdiction over the person, but they do not discuss the issue and Rule 4 does in fact create personal jurisdiction. Other states with procedural rules provide little guidance. A majority have rules regulating manner of service of process but purport to leave jurisdiction to statutes. A substantial minority include bases of jurisdiction as well as process in their rules.

In the final analysis, there was sufficient doubt that it would be dangerous to simply promulgate rules of amenability to process. On the other hand, it is very difficult to make a meaningful change in the process statutes without cleaning up the amenability rules at the same time. The best approach would be to promulgate amenability rules and indicate that such rules are arguably within the rule-making power of the Council, but the Legislature should consider whether it intended to confer power to make rules relating to personal jurisdiction upon the Council in creating the Council. The Legislature could then veto the rules if they either disagreed with the merits or did not intend to include personal jurisdiction within the rule-making power. If the Legislature does nothing under these circumstances, it would be interpreting procedure to include personal jurisdiction. We could also suggest that if the Legislature does not wish to leave personal jurisdiction to the rule-making power of the Council, then it should enact the promulgated rules as a statute.

OREGON RULES OF CIVIL PROCEDURE

RULE 1

SCOPE

These rules govern procedure and practice in all circuit and district courts of this state for all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where a different procedure is specified by statute or rule. These rules shall also govern practice and procedure in all civil actions and special proceedings, whether cognizable as cases at law, in equity or of statutory origin, for all other courts of this state to the extent they are made applicable to such courts by rule or statute. These rules shall be construed to secure the just, speedy and inexpensive determination of every action. These Rules, and amendments thereto, shall apply to all actions filed after their effective date.

RULE 2

ONE FORM OF ACTION

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

RULE 3

An action shall be commenced by filing a complaint with the clerk of the court. Commencement of an action for purposes of statutes of limitations is governed by ORS 12.020.

RULE 4

SUMMONS

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

B. Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section D. of this Rule.

C. Contents. The summons shall contain:

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

C.(2) A direction to the defendant requiring defendant to appear and defend within the time required by subsection (4) of this section and shall notify defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(2)(a) All summonses other than a summons to join a party pursuant to Rule K.(4) shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer."

This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or his attorney.

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

C.(2)(b) A summons to join a party pursuant to Rule K.4(a) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CARREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

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

C.(2)(c) A summons to join a party pursuant to Rule K.4(b) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

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

C.(3) A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action, may be served by mail.

C.(4) The summons shall require the defendant to appear and defend within the following times:

C.(4)(a) If the summons is served within the state personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 20 days from the date of service.

C.(4)(b) If the summons is served outside this state personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 30 days from the date of service.

C.(4)(c) If the summons is served by publication pursuant to section G. of this Rule, the defendant shall appear and defend within 45 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

D. By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor an officer or director

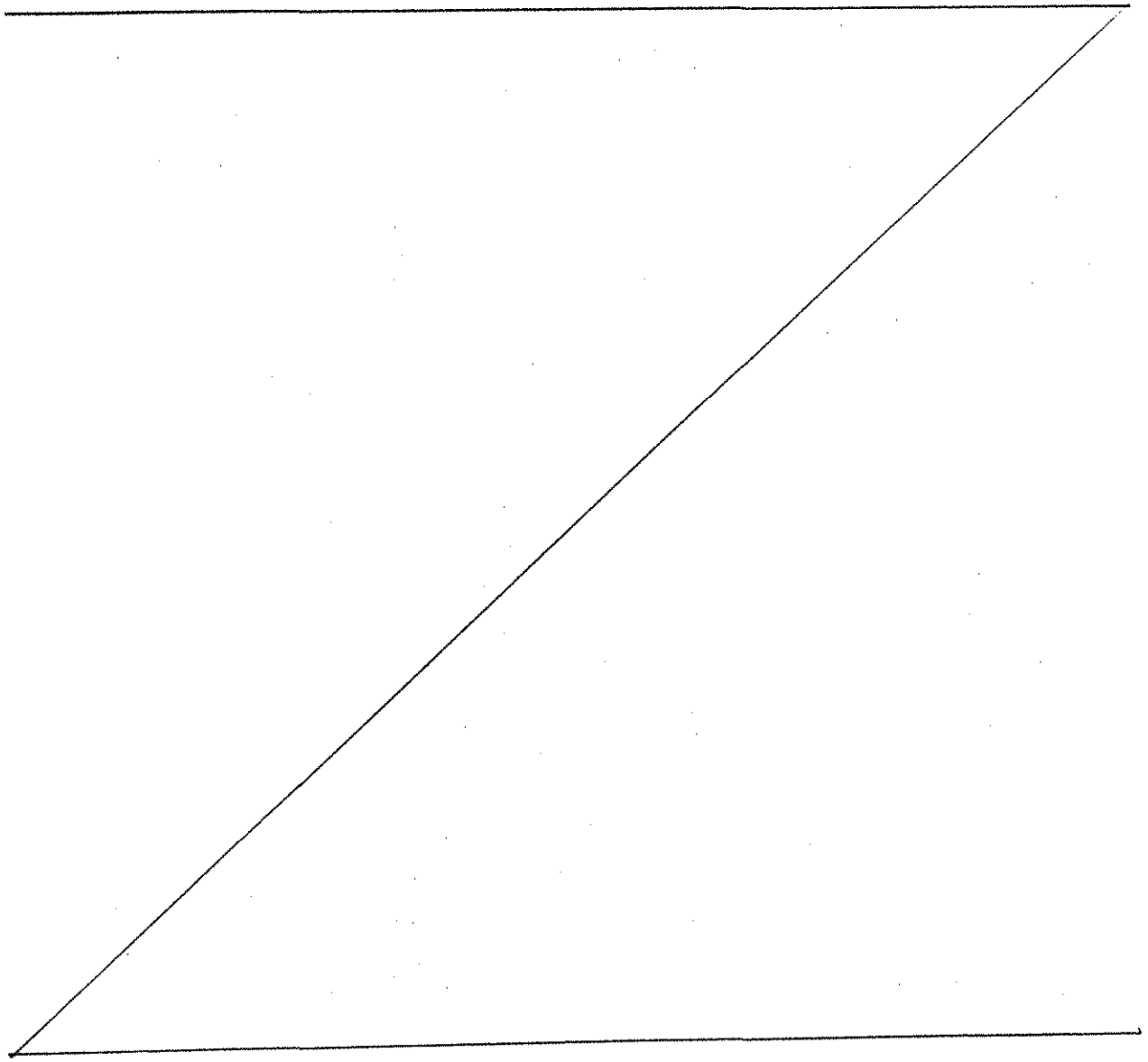
of a corporate party. Compensation to a sheriff or a sheriff's deputy of the county in this state where the person served is found, or such person's dwelling house or usual place of abode is located, who serves a summons, shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee shall be paid for the service. This compensation shall be part of the disbursements and shall be recovered as provided in ORS 20.020.

E. Return; proof of service. (1) The summons shall be returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. When served out of the county in which the action is commenced, the summons may be returned by mail.

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

E.(2)(a) Personal service or mailing shall be proved by (i) the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer or director of a corporate party to the action, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left and shall state such facts as show reasonable diligence in attempting to effect personal service upon the defendant. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the

summons and complaint was left and such facts as show reasonable diligence in attempting to effect personal service on defendant. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (iii) An affidavit or certificate containing proof of service may be made upon the summons or as a separate endorsement.



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

Affidavit of Publication

State of Oregon,)
) ss.
County of _____.)

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

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

_____
Notary Public of Oregon.

My commission expires
_____ day of _____, 19 __.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and his official seal, if he has one, shall be

affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of his official seal, if he has one, shall be prima facie evidence of his authority to make and certify such affidavit.

*E.(3) If summons has been properly served, failure to return the summons or make or file a proper proof of service shall not affect the validity of the service.

*F. Manner of service. (1) Unless otherwise specified, the methods of service of summons provided in this section shall be used for service of summons either within or without this state.

F.(2) For personal service, the person serving the summons shall deliver a certified copy of the summons and a certified copy of the complaint to the person to be served. For service by mail under paragraph (d) of subsection (3) of this section or subsection (4) of this section or mailing of summons and complaint as otherwise required or allowed by this Rule, the plaintiff shall mail a certified copy of the summons and a certified copy of the complaint to the person to be served by certified or registered mail, return receipt requested. Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

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 shall be 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 with reasonable diligence the defendant cannot be served under subparagraph (i) of this paragraph, 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 his 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.

F.(3)(b) Upon a minor under the age of 14 years, by service in the manner specified in paragraph (a) of this subsection upon such minor, and also upon his father, mother, conservator of his estate or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule V.(1)(b).

F.(3)(c) Upon an incapacitated person, by service in the manner specified in paragraph (a) of this subsection upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem appointed pursuant to Rule V.(2)(b).

F.(3)(d) Upon a domestic or foreign corporation, limited partnership or other unincorporated association which is subject to suit under a common name:

F.(3)(d)(i) By personal service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership or association. In lieu of delivery of a copy of summons and complaint to the registered agent, officer, general partner or managing agent, such copies may be left at the office of such registered agent, officer, general partner or managing agent,

with the person who is apparently in charge of the office.

F.(3)(d)(ii) If no registered agent, officer, director, general partner, or managing agent resides in this state or can be found in this state, then plaintiff may serve such person by mail. Service by mail under this subparagraph shall be fully effective service and permit the entry of a default judgment if defendant fails to appear.

F.(3)(d)(iii) If by reasonable diligence, the defendant cannot be served pursuant to subparagraphs (i) and (ii) of this paragraph, then by personal service upon any person over the age of 14 years who resides at the dwelling house or usual place of abode of any person identified in subparagraph (i) of this paragraph, or by personal service on any claerk or agent of the corporation, limited partnership or association who may be found in the state. Where service is made by leaving a copy of the summons and complaint at the dwelling house or usual place of abode of persons identified in subparagraph (i) of this paragraph, 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)(iv) 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 a partnership or unincorporated association not subject to suit under a common name or persons jointly indebted on a contract, relating to partnership or association activities or the joint contract, by personal service individually upon each partner, association member or joint obligor known to the plaintiff, in any manner prescribed in paragraphs (a), (b) or (c) of this subsection. If less than all of the defendants are served, the plaintiff may proceed against those defendants served and against the partnership, association or joint obligors and a judgment rendered under such circumstances is a binding adjudication against all partnership or association members or joint obligors

as to partnership or association assets or joint property, wherever such assets or property may be located.

F.(3)(f) 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. Service upon the Adult and Family Services Division shall be by personal service upon the administrator of the Family Services Division or by leaving a copy of the summons and complaint at the office of such administsrator with the person apparently in charge.

F.(3)(g) Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service upon an officer, director, managing agent, clerk or secretary thereof. In lieu of delivery of the copy of the summons and complaint personally to such officer, director, managing agent, clerk or secretary, such copies may be left in the office of such officer, director, managing agent, clerk, or secretary with the person who is apparently in charge of the office. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

F.(4) When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

G. Publication. (1) On motion upon a showing by affidavit that service cannot with due diligence be made by another method described in subsection (3) of section F. of this Rule, the court may order service by publication.

G.(2) In addition to the contents of a summons as described in section C. of this Rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(2) shall state: "This paper must be given to the court within 45 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

*G.(3) An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced, or if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times, with intervals of at least 7 days between each successive publication.

G.(4) If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at his last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present and last known address of the defendant, mailing a copy of the summons and complaint is not required.

G.(5) If service cannot with due diligence be made by another method described in subsection (3) of section F. of this Rule because defendants are unknown heirs or persons as described in sections (9) and (10) of Rule I, the action shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien or interest in

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

G.(6) A defendant against whom publication is ordered or his representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

G.(7) Service shall be complete at the date of the last publication.

*H. Disregard of error; actual notice. Failure to strictly comply with provisions of this Rule relating to the form of summons, issuance of summons, the person who may serve summons and the manner of service of summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action and had a reasonable opportunity to appear and defend. The court may allow amendment to a summons or proof of summons and shall disregard any error in service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

I. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 5 E.

RULE 5

PROCESS - SERVICE OF PROCESS

A. Process. All process authorized to be issued by any court or officer thereof shall run in the name of the State of Oregon and be signed by the officer issuing the same, and if such process is issued by a clerk of court, he shall affix his seal of office to such process. Summons and subpoenas are not process and are covered by Rules 4 and 55, respectively.

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

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

D. Telegraphic transmission of writ, order or paper, for service; procedure. Any writ or order in any civil action, suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy, as defined in ORS 757.631, of such writ, order or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him if any return be requisite, in the same manner and with the same force and effect in all respects as the original might be if delivered to him. The officer or person serving or executing the same shall have the same authority and be subject to the same liabilities as if the copy were the original. The original, if a writ or order, shall also be filed in the court from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent. In sending it, either the original or a certified copy may be used by the operator for that purpose.

E. Proof of service or execution. Proof of service or execution of process shall be made as provided in Rule 4 E.

RULE 6

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

A. Service; when required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer or judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

B. Same; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

C. Same; numerous defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or

matter constituting an affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereupon upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

D. Filing; no proof of service required. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Such filing by a party or a party's attorney shall constitute a representation that a copy of the paper has been served upon each of the other parties as required by section A. of this Rule. No further proof of service is required unless an adverse party raises a question of notice. In such instance the affidavit of the person making service shall be prima facie evidence.

E. Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office, except that the judge may permit the papers to be filed with him, in which event the judge will note thereon the filing date and forthwith transmit them to the office of the clerk or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse upon such pleading or paper the day of the month and the year. The clerk or person exercising the duties of that office is not required to receive for filing any paper unless the name of the court, the title of the cause and the paper, and the names of the parties, and the attorney, if there be one, is legibly endorsed on the front of the document, nor unless the contents thereof can be read by a person of ordinary skill.

F. Effect of failure to file. If any party to an action fails to file within five (5) days after the service any of the papers required by this Rule to be filed, the court, on motion of any party or of its own motion, may

order the papers to be filed forthwith, and if the order be not obeyed, the court may order them to be regarded as stricken and their service to be of no effect.

RULE 7

TIME

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 18.020.

* B. Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure act was the result of excusable neglect, but it may not extend the time for taking any action to file, object or hear and determine findings of fact or to vacate, set aside, amend or otherwise change a judgment which has been entered, beyond the time specified for taking such action in the applicable rule or statute.

C. Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continue existence or expiration of a term of court. The continued

existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

D. For motions; affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

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

The following would either be enacted by the Legislature as a statute or promulgated by the Council as rules. ORS 14.010 to 14.035 would be repealed.

RULE 4 A.

PERSONAL JURISDICTION

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4 (Oregon Rule of Civil Procedure 4) under any of the following circumstances:

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

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

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

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

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

(5) Has specifically consented to the exercise of personal jurisdiction over such defendant, whether by appointment of agent for service of process in this state or otherwise.

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

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

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

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

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

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

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

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

(3) Arises out of a promise made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value or to guarantee payment for such goods, documents or things; or

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

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

F. Local property. In any action which arises out of the ownership, use or possession of real property situated in this state or the ownership, use

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

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

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

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

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

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

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

J. Certain marital and domestic relations actions.

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

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

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

K. Personal representative. In any action against a personal representative to enforce a claim against the deceased person represented where one or more of the grounds stated in sections (subsections) B. to J. would have furnished a basis for jurisdiction over the deceased had he been living and it is immaterial under this subsection whether the action had been commenced during the lifetime of the deceased.

L. Joinder of claims in the same action. In any action brought in reliance upon jurisdictional grounds stated in sections (subsections) C. to J., there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under this section for personal jurisdiction over the defendant as to the claim or cause to be joined.

RULE 4 B.

JURISDICTION IN REM

A court of this state having jurisdiction of the subject matter may exercise jurisdiction in rem on the grounds stated in this section. A judgment in rem may affect the interests of a defendant in the status, property or thing acted upon only if a summons has been served upon the defendant pursuant to Rule 4 (Oregon Rule of Civil Procedure 4). Jurisdiction in rem may be invoked in any of the following cases:

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

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

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

RULE 4 C.

PERSONAL JURISDICTION, WITHOUT SERVICE OF SUMMONS

A court of this state having jurisdiction of the subject matter may, without a summons having been served upon a person, exercise jurisdiction in an action over a person with respect to any counterclaim asserted against that person in an action which the person has commenced in this state and also over any person who appears in the action and waives the defense of lack of jurisdiction over his or her person as provided in Rule J. 7 (Oregon Rule of Civil Procedure J. 7). Where jurisdiction is exercised under Rule 4 B., a defendant may appear in an action and defend on the merits, without being subject to personal jurisdiction by virtue of this Rule (section).

RULE 4 D.

STAY OF PROCEEDING TO PERMIT TRIAL IN A FOREIGN FORUM

A. Stay on initiative of parties. If a court of this state, on motion of any party, finds that trial of an action pending before it should as a matter of substantial justice be tried in a forum outside this state, the court may in conformity with section (subsection) C. enter an order to stay further proceedings on the action in this state. A moving party under this subsection must stipulate consent to suit in the alternative forum and waive right to rely on statutes of limitation which may have run in the alternative forum after commencement of the action in this state. A stay order may be granted although the action could not have been commenced in the alternative forum without consent of the moving party.

B. Time for filing and hearing motion. The motion to stay the proceedings shall be filed prior to or with the answer unless the motion is to stay proceedings on a cause raised by counterclaim, in which instance the motion shall be filed prior to or with the reply. The issues raised by this motion shall be tried to the court in advance of any issue going to the merits of the action and shall be joined with objections, if any, raised by answer or motion pursuant to Rule J. 1 (Oregon Rule of Civil Procedure J. 1). The court shall find separately on each issue so tried and these findings shall be set forth in a single order which is appealable.

C. Scope of trial court discretion on motion to stay proceedings. The decision on any timely motion to stay proceedings pursuant to section (subsection) A. is within the discretion of the court in which the action is pending. In the exercise of that discretion the court may appropriately consider such factors as:

(1) Amenability to personal jurisdiction in this state and in any alternative forum of the parties to the action;

(2) Convenience to the parties and witnesses of trial in this state and in any alternative forum;

(3) Differences in conflict of law rules applicable in this state and in any alternative forum; or

(4) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

D. Subsequent modification of order to stay proceedings. Jurisdiction of the court continues over the parties to a proeeding in which a stay has been ordered under this section until a period of 5 years has elapsed since the last order affecting the stay was entered in the court. At any time during which jurisdiction of the court continues over the parties to the proceedings, the court may, on motion and notice to the parties, subsequently modify the stay order and take any further action in the proceeding as the interests of justice require. When jurisdiction of the court over the parties and the proceeding terminates by reason of the lapse of 5 years following the last court order in the action, the clerk of the court in which the stay was granted shall without notice enter an order dismissing the action.

8

COMMENTS TO RULES 4 A. THROUGH 4 D.

The present Oregon definition of amenability to jurisdiction is primarily found in ORS 14.010 to 14.035, but some bases of amenability are scattered throughout the summons provisions of Chapter 15.

The suggested rules are drawn primarily from the Wisconsin statutes. The Wisconsin statutes are among the clearest and most carefully drafted in the country. They draw together all provisions relating to amenability to personal jurisdiction. I would call them an example of third generation long arm statutes. The original long arm statute came from Illinois and was in form close to the existing ORS 14.035. It added jurisdictional bases to existing jurisdictional process statutes. The second generation long arms are presently in force in most of the states. They generally follow the pattern of being an addition to existing jurisdiction statutes, but amplify the grounds for exercising jurisdiction, i.e., covering contracts and tortious activity outside the state which causes injury in the state. See Uniform Laws Annotated, Interstate Procedure Act, § 103, N.Y. CPLR, § 302, Ala. Rule 4 - 2.

One type of third generation long arm statute is the California approach which merely says that the courts have jurisdiction to the extent Constitutionally permissible. The trouble with this approach is that it incorporates the vague Constitutional standard and provides no guidance to the plaintiff.

The Wisconsin statute goes in the opposite direction by specifically describing a number of situations that would fit within a Constitutional standard. The greatest virtue of the Wisconsin statute, in addition to the breadth of activities covered, is that it generally describes activities in fairly specific language, rather than focusing on legal conclusions, such as, committing a tort, contracting, or transacting business. The Oregon court has had substantial difficulty with the Oregon long arm statute because frequently the same conduct is alleged to be tortious and a breach of contract, and different tests have been developed for different sections of the existing long arm statute. In addition, most non-tortious conduct somehow must be fit into the abstraction of "transacting business." Also, the Wisconsin approach integrates all bases for jurisdiction into one rule, which is developed separately from provisions relating to manner of service of summons. Therefore, in general, the Wisconsin statute best conforms to the committee's decision to expand long arm jurisdiction as far as possible, while maintaining a fair amount of predictability and guidance for attorneys.

Rule 4 A.

This is the crucial section of the proposed statute or rules. It brings together in one section all circumstances that will subject a corporate or individual defendant to personal jurisdiction. To some extent, the long arm aspects of the rule overlap, but the intent is to cover all possible Constitutional contacts. The bases described incorporate all aspects of the existing Oregon long arm statute and would cover all the cases that have arisen under that statute.

Rule 4 A.A.

These are the traditional territorial bases of jurisdiction. Subsection (1)

is presently covered by ORS 14.010 if a defendant is "found" in the state. Subsection (2) is presently covered by ORS 14.010 under the concept of residence. Residence in this statute has been defined as domicile. See Fox v. Lafley, 212 Or. 80 (1957). This jurisdiction is usually effectuated by substituted service, but domicile and "dwelling house and usual place of abode" do not mean the same thing. A person has only one domicile, and the mental element of intent to remain permanent is required. Thus, substituted service can be used if a person is domiciled in the state or if there is some other basis for jurisdiction, but maintaining a dwelling house or usual place of abode is not in and of itself a basis for jurisdiction, it is merely a manner of serving process.

Subsection (3) uses the language of ORS 14.020 rather than "domestic corporation", which is used in the Wisconsin statute.

Subsection (4) is intended to describe the situation now covered in a number of general statutes under the phrase, "transacting business." E.g., ORS 73.434, Foreign and Alien Insurers, 74.310, Foreign Industrial Loan Companies, and 62.155, Foreign Corporations. This does not refer to causes of action arising out of the transaction of business in this state, but transacting business in the state to the extent that one is subject to suit for any claim that may be brought against a defendant, irrespective of any connection between the claim and the state. See Perkins v. Benguet Consolidated Mining Corp., 342 U.S. 437 (1952). See Winslow Lumber Company v. Hines, 125 Or. 63 (1928). Out-of-state business entities will still be required to appoint a registered agent in this state by the various separate statutes if they are transacting business, but if they do not appoint an agent, then the question of whether they are liable to service of summons is governed under this subsection. The language used is the generally accepted definition of transacting business.

Subsection (5) does not appear in the Wisconsin statutes but covers the consent by appointment of agent which is presently in ORS 14.020 and 15.080 (6). This would also cover any other manifestation of consent, such as a contractual agreement, to be subject to jurisdiction. See National Equipment Rental, Ltd. vs. Szukhert, 375 U.S. 311 (1964).

This section covers the possibility that separate statutory bases of jurisdiction will continue to exist or be enacted by the Legislature. There is also nothing specific in this Rule dealing with child custody cases. This is such a specialized area that it is better left to statutory or case law development. Amenability and forms of process are covered in the Uniform Child Custody Jurisdiction Act, ORS 109.700, et seq.

Section C. is the first of the minimum contact sections of the statute. This and the remaining bases for jurisiction specified are limited to cases "arising out of" the contact specified. This basically covers any tortious activity in the state but is much broader in the sense that it would cover any action in the state giving rise to liability, whether it be warranty, contract, etc. It would incorporate that aspect of transacting busines which has been applied in the warranty cases and all of 14.035 (b) relating to tortious activity. Generally note that except for Rule J. (1) and (3), there is no requirement that plaintiff be a resident. This is consistent with Meyers vs. Bickwedel, 259 Or. 457 (1971).

Section D. solves the problem of tortious or other activity outside the state causing injury within the state. The Oregon court has interpreted the

commission of a tort language to include this situation and the Rule would be consistent with State ex rel Western Seed Production Corporation v. Campbell, 250 Or. 262 (1968); State ex rel Advance Dictating v. Dale, 269 Or. 242 (1974); BRS, Inc. v. Dickerson, 278 Or. 269 (1977) and State ex rel Academy Press v. Beckett, ____ Or. ____ (June 27, 1977).

It is possible that merely causing injury in the state might be in and of itself sufficient contact, but the Oregon court and most state courts have not gone this far. Hanson v. Denkala, 357 U.S. 235 (1958). Some element of foreseeability or intentional involvement with a state is necessary and arguably, merely manufacturing a product that somehow finds its way into Oregon would not have the necessary foreseeability element. The most recent Supreme Court case on jurisdiction, Kukolo v. Superior Court of California, 46 Law Week 4421 (1971) confirms this by holding that a husband who merely consented to having a child go to California did not intentionally become involved with California to the extent of being subject to personal jurisdiction for a support award. Therefore, subsections (1) and (2) are necessary.

Section E. generally covers the situation described in other states as "entry into a contract to be performed in this state" or "contracting to supply goods and services in the state." This addition is quite important because most of the long arm cases that have come before the Oregon Supreme Court have involved attempts to cram contract situations into a phrase, "transacting business." The language here again avoids any specific reference to the ultimate question of whether there was a contract but focuses only on the acts involved. The section focuses separately on promising to act within the state or somehow related to the state and acting within the state or somehow related to the state, and differentiates between services and goods. Subsection (1) would cover the recent case of State ex rel Academy Press v. Beckett, supra, where the plaintiff contracted with an Illinois book publisher to publish a book. Subsection (4) would cover State ex rel White Lumber Sales, Inc. v. Sulmonetti, ____ Or. ____ (1968). Subsection (5) would cover Neptune Microfloc vs. First National Utility, 261 Or. 494 (1972).

The references to guarantees in subsections (1) to (4) do not appear in the Wisconsin statute. Two Oregon cases have dealt with guarantee agreements involving officers of business entities purchasing or selling goods in Oregon. BRS v. Dickerson, supra, and State ex rel Ware v. Hieber, 267 Or. 124 (1973).

Section F. is one of the most troublesome in the statute. The Oregon statute reads as follows:

> (6) **Local property.** In any action which arises out of:
>
> (a) A promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this state; or
>
> (b) A claim to recover any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this state either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

(c) A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this state at the time the defendant acquired possession or control over it.

(7) Deficiency judgment on local foreclosure or resale. In any action to recover a deficiency judgment upon a mortgage note or conditional sales contract or other security agreement executed by the defendant or predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:

(a) In an action in this state to foreclose upon real property situated in this state; or

(b) Following sale of real property in this state by the plaintiff under ch. 846; or

(c) Following resale of tangible property in this state by the plaintiff under ch. 409.)

The Wisconsin language was not used for several reasons. First, although the comments to the Wisconsin statutes suggest that this was intended to cover all actions relating to use or possession of property, such as personal injury claims relating to use of property, on its face the Wisconsin statute does not do this and seems to be more limited than the general provisions of 14.035 (c). Secondly, the Wisconsin statute may run into some Constitutional problems after Shaffer v. Heitner, 97 S. Ct. 2569 (1977). The Shaffer case basically holds that simple presence of property in the state is not in and of itself a sufficient minimum contact when the subject of the action is not the status of the property. The actions covered under this section do not relate to title to the property, and under sections 6 (b) and 7 (c) of the Wisconsin statute, the only requirement is that property be in the state at the time of an action. To the extent this would apply to personal property, such property could be in the state without any foreseeability or knowing involvement by the defendant. For real property, presence would always be sufficient because any defendant involved with Oregon real property intentionally is developing a contact with the state.

The language actually used in this section maintains the general coverage of existing ORS 14.035 and extends coverage to personal property, provided the personal property was in the state at the time of ownership, use or possession giving rise to the action.

A specific reference to deficiency claims is also included to avoid any question whether these are claims arising out of use or ownership of property.

G. This is not specifically presently covered under the existing Oregon statute. It describes the situation in Shaffer vs. Heitner, where the court held that seizing stock of the officers in a quasi in rem approach did not provide jurisdiction. It seems clear, however, that knowing involvement with an Oregon corporation is sufficient contact with Oregon to provide a basis for jurisdiction in and of itself if done directly through a long arm statute, and Delaware amended its statutes immediately after the Shaffer decision to this effect.

H. This is the classical International Shoe situation but not presently specifically covered by 14.035. The Wisconsin statute limits this to taxes after July 1, 1960, but I could find no explanation of the limitation.

I. This is an expansion of ORS 14.035 (d). It is broader than the existing statute, incorporating not only a situation where the person or party is located in the state at the time of contract but also incorporating at the time of the happening of the event insured against or when the event insured against happens in the state. The Wisconsin statute refers to insuring a "person" who is a "resident" in the state. The existing statutory language referring to "person, property or risk" located in the state seems broader and was used.

J. The Wisconsin statute provides for marital status determination when either party is a resident and also personal judgments when a defendant resided six consecutive months of the last six years in the state. The language actually incorporated was from ORS 14.035 (2), which is somewhat more limited. Arguably, a broader reach for the statute would be Constitutional, but the area is somewhat specialized, and the existing policy determination in the statute was retained. See Doyle v. Doyle, 17 Or. App. 529 (1974). Section (1) does not appear explicitly in the Oregon statute but is an accepted basis for jurisdiction.

Subsection C. covers the problem presented by State ex rel Poole v. Dorrah, 271 Or. 410 (1975) and State ex rel McKenna v. Bennett, 28 Or. App. 155 (1977). In the McKenna case, the Court of Appeals held that sexual intercourse within this state is not a tort within the meaning of 14.035, and jurisdiction could not be asserted of a defendant in a filiation proceeding by using the long arm statutes. The case suggests there is no Constitutional barrier to such jurisdiction and seven other states have so held. Notice that outside the filiation proceeding, this statute does not give jurisdiction over general support claims or any other claims under Chapter 109. By passing the Uniform Reciprocal Support Act, ORS Chapter 110, the Legislature opted for this approach. Also notice that there is no specific provision for jurisdiction to determine status for anything other than the marital status. Arguably, the same status basis could be used to establish a parent-child status, but there is a basic difference between creating and severing status, and the creation of status would automatically carry inheritance and other financial obligations and is, in effect, a type of personal jurisdiction.

Section K. This section makes clear that when a personal representative is to be sued, it is the contacts of the decedent they are considering, not the contacts of the personal representative.

Section L. This is the equivalent of ORS 14.035 (4).

There was another possible section which I considered adding between existing grounds J. and K. It is not in the Wisconsin statute but comes from Rule 42 of the Alabama rules. It reads as follows:

> "Otherwise having some minimum contacts with this state and, under the circumstances, it is fair and reasonable to require the person to come to this state to defend an action. The minimum contacts referred to in this subdivision (I) shall be deemed sufficient, notwithstanding a failure to satisfy the requirement of subdivisions (A)-(H) of this subsection (2), so long as the prosecution of the action against a person in this state is not inconsistent with the Constitution of this state or the Constitution of the United States."

This would guarantee the broadest possible reach of the long arm statute. It is different than the California approach in that detailed grounds are specified in the statute. One argument for including this section is the repeated statements by the Supreme Court that it interprets the long arm statute as broadly as Constitutional due process will admit. See State ex rel Western Seed v. Campbell supra.

Rule 4 B.

This is Section 80.107 of the Wisconsin statutes. The existing Oregon statutes, ORS 14.010 and 14.020, say the court has jurisdiction when property is located within the state, but only to the extent property is seized. This provides the authority for in rem jurisdiction. The Wisconsin statute was modified to deal only with in rem and not quasi in rem because under Shaffer v. Heitner, merely seizing property is not a sufficient basis for jurisdiction without some other minimum contact. The Shaffer case, however, says that in most situations where a true in rem case is involved, i.e., involving title to the property which is located in the state, this is sufficient minimum contact. It should be noted that to a large extent, this section is now unnecessary because of Rule 4 A., referring to use and possession of property as a minimum contact, but this covers the possibility that title to personal property located in the state but not arising out of use or ownership in the state is involved in an action or somehow title to real property in the state does not fit within Rule 4 A. Oregon never had a true quasi in rem statute. The existing provisions of ORS 29.110, relating to ability to attach to secure judgment, are unchanged. It is possible that someone may wish to use attachment and argue this as at least one element of minimum contacts, but again, there is no specific quasi in rem jurisdiction provided.

Rule 4 C.

This is Section 80.107 of the Wisconsin statute. This covers personal jurisdiction by consent in the sense of utilizing the courts of this state. The existing statutes, ORS 14.010 and 14.020, refer to jurisdiction when a defendant "appears." Since Rule K. eliminates a general or special appearance and governs waiver of personal jurisdiction, the consent jurisdiction here is cross-referenced to that rule. The Wisconsin statute has a last sentence which is somewhat difficult to interpret, dealing with the question of limited appearance. The existing last sentence was drafted to provide a limited appearance in the sense that contesting on the merits in an in rem case, i.e., protecting interest in property that is the subject of the suit, does not generally subject the defendant to personal jurisdiction. This is the approach recommended by the re-statement of judgments. The Oregon rule is unclear. In Belknap v. Charlton, 25 Or. 41 (1873), the court said if a defendant appeared and contested the validity of attachment, this was not a submission to jurisdiction, but contesting the merits was. This was followed in Nelson v. Smith, 157 Or. 292 (1937), which was a quasi-in-rem case. Apparently, in neither case was any judgment given beyond the property attached, and the court was distinguishing between general and special appearance, not between general and limited jurisdiction.

Rule 4 D.

This is an important component of the total approach being recommended for jurisdiction and process. By greatly expanding the basis for personal jurisdiction, the danger that defendants would be subject to trial in a completely inconvenient forum is increased at the same time. Although convenience is an

element of the due process evaluation, in practice it is a minor factor, with primary emphasis upon the quantity and quality of contacts with the forum by the defendant. If such contacts exist, jurisdiction exists whether or not Oregon is a convenient place for trial. Fairness in the jurisdictional sense focuses on fairness to subject a defendant to jurisdiction, not fairness in the sense of the best place to try the case. Fairness in the latter sense can only be applied through a forum non conveniens doctrine or a venue transfer statute, such as USC 1404. The need for such a rule is explained in the following language of the concurring opinion of Justice Linde in State ex rel Academy Press v. Beckett, supra:

> "* * * But when 'fairness' is used to describe the conditions under which the forum state may constitutionally take jurisdiction of a claim against a defendant outside the state, those conditions will necessarily be stated as factors or patterns that make long-arm jurisdiction "fair" and therefore constitutional as a general rule for all similar cases, irrespective of the relative positions of the litigants in the particular case. There may be far less unfairness in asking a defendant in Vancouver, Washington, with full notice of the proceedings, to litigate a case in Multnomah County, Oregon, than to demand this of a defendant in Fort Lauderdale, Florida, as in White Lbr., but territorial notions of a prior 'entry into' or 'presence in' the jurisdiction may allow one and not the other."
>
> * * * * *
>
> "* * *As I have suggested above, however, fairness to particular litigants is often an ad hoc rather than a categorical determination, and one that cannot be properly decided as a matter of Oregon law so long as we treat it as one that must always be litigated as an issue of federal constitutional law. To permit such ad hoc determinations of fairness requires a nonconstitutional element in ORS 14.035 corresponding to the doctrine of forum non conveniens. See Scoles, Oregon Conflicts: Three Cases, 49 Or. L.Rev. 273, 278-280 (1970). It should be possible for an Oregon court to dismiss a case after allowing plaintiff time to obtain jurisdiction in a more appropriate forum (perhaps involving a stipulation by defendant as to service of process, waiver of the statute of limitations, or other safeguards for plaintiff), irrespective of whether the Oregon court believes that its own exercise of jurisdiction would be unconstitutional.
>
> In Illinois, the source of our long-arm statute and the doctrine of its expansive scope, see Western Seed, 250 Or. at 270-271, the state supreme court in fact approves such a dismissal of cases without a conclusion whether the Constitution would permit the state to assert jurisdiction. See, e.g., Adkins v. Chicago, R. I. & P. R.R., 54 Ill. 2d 511, 301 N.E. 2d. 729 (1973), cert. denied, 424 U.S. 943 (1976), cf. Cotton v. Louisville & N. R.R., 14 Ill. 2d 144, 152 N.E. 2d 385 (1958). Elsewhere the procedure has been codified. These solutions, and the underlying distinction between 'fairness' as the presence of constitutional prerequisites and fairness of the choice of forum in the actual

case, are described in Morley, Forum Non Conveniens: Restraining Long-Arm Jurisdiction, 68 N.W. U. L. Rev. 24 (1973). Once it is recognized that fairness is properly a matter of Oregon law before it becomes, in a different sense, a synonym for federal constitutional limits, a procedure to assure fairness can be provided by a statute or perhaps a rule of the Council on Judicial Procedure, or possibly by further consideration of the standards implicit in ORS 14.035."

Justice Linde suggests that Oregon courts do have forum non conveniens power but, if so, it is little recognized and a rule is necessary to encourage use. This rule is Wisconsin statute, section 80.163. It is not, strictly speaking, a forum non conveniens statute but more of a transfer statute accompanied by use of stays of action. The Wisconsin approach is preferable because it is designed to work with the other Wisconsin statutes used, and it provides a procedure to be followed and criterion for the trial judge in deciding when to grant a stay. Use of a stay rather than a dismissal also is desirable to avoid any harsh consequences. Other states allow this forum non conveniens rule to be made on the court's own motion; the Wisconsin statute is limited to motion of the parties; if both sides want to litigate in Oregon, it is not then truly an inconvenient forum.

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: PROPOSED DRAFT OF RULES

DATE: August 15, 1978

Enclosed is the proposed draft of all rules, with comments, for approval and release to the Bar and public. For your use in identification of prior drafts of rules and comparable ORS sections, conversion tables are attached to this memo. Changes required in later ORS sections have not been completed. You have most of the law - equity changes, and I will try to have changes required by the new process and pleading rules at the meeting.

A chart showing all changes from prior rule drafts is also attached. Many of these changes are those approved at the July meeting but, in organizing the final set of rules and writing comments, I found some apparent language problems, anomalies and omissions which I changed. Those changes are marked with an asterisk and should be examined carefully.

I also saw a few problems in some rules that I thought should be discussed by the Council:

Page 34. Rule 10 B. The last sentence of this rule may go too far in authorizing a court to vacate a judgment after expiration of a term of court. The former rule, 10 B., eliminated at the last meeting, qualified this.

Rule 10 C. Is the notice of hearing procedure described here in line with existing practice and local rules?

Page 119. Rule 45 B. The requirement of a court order establishing an admission which we added seems unnecessary when applied to a request for admission of genuineness of documents and things as opposed to truth of facts. Admission of genuineness if a convenient way of avoiding an elaborate and unnecessary foundation at trial and would not constitute a dangerous procedural trap for an opponent. We could change the provision as follows:

> "If a written answer or objection to any request, other than a request for the admission of the genuineness of documents or things, is not served within the time specified above...excusable neglect. Requests for admissions as to the genuineness of documents or things are deemed admitted without court order if a written answer or objection is not served within the time specified above."

Page 128. Rule 51 A. Does this section serve any useful purpose?

Page 161. Rule 60. I still have trouble with this as a separate rule. Is the procedure described in section D. necessary? This also does not seem important enough for a separate rule. Why not just add a new section 59 H. as follows:

> H. Objections to instructions and statements of issues. All objections to statements of issues submitted to the jury or the giving or failure to give instructions are waived unless raised before the jury retires to consider the verdict. Opportunity shall be given to make such objections outside the hearing of the jury and objections shall specify the portion of the statement or instructions and the grounds of such objection.

DRAFT

Rule 7

October 16, 1978

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

C.(3) Notice to party served.

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

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or the plaintiff's attorney.

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

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attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or the defendant's attorney.

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

D. Manner of service.

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

mail is delivered and the return receipt signed or when acceptance is refused.

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

D.(3)(a) Individuals.

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

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

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

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

D.(4) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

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

D.(5)(a) On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action or proceeding, the

defendant's last known address. If plaintiff does now know and cannot ascertain, upon diligent inquiry, the present and last known address of the defendant, mailing a copy of the summons and complaint is not required.

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

D.(5)(f) Defending after judgment. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may

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

F.(2)(a)(ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

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

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

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

G. Disregard of error; actual notice. Failure to strictly comply with provisions of this rule relating to the form of summons, issuance of summons and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons or affidavit or certificate of service of summons and shall disregard any error in the content or

M E M O R A N D U M

TO: Process Committee

FROM: Fred Merrill

RE: ORS SECTIONS COVERING APPOINTMENT OF PUBLIC OFFICIALS FOR IN STATE SERVICE OF PROCESS

DATE: September 27, 1978

At the Bend meeting the Council referred suggested modifications to ORS sections appointing public officials as agents for service of process (hereinafter referred to as public agents statutes) to this committee for consideration and recommendations. The purpose of this memo is to suggest several alternatives available to the committee. At the meeting members raised two questions relating to these statutes.

QUESTION NO. 1

Do the statutes make service of process available in any situation where there would be no basis for personal jurisdiction under the proposed Rules of Civil Procedure or in any manner not covered by the Rules?

A summary of the public agent statutes is attached. As indicated in the original memo to the Council, these statutes both define conditions under which a defendant is subject to jurisdiction by defining circumstances when an agent must be appointed or is deemed appointed, and specify a service method.

In terms of defining jurisdiction, the summary shows that there are four different types of public agent statutes.

(1) The first group relates to a resident or a domestic corporation or to a foreign corporation engaged in substantial activity in the state. These defendants would be covered by traditionally accepted territorial theories of jurisdiction incorporated in Rule 4 A. Included in this group are the provisions related to domestic corporations and other business entities and foreign corporations doing business in the state: ORS 57.075, 57.700, 61.086, 61.471, 61.700, 62.155, and 731.434.

(2) A second group are based upon some type of contact with the state and are equivalent to the long arm statute. In these statutes the defendant is deemed to have appointed a public official as an agent for service of process for suits arising out of some named activity in the state. These fall under the minimum contacts theory and would be covered by our Rules 4 B. through L. Included in this group are ORS 57.822, foreign corporations, etc., holding or foreclosing mortgages or trust

deeds in this state; 59.155, sales of securities or violations of the Oregon Securities Law; 91.578 and 92.375, subdivision activity in this state; 509.910, foreign corporations violating certain environmental laws in this state; 650.070 and 650.075, franchise activities in this state; 673.695, activities as a tax preparer in this state; 699.250, real estate activity in this state; 722.102, activities as director of savings and loan; 731.324, insurance activities within this state; 746.320, insurance activities in the state in suit brought by resident insured; and 761.495, operating or owning motor vehicle involved in accident in this state.

(3) The third group of statutes require the filing of an actual written consent by the defendant. There are two sub groups involved:

(a) Where the consent is to service for activities undertaken within the state. This includes ORS 57.700(c), 61.700 and 69.520, relating to withdrawal of foreign corporations and limited partnerships; 91.578 and 91.611, condominium owners and developers relating to property or activities; and, 486.521, insurance companies seeking to satisfy Financial Responsibility Law.

(b) Where the consent is to any action filed within the state. This includes ORS 57.485 (also, by adoption, 61.086 and 62.455), foreign corporations merging with domestic corporation, and 744.055, nonresident insurance agents.

The first sub group would be covered by our rules. For the second, although Rule 4 A.(5) refers to specific consent as a basis for jurisdiction, without these statutes there would be no specific consent.

(4) The last group includes situations where a defendant is deemed to have consented to general service of process for any suit filed in the state by virtue of some activity undertaken in the state, usually seeking a license or privilege. This group includes ORS 345.060, applying for license to act as agent for vocational school; 648.060, appearing as party in interest in application for assumed business name; 697.640, applying for debt consolidation license; 703.120, applying for license as polygraph examiner, and 731.370, reciprocal insurer applying for certificate of authority.

This group clearly goes beyond our rules. The simple act of seeking a license would not be substantial activity subjecting one to general service of process under Rule 4 A.(4), and the action need not arise out of any activity in the state.

The service of process provisions in these public agent statutes clearly go beyond our rules. They all contemplate service in the state on the public official with, in most cases, mailing to the defendant at some specified address. Under Rule 7, if a defendant could not be found within the state, the plaintiff would be required to effectuate personal or substituted service outside the state. The only mail service contemplated by the rule is for corporations where officers and agents cannot be found in the county of filing, in which case process may be mailed to such officers and agents. These public agents statutes contemplate mailing, not to the officers and agents, but to some specified address of the corporation. Also, most of the public agents statutes apply not only to corporations but to individuals as well.

QUESTION NO. 2

The second question raised was the constitutionality of these statutes. The statutes falling in groups (1), (2) and (3)(a) above are probably constitutional. There is very limited case authority, either interpreting them or commenting on their constitutionality. The validity of ORS 57.075 was upheld in Winslow Lumber Co. v. Edward Hines Lumber Co., 125 Or 63 (1928). One of the first minimum contacts analyses of the Oregon Supreme Court concerned the transacting business concept of 57.075. Enco, Inc. v. F. C. Russell Co., 210 Or 324 (1957). In any case, the traditional basis of jurisdiction and the minimum contacts involved generally would meet constitutional standards, although 746.320 could be interpreted in a way that might make it somewhat thin in terms of minimum contacts.

Groups (3) and (4), however, are more troublesome. They purport to subject the defendant, in an action not necessarily arising out of activities in the state, to the jurisdiction of the courts of this state based upon a minimal amount of activity. The approach is one of requiring a defendant to generally subject himself to jurisdiction in this state as a condition of engaging in some activity or applying for a privilege. The jurisdictional basis is either an express consent to jurisdiction or implying consent from the activity or application. These types of statutes were extensively used prior to the minimum contacts theory and a confusing body of law developed. The early Supreme Court cases held that actual specific consent given in response to a statutory requirement was a valid basis for jurisdiction, at least for a corporation. Implied consent arising from activities in the state was only clearly held valid for corporations when the action arose out of activity in the state. See Simon v. Southern Railway, 236 U.S. 115 (1915). Then, in 1919 the court said that implied consent could

not apply to individuals because the state lacked authority to exclude them from activities in the state because of the privileges and immunities clause. Flexner v. Farson, 248 U.S. 289 (1919). However, in 1927 the Supreme Court upheld a nonresident motor vehicle act applied to an individual in Hess v. Pawloski, 274 U.S. 352 (1927). There have been no further Supreme Court cases on implied or actual consent statutes. The minimum contacts analysis of International Shoe v. Washington, 326 U.S. 310 (1945), clearly would not support general jurisdiction for claims not related to activities in a state based on an implied consent theory, unless the activities in the state were very substantial.

This is reinforced by Shaffer v. Heitner, 97 S. Ct. 2569 (1977), which emphasizes that a minimum contacts analysis is the building principal for all types of jurisdiction.

The statutes in group (3)(b), with specific consent, probably are constitutional, but the validity of those statutes in group (4) is very questionable. For example, saying that a person or entity who engages in the one act in Oregon of seeking to receive a vocational school license, become a debt consultant or become a polygraph operator, is completely and forever subject to the jurisdiction of Oregon courts for any action that may be brought, however unrelated to Oregon, is not consistent with modern jurisdictional theory.

ALTERNATIVES

There are four alternative approaches that could be adopted for these public agent statutes:

1. We could simply eliminate the statutes entirely, leaving Rules 4 and 7 as they are. This would be the simplest, but some basis of jurisdiction and flexibility of service of process might be lost. In any case, the statutes apply to notices and demands going beyond civil procedure into substantive law and administrative law and must be retained for those purposes.

2. Incorporate the bases of jurisdiction into Rule 4 and the service method into Rule 7. The modification of Rule 4 to incorporate the statutes is almost impossible. The bases for jurisdiction are so complicated that they don't fit the structure of Rule 4. A more useful approach might be to include those particular public agent statutes that are most closely related to the long arm character of Rule 4 into that rule and leave the rest. To some extent, this has been done by incorporating the securities dealers provision, and the previous memo to the Council suggested incorporation of two of the insurance provisions and the franchise provision.

The service provisions all refer to different addresses and in some cases, different forms of mail, but the essence of these provisions could be retained by eliminating Rules F.(3)(a)(iii) and F.(3)(d)(iii) and adding a new F.(3)(g) as follows:

> "In any case, by serving summons in a manner specified in this rule or by any other rule or statute upon defendant or an agent appointed or authorized by law to accept service of summons. When jurisdiction over the defendant is based upon ORS 57.075, 57.485 (here, list all of the retained statutes), service may be made by mailing a copy of the summons and complaint to the defendant by certified or registered mail to:
>
> (a) The last registered office of the defendant, if any, filed with any state official where filing of a registered office is required by law, or any office which defendant has designated for service of summons, or the principal office of the defendant if such office can be determined; and
>
> (b) Such address, the use of which the person initiating the action or proceeding knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice."

3. Leave the special basis of jurisdiction and service methods in the separate ORS sections but modify the sections to eliminate appointment of state officers as agents for service on state officials. This was the approach followed in the material furnished to the Council before the last meeting.

4. Leave the statutes as they are. This would be possible because of the accommodating provisions in Rules 1 and 4 relating to other specific statutes. As a long-range solution, this would not be desirable because it does not eliminate service of process on state officials and preserves some statutes which are probably unconstitutional. For the present, however, given the short period of time left to prepare the material for the Legislature and the probable need to get some input from the Bar on these proposed changes, it may be better to put off this problem until the next biennium.

ORS SECTION	BASIS	SERVICE
57.0	Domestic corporation (a) No registered agent (b) Cannot find registered agent (c) Dissolved and action commenced in five years; see ORS 57.630. ORS 61.086 makes provision apply to non-profit corporations. ORS 62.155 makes provision apply to cooperatives.	Serve Corporation Commissioner. Mail by certified or registered mail to (A) last registered office, and (B) address most likely to result in actual notice.
57.483	Surviving foreign corporation in merger of foreign and domestic corporation which files actual consent to service of process because wishes to transact business. ORS 61.471 makes section apply to non-profit corporations.	?
7.700	Foreign corporation which is (A) authorized to transact business in state and does not have a registered agent or agent cannot be found, (B) transacting without being authorized, (C) has been authorized and withdrawn and consented to service; ORS 57.721 requires consent to service to claims arising out of activities in state; (D) transacted w/o authorization and ceased to transact. ORS 61.700 makes this applicable to non-profit corporations.	Upon Corporation Commissioner. Registered or certified mail to (A) principal office or place of business, and (B) address most likely to give notice.
57.822	Foreign business entities not authorized to transact business which holds or purchases notes secured by mortgages or trust deeds or forecloses and holds property up to five years and in order to so do consented to service of process; except National Banking Ass'n.	Upon Corporation Commissioner by registered mail to principal place of business.

ORS SECTION	BASIS	SERVICE
59.[illegible]	Applicant for registration as security dealer, person who offers or sells security in state, or person who violates Oregon Security Law for civil proceeding under Oregon Security Law.	Upon Corporation Commissioner. Certified mail to address shown on Commissioner's records, and address most likely to give notice.
69.500	Limited partnership where (a) no registered agent appointed or (b) cannot find registered agent. Under ORS 69.450 a foreign limited partnership that does not appoint registered agent subject to this provision (presumably if transacting business but statute does not say).	Upon Corporation Commissioner by certified or registered mail at last address of registered agent and last known address or general partners served as shown in Corporation Commissioner's records.
69.520	Foreign limited partnership withdrawing from transacting business and filing consent to service for actions based on activities in state.	Upon Corporation Commissioner; mailing to address given in application for withdrawal.
91.578	Condominium unit owners who signed declaration appointing agent for service in action relating to the common elements or more than one unit.	Upon recording officer in county where declaration filed; by certified or registered mail upon person designated in declaration to receive process.
91.611	Nonresident condominium developer who files irrevocable consent to service for actions for violation of 91.500 to 91.671 and 91.990.	Upon Real Estate Commissioner; by registered mail to address set forth in consent.
92.375	Nonresident subdivider filing notice of intent to sell or lease subdivided lands and nonresident developer who acquires more than 10 lots or parcels in a subdivision in a 6-month period; when irrevocable consent to service filed.	Upon Real Estate Commissioner; by registered mail to address given in consent.

ORS SECTION	BASIS	SERVICE
345 50	Non-domiciled applicant for license to act as agent for vocational school.	Upon Superintendent of Public Instruction. By certified mail to the applicant's last known address Publication or out of state service also required.
486.521	Insurance or surety company which furnishes power of attorney authorizing Motor Vehicles Division to accept service of process in actions arising out of vehicle accident involving its principal or assured, in order to have certificate of insurance accepted as part of future responsibility.	?
509.910	Foreign corporation which does not have statutory agent in suit for injunction to restrain certain violations of environmental laws.	Upon Corporation Commissioner as in other cases provided by law.
648.061	Person not domiciled within this state or foreign corporation not authorized to do business in the state who appear as parties of interest in an application for registration of asssumed business name.	Upon Corporation Commissioner; certified mail to principal office.
650.070 650.075	Every person who sells or offers to sell a franchise in state or has engaged in conduct that is subject to proceeding under 650.020.	If personal service cannot be used, upon Corporation Commissioner; by certified mail at (A) address that appears in Commissioner's records and (B) address most likely to give notice.
673.695	Nonresident who accepts license as tax preparer or tax consultant for any action arising out of any business done in state.	Upon the Director of Commerce; by registered mail at most recent address furnished to the State Board of Tax Examiners or his last known address.

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696 50	Nonresident real estate licensee licensed in this state by reciprocal agreement in any action arising out of business done in this state as a real estate licencee.	If cannot be found in state upon Real Estate Commissioner; by registered mail to most recent address furnished to Commissioner or last known address.
697.640	Applicant for debt consolidation agency licence filing written consent appointing Real Estate Commissioner agent for service of process.	?
703.120	Nonresident applicant for license as polygraph examiner who files consent to executive director of the Board on Police Standards and Training to act as agent. (Note: this statute must have been written by one of the polygraph examiners; as written section (2) authorizes service on any nonresident polygraph examiner for anything).	Upon executive director of Board on Police Standards and Training or by registered or certified mail to most current address on records of executive director.
722.102	Nonresident director of domestic savings and loan association for proceedings in connection with election or service as director.	Incorporates (3) to (5) of ORS 57.075.
731.324	An authorized insurer who "transacts insurance" as defined in 731.146, where action arises out of transacting insurance.	Upon Secretary of State; by certified mail to last known principal place of business.
731.370	Reciprocal insurer applying for certificate of authority.	Same as 731.434.
731.434	Insurers under same circumstances generally as corporations in Ch. 57.	Same as Ch. 57, except upon Insurance Commissioner

ORS SECTION	BASIS	SERVICE
744. 5	Nonresident seeking licensing as insurance agent in state who filed written consent to service of process on Corporation Commissioner.	?
746.320	Unauthorized alien insurer who (A) issues or delivers policies of insurance to persons residing or authorized to do business in state; (B) solicits applications from such persons; (C) collects premiums or fees from such persons; (D) engages in any other transaction or business with such persons; and action by or on behalf of insured or beneficiary and arising out of policy with resident or authorized to do business. Certain insurers excluded by 746.360.	Upon Insurance Commissioner; by registered mail to principal office.
767.095	Nonresident motor carrier in actions caused by or relating to operation of motor vehicles of or by such carrier within state.	Upon Public Utility Commissioner; by letter directed to residence or place of business as shown by records of Commissioner.

M E M O R A N D U M

TO: Process Committee

FROM: Fred Merrill

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> "In any case, by serving summons in a manner specified in this rule or by any other rule or statute upon defendant or an agent appointed or authorized by law to accept service of summons. When jurisdiction over the defendant is based upon ORS 57.075, 57.485 (here, list all of the retained statutes), service may be made by mailing a copy of the summons and complaint to the defendant by certified or registered mail to:
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> (a) The last registered office of the defendant, if any, filed with any state official where filing of a registered office is required by law, or any office which defendant has designated for service of summons, or the principal office of the defendant if such office can be determined; and
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744.(	Nonresident seeking licensing as insurance agent in state who filed written consent to service of process on Corporation Commissioner.	?
746.320	Unauthorized alien insurer who (A) issues or delivers policies of insurance to persons residing or authorized to do business in state; (B) solicits applications from such persons; (C) collects premiums or fees from such persons; (D) engages in any other transaction or business with such persons; and action by or on behalf of insured or beneficiary and arising out of policy with resident or authorized to do business. Certain insurers excluded by 746.360.	Upon Insurance Commissioner; by registered mail to principal office.
767. .5	Nonresident motor carrier in actions caused by or relating to operation of motor vehicles of or by such carrier within state.	Upon Public Utility Commissioner; by letter directed to residence or place of business as shown by records of Commissioner.

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES October 3, 1978

FROM: Fred Merrill

RE: October 21, 1978, Meeting

Enclosed are (1) a copy of the revised rules released to the Bar and public, (2) a list of changes from the last draft, and (3) a copy of a notice given to all persons attending the Bar convention, sent to all newspapers and circuit court clerks, and scheduled to appear in the October Bar Bulletin.

The activities of the Council were described at the Trial Practice Section meeting. At this meeting and the convention, most of the comments which I received based on the summary related to:

(1) Interrogatories

(2) Discovery of insurance policies

(3) Inability to take a nonsuit after appearance or summary judgment

The rules will be discussed at the October Civil Practice CLE meetings, and we may get further feedback. The notices state that no final action will be taken until the December meeting which was scheduled by the Chairman. ORS 1.730(b) requires two weeks notice of the "time, place and a description of the substance of the agenda" of "any meeting at which final action will be taken on the promulgation, modification, or repeal of a rule" to be published to all members of the Bar. The notice in the Bar Bulletin will satisfy that, but the October Bulletin may be out less than two weeks before the November meeting.

For the October meeting, I have received some specific questions about the rules:

1. What effect Rule 1 would have on procedure in Small Claims Court. A number of specific procedures are provided for small claims by ORS 46.405 to 46.560, but the question is whether the language of Rule 1 would make procedures not specifically covered, such as, discovery, available in Small Claims Court. Also, should there be some transition period for the summons rule? Will all the sheriffs and process servers be able to change forms and practices that fast?

2. Does Rule 4 E. go beyond constitutional limits? It would subject a person who simply orders non-custom made goods from an Oregon resident to jurisdiction. In Rule 4 F., is the last sentence necessary in view of the limited ability to obtain a deficiency judgment

in Oregon (non-purchase money mortgages and land sale contracts where judicial sale is granted). At least, the reference to trust deeds should be eliminated. The language from the Wisconsin statute is somewhat confusing.

3. In Rule 5, should the words, "or other applicable statute or rule", be added at the end of the second sentence of the introduction?

4. Should Rule 7 be reorganized and clearer headings added? Should issuance be defined in Rule 7 B.? Could Rules 7 C.(4)(a) and (b) be combined and do we want an absolute 30-day period in all cases? Should Rules 7 F.(3)(iii) and F.(3)(d)(iii) be changed to read, "an agent appointed or authorized."

5. Are Rule 9 C. and 9 F. necessary? In Rule 9 D., is proof of service required on subsequent papers to show court or parties when time periods begin to run?

6. In Rule 15 A., could the last two sentences be replaced by the following sentence: "Any other motion or responsive pleading shall be filed within 10 days after service of the pleading moved against or to which the responsive pleading is directed."

7. Would Rule 21 D. be clearer if the language was reorganized as follows: "Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion by a party within 10 days after service of the pleading, or upon the court's own initiative at any time, the court may require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense or reply is not apparent."

8. In Rule 36 B.(4)(c), does this mean that the party requesting the report shall pay expert witness fees if the report had already been prepared prior to the request? Is this consistent with Rule 44 D.?

9. In Rule 39 G.(1), should the rule say "certify under oath" as opposed to "under penalty of perjury." Can we promulgate a rule creating a perjury penalty? The language comes from the federal rule.

10. In Rule 41 C.(1), the last clause is one reason parties enter the usual stipulation at a deposition preserving all substantive objections until trial. Should we keep the rules in line with practice?

11. Should the time period for a defendant responding to request for production and inspection in Rule 43 B. be 45 days instead of 60 days to conform with other rules.

12. Is Rule 43 C. necessary?

13. Is Rule 52 necessary? Don't all courts do this by local rule?

14. Should the reference to defendant in 54 E. be changed to "party against whom claim is asserted" and plaintiff to "party asserting the claim."

15. In 57 B.(1), do we wish to change the rule to allow a challenge to the panel? How else can a litigant attack impropriety in jury selection? A challenge to an individual jurer based on improper selection has been held to be a challenge of the panel. State v. Ju Nun, 53 Or 1 (1909). But see, Strickler v. Portland Ry., L. and P. Co. 79 Or 526 (1916).

16. Does subsection 58 B.(5) serve any useful purpose? This provision was originally enacted in the 1862 Deady Code, as amended in 1864, as a limitation on trial counsel. It said the time "shall not exceed two hours." In Hurst v. Burnside, 12 Or 520, 526 (1885), the Supreme Court refused to reverse a trial court ruling limiting plaintiff to one and one-half hours. The court said a trial court had inherent power to limit argument and the provision only added a legislative limit; it did not say the trial judge had to allow two hours. In 1905, Ch. 60, however, the reference to "shall not exceed two hours" was changed to "shall not be limited to less than two hours." This changed the statute from a limit on counsel to a limit on the inherent power of the trial judge. In Kelty v. Fisher, 105 Or 696 (1922), the court reversed a judgment because the court had limited plaintiff to 15 minutes and defendant to one-half hour. This is the last Oregon case on the provision but argument on time limits may have some currency as there is a 1965 ALR annotation on the subject. 3 ALR 3rd 1341.

One ambiguity in the statute is application to multiple parties. Strangely, the Hurst opinion quotes section 194 of the Deady Code as reading: "Not more than two counsel on a side shall be allowed to address the jury....and the whole time occupied on either side shall not exceed two hours." The underlined language did not appear in the 1862 law or in the Deady Code, or the Deady and Lane Code, which the court would have been using in 1885. This could be added to clarify the statute but seems a rather severe limit.

17. Should counsel have a right to written instructions under Rule 5 B.? What is an "informal" verdict in Rule 59 G.(4)? Is Rule 59 H. as clear as it could be? Should the last sentence also say, "including a failure to submit a requested statement or issues." Does subsection 59 C.(5) mean that the jury can't go home at night?

18. In Rule 61, could the last two sentences of the first paragraph of the comment be incorporated in the rule? Do sections 61 D. and E. serve any useful purpose. They are taken from ORS. ORS 17.410 was part of the 1853 code in almost exactly the same language. The rule is basically a required special verdict because a judgment in a replevin action must provide, where plaintiff or defendant is entitled to the property, for return of the property or if this is not possible, payment of value. ORS 18.110. There are a number of old cases strictly applying the section and also dealing with whether the assessment of value should be for each item or in the aggregate (at the court's discretion) and whether the jury must find who owns the property (apparently required when right to recover based on ownership). The latest case, Mazama Timber Products v. Taylor, 239 Or 569 (1965), still says the jury must find specially on right to possession. Abolishing the section might leave a party in the position that the special verdicts necessary to support the replevin remedy would be at the discretion of the trial judge. The language used might be clarified as follows:

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

Section 61 E. is based on ORS 17.425. The language was adopted in 1862 and is virtually unchanged. The provision does not deal with adequacy of damages or general vs. special damages, but merely requires that a general verdict for a party claiming money be accompanied by some assessment of damages. It is clear that a general verdict that simply says we find for the plaintiff and says nothing concerning damages is not sufficient. Goyne vs. Tracy, 94 Or 216 (1919). When a verdict finds for the plaintiff and assesses "0" or "none" for damages, it is not clear whether this provision applies. In McLean v. Sanders, 139 Or 144 (1932), and Klein v. Miller, 159 Or 27 (1938), the Oregon Supreme Court said such a verdict was insufficient and a new trial should be granted if the trial judge did not resubmit the case to the jury. In Fischer v. Howard, 201 Or 426 (1954), the court held that, if defendant was present, he must object immediately to such verdict or waive the objection. The court also suggests strongly that a more sensible rule would be to say that an assessment of no damages is an assessment of the amount of recovery. See 17 OLR 348. Such a verdict logically means the jury thought the defendant was negligent but plaintiff suffered no damage.

For our rules, two changes might be considered. The words, "A specific indication by a jury that no recovery shall be had complies with

this rule," might be added at the end. Secondly, the rule does not conflict with 61 B., giving the trial judge power to make findings on special verdicts not submitted because the damage assessment is part of the general verdict, not a special interrogatory. To make this clearer, why not make this a subsection of 61 A.?

19. Rules 63 D. and 64 F. are taken from ORS 17.615. The language could be interpreted to mean the motion must be filed "within" the 10-day period after judgment only and a motion filed before judgment is not proper. Actually, the Supreme Court interpreted "within" to mean "not later than" 10 days after judgment. Highway Commission v. Fisch-Or, 241 Or 412 (1965). Should the rules reflect this interpretation. The same case also notes that the motion time limit refers to "filing" of the judgment but the decision limit refers to "entry" of the judgment. The court has said that the effective date of orders and judgments is the filing date; that is the date of delivery to the clerk of court. Any other rule would make the effective date dependent upon the whim of the clerk. Charco, Inc. v. Cohn, 242 Or 566 (1966). Should both time limits refer to filing?

20. In Rule 64 B., subsections B.(5) and (6) have been modified by constitutional amendment. The amendment was the result of a 1910 initiative and is Article VII, Section 3. It says, "No fact tried by a jury shall otherwise be re-examined by any court of this state unless the court can affirmatively say there is no evidence to support the verdict." After a number of inconsistent opinions, the court held that this amendment eliminated the common law power of a judge to reduce damages in a verdict solely on the grounds they are excessive and grant a new trial on the grounds the verdict was against the weight of the evidence. Van Lom v. Schneiderman, 187 Or 89 (1949); Bean v. Hostetler, 182 Or 518 (1948). The two provisions may still have some vestigial function. Subsection (5) might still authorize reduction of damages if they are so excessive they indicate passion and prejudice; see Van Lom v. Schneiderman, supra, P. 105, and Brand dissenting and concurring. Subsection (6) refers to a verdict "against law" and also can mean insufficient evidence such that a directed verdict or NOV could be granted, i.e., no "substantial evidence." See, Van Lom v. Schneiderman, supra, P. 97.

The issue for the Council is whether the sections are misleading and should be modified or eliminated. The danger is that change might be interpreted to further restrict new trials. The predecessor of 64 B., ORS 17.610, has been held not to be exclusive and the court can grant a new trial for any reversible error either with or without motion, Pullen v. Eugene, 77 Or 320 (1915). The comments could also reflect the Council intention.

21. The language used to refer to procedures that may be initiated by the court is not consistent. Rules 9 C., 22 E., 32 M.(1)(a) and 64 G. refer to the court's "own motion". Rules 9 C., 21 D., 49 E., 30, and 51 D. refer to the court's "own initiative". Since the court does not actually make a motion, could we use "own initiative" in all cases?

The report of the Oregon State Bar Practice and Procedure Committee had some recommendations that should be considered by the Council (P. 80-85, OSB Committee and Section Reports). They include: pleading and proving attorney fees which the Council has decided to defer to the next legislature; a long arm provision for filiation proceedings which we have covered in Rule 4; and, a referral of the question of third party procedure in contribution claims to the Council. The last may be substantive rather than procedural.

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: FRED MERRILL

RE: Questions for November 3, 1978, Meeting

DATE: October 30, 1978

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

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

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

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

ALTERNATIVE A.

"A. Voluntary dismissal; effect thereof.

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

serving such motion on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action or proceeding against the same parties on or including the same claim.

* * * *

C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (a) of subsection (1) of section A. of this rule shall be filed and served not less than five days prior to the day of trial."

This alternative incorporates the existing provisions of ORS 18.230.

ALTERNATIVE B.

"A. Voluntary dismissal; effect thereof.

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

> is pending or no summary judgment adverse to the plaintiff has been filed, or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action or proceeding against the same parties on or including the same claim.
>
> * * * *
>
> C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (a) of subsection (1) of section A. of this rule is only available if no summary judgment motion seeking judgment in favor of an adverse party is pending and no summary judgment adverse to the claimant has been filed."

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

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

In view of the last sentence giving the plaintiff only

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

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

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

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

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

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

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

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

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

This is the language in the existing statutes.

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

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

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

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

> B.4(d) As used herein, the term, "expert witness", includes any person who is expected to testify at trial in an expert capacity, and regardless of whether the witness is also a party, an employee, agent or representative of the party, or has been specifically retained or employed.
>
> B.4(e) Nothing contained in this subsection shall be deemed to be a limitation of one party's right to obtain discovery of another party's expert not covered under this rule, if otherwise authorized by law."

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

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

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

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

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

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

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

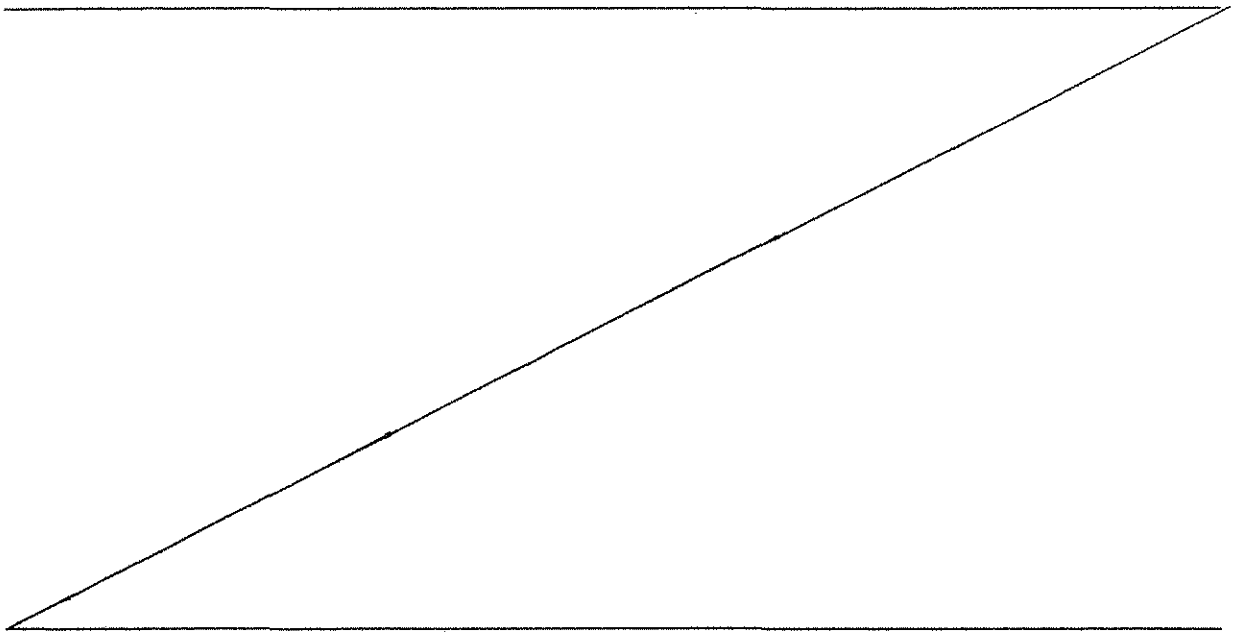
In Section D., although the language is changed slightly, the grounds for challenge for cause are the same in most cases. Soundness of mind and no prior jury service within a year are part of the qualifications for jury service and are encompassed by D.(1)(a). In D.(1)(b) the reference to mental or physical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

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

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

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

The remainder of the rule is unchanged.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "Any party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even

> though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If a motion for directed verdict is made by the defendant, the court may, at its discretion, order a dismissal without prejudice under Rule 54 A. rather than direct a verdict."

10. Redrafts of Rule 61 D. and E. For the redraft of Rule 60 E., I suggest we eliminate 60 E., change existing Rule 60 A. to 60 A.(1), and add the following as 60 A.(2):

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

This redraft eliminates the last clause, which seems to refer to right to trial on damages after a judgment on the pleadings on liability. It also contains no specific reference to a counterclaim situation. The rule as it exists seems very confusing in a situation where the jury finds for a plaintiff on the original claim and for a defendant on a counterclaim. When a counterclaim is asserted, no general rule seems desirable, and submission and directions to the jury should be left to the common sense of the trial court depending upon the circumstances.

Although the Council approved the language modifying Rule 60 D. set out on Page 4 of the October 3, 1978, memorandum, I would suggest the following as a clearer revision:

> "In an action for the recovery of specific personal property where any party who alleges a right to possession of such property is not in possession at the time of trial, in addition to any general verdict or other special verdict, the court shall require the jury to return a special verdict in the form of a special written finding on the issue of the right to possession

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

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

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

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

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

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

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

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

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

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

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: MATTERS FOR YOUR CONSIDERATION AT 11-18-78 MEETING

DATE: November 10, 1978

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Perhaps the comments following Rule 9 could be clarified.

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

G. The suggestion that parties be required to serve a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Revision

November 10, 1978

RULE 57

JURORS

A. Challenging compliance with selection procedures.

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

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

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

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

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

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

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

D. Challenges.

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

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

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

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

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

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

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

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

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

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

D.(3) Conduct of peremptory challenges. After the full number of jurors have been passed for cause, peremptory challenges shall be conducted as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the said order of alternation shall not defeat the adverse party of his full number of challenges, and such refusal by a party to exercise his challenge in proper turn shall conclude that party as to the jurors once accepted by that party, and if his right of peremptory challenge be not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted.

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

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

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

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

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

DATE: November 13, 1978

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

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

DATE: November 13, 1978

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: SUBMISSION TO THE LEGISLATURE

DATE: November 17, 1978

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

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

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

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

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

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

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

I propose that we do the following in this area:

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

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

(a) New rules and comments

(b) ORS sections superseded

(c) ORS sections amended

(d) Suggested legislation

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

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

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

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

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

APPENDIX "A"

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

APPENDIX "B"

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

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

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

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

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

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

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: Comments of Orlando J. Hollis

DATE: November 16, 1978

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

A. SUBSTANTIVE SUGGESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

paragraph is a form of general denial.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

sentence read:

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

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

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

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

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

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

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

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

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

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

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

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

procedure is applicable.

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

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

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

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

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

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

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

B. GRAMMATICAL AND STYLISTIC CHANGES

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

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

to "sent".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

dismiss" after "motion".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: SUBMISSION TO THE LEGISLATURE

DATE: November 17, 1978

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

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

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

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

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

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

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

I propose that we do the following in this area:

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

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

(a) New rules and comments

(b) ORS sections superseded

(c) ORS sections amended

(d) Suggested legislation

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

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

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

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

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

APPENDIX "A"

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

APPENDIX "B"

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

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

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

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

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

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

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: FINAL DRAFT OF RULES

DATE: November 26, 1978

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: ORS SECTIONS SUPERSEDED

DATE: November 29, 1978

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

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

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

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

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

Section II

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

Chapter 11

11.010, 11.020, 11.050, 11.060.

Chapter 13

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

Chapter 14

14.010, 14.020, 14.035.

Chapter 15

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

Chapter 16

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

Chapter 17

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

Chapter 18

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

Chapter 20

20.030.

Chapter 23

23.010.

Chapter 29

29.040, 29.510.

Chapter 30

30.350.

Chapter 35

35.225.

Chapter 41

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

Chapter 44

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

Chapter 45

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

Chapter 46

46.110, 46.155, 46.160.

Chapter 174

174.120.

Chapter 441

441.810.

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: MISCELLANEOUS QUESTIONS REGARDING FINAL DRAFT

DATE: December 1, 1978

I. RULE 44 E.

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

II. COMMENTS OF BOB LACY

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

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

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

He also suggested that we add the following language which comes from Federal Rule 13(c) to our Rule 22 A.:

> "A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party."

This is consistent with ORS 16.305, which is subsection A., and eliminates the possibility of an attorney relying on old case law limiting the availability of counterclaims. See Mack Trucks v. Taylor, 227 Or 376 (1961).

He also asks whether Rule 22 B.(3) is necessary in light of Rule 9. He suggests that Rule 22 B.(3) could be read to prevent the assertion of a cross-claim against a co-defendant who refuses to enter an appearance.

MEMORANDUM

TO: Don McEwen
Charles Paulson
Mike King

FROM: Fred Merrill

DATE: December 11, 1978

I believe you were appointed as the "final polish" committee at the last meeting.

I. MATTERS RELATING TO FINAL RULES. In addition to the changes directed at the last meeting, the following are some additional matters relating to the final form of the rules for your approval. (By the way, the enclosed paragraph was inadvertently omitted from Page 4 of the minutes of the meeting held December 2, 1978).

1. Although I suggested the addition to ORCP 7 D.(5)(a), on Pages 3 and 4 of the minutes, the language did not work. In the Boddie case, the court did not particularly say posting, publication, or other service methods of this type were reasonably calculated to apprise the defendant of anything. The court only says that these methods are better than nothing and that posting is probably as good as publication. I suggest that we merely add: "or by any other method". I also suggest an additional sentence as follows: "If service is ordered by any manner other than publication, the court may order a time for response". ORCP 7 C.(2) refers to either publication or non-publication and for some other method such as posting, responding within 30 days from "service" may not make sense.

2. To comply with the Council's direction relating to Rule 22 on Pages 4 and 5 of the minutes, the following language was added to ORCP 22 D., Page 62:

> "If an amended pleading is filed, the party filing the motion does not waive any defenses or objections asserted against the original pleading by filing a responsive pleading or failing to reassert the defenses or objections."

The following language was also added to 22 E., Page 63:

> "If an amended pleading is filed, the party filing the motion to strike does not waive any defense or objection asserted against the original pleading by filing a responsive pleading or failing to reassert the defense or objection."

Actually, 21 F. and G. probably cover this anyway, but the new language would make the situation absolutely clear.

3. I think I told the Council at one point that no provision relating to transfer was included in the draft of Rule 34 because none existed in the Oregon statute. I found that ORS 13.080(4) does cover transfer. It simply says the court on motion may allow the action to be continued against the successor in interest. The provision from the federal rule which we included as 34 E., Page 88, is more flexible and I would suggest is better.

4. I put the words "upon motion of any party" at the beginning of Rule 53 A., Page 148, rather than in the third line as suggested at the meeting. They appear at the beginning of the section in ORS 11.050

and if placed in the third line would only modify joint trials and not consolidation.

5. In ORCP 54 A.(1), last sentence, Page 149, I changed "section" to "subsection" and in ORCP 54 A.(2), last sentence, Page 149, I changed "paragraph" to "subsection".

6. In ORCP 55 F.(1), Page 158, second line, I changed "notice will be issued" to "notice will be served".

7. In ORCP 58 A., Page 173, third line, I changed "(5)" to "(4)". A limitation on time to address the jury does not fit a court trial. In ORCP 63 F., Page 188, fourth line, I changed "entry" to "filing" to be consistent with ORCP 64 F.

II. APPROVAL OF SECTION III; RULES AMENDED. At the last meeting, you were given copies of some of the miscellaneous changes to rules remaining in ORS sections as follows:

1. ORS 35.255 is changed because section (2) is probably unconstitutional in authorizing publication merely because a defendant is a non-resident.

2. ORS 52.140 is changed to conform service in justice courts to the rules. This would be a case where the ORCP was made specifically applicable under Rule 1 to a court other than a district or circuit court.

3. ORS 97.900 is changed because (a) it is probably unconstitutional in providing that no notice need be given to nonresidents, (b) no special publication provision is necessary in light of Rule 7, and (c) the time for response should be consistent with Rule 7. Note, in section (1) I am not sure what "known" means. Should this say, "If such owners and holders can be served in the county in which the action is filed"?

4. ORS 105.230 is changed because it is probably unconstitutional in authorizing service by publiation upon nonresidents.

5. ORS 109.330 is changed as it may be unconstitutional in authorizing publication of citation on someone not found in the state. In any case, why requiring publication, plus mailing, if mailing is the effective service? The suggested change would require mailing if possible before publication is required.

6. ORS 174.160 and 174.170 probably should be included in the bills prepared by Legislative Counsel and not in our rule changes. The sections are not limited to civil procedure.

7. ORS 226.590 is changed because making publication the only service method is probably unconstitutional except for unknown defendants. Note the words "within the State of Oregon" should also be removed from the fourth line of section (1).

8. ORS 305.130 is changed to conform to the time for response in ORCP 7.

9. ORS 520.175 is changed to be consistent with Rule 7 relating to who may serve summons.

10. ORS 12.010 was changed to be consistent with Rule 21, which provides that a statute of limitations defense may be raised by motion, and with Rule 47, which allows such defense to be raised by summary judgment motion.

11. ORS 20.210 was changed to eliminate the requirement of verifying cost bills as previously directed by the Council.

12. ORS 30.610 was changed to eliminate verification of actions brought in the name of the state.

13. ORS 111.205 was changed to eliminate the necessity of verifying petitions in probate courts. Note, the state is also one which requires a law equity change through the bills which the Legislative Counsel will prepare. Perhaps our change should only eliminate "petitions".

14. ORS 44.320 is changed to conform to Rule 38 relating to who may administer an oath for deposition.

15. ORS 17.630 should perhaps be part of the material being pprepared by the Legislative Counsel. The reason we did not include the last sentence in ORCP 64 G. is that it is a rule of appellate procedure. ORS 17.630 is listed as superseded.

16. ORS 30.230 is changed because the ORCP eliminates non-suits.

Please let me know if you object to any of these changes. I am searching the OLIS print-out for any other modifications and will try to have them to you around December 18.

For the changes in SECTION I, I need to have them AS SOON AS POSSIBLE because we hope to have the final rules typed and proof-read by December 15.

I am also enclosing a letter from Eric Carlson. The matters marked with a check or an "X" either had already been or were changed in the final set of rules.

Enclosure

cc: Council members (Encl.)

PROPOSAL FOR MANDATORY EXCHANGE OF EXPERT'S REPORTS

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

PROPOSED RULE

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

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

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

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

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

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

COMMENTS BY E. RICHARD BODYFELT (PROPONENT)

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

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

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

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

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

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

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

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

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

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

E. Richard Bodyfelt
February, 1978

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PROPOSED "INTERMEDIATE" RULE REGARDING INTERROGATORIES

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

PRELIMINARY COMMENT

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

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

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FIRST ALTERNATIVE PROPOSED INTERROGATORY RULE WITH LIMITATIONS

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

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

(2) Add the following to the Rule:

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

COMMENTS BY PROPONENT REGARDING
FIRST ALTERNATIVE

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

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SECOND ALTERNATIVE PROPOSED
INTERROGATORY RULE WITH LIMITATIONS

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

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

COMMENTS BY PROPONENT REGARDING SECOND ALTERNATIVE

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

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rejected by the Legislature.

E. Richard Bodyfelt
February, 1978

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON
PORTLAND 97205

CHAMBERS OF
JUDGE JAMES M. BURNS

January 5, 1978

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

Re: "The 20 Q. Rule"

Dear Jerry:

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

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

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

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

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

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

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

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

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

With kind regards, I remain

Sincerely yours,

James M. Burns

JMB/i

RULE 32

USE OF DEPOSITIONS IN COURT PROCEEDINGS

No change.

RULE 33

INTERROGATORIES TO PARTIES

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

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

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

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

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

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

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

Committee Comments

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

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

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

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

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

RULE 34

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

* * *

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

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

is within the county and capable of making the affidavit; otherwise, the affidavit may be made by the agent or attorney of the party. The affidavit may also be made by the agent or attorney if the action or defense is founded on a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney, or if all the material allegations of the pleading are within the personal knowledge of the agent or attorney. When the affidavit is made by the agent or attorney, it must set forth the reason of his making it] *or his resident attorney.* When a corporation is a party, *and if the attorney does not sign the pleading,* the [verification] *subscription* may be made by any officer thereof upon whom service of a summons might be made [,]; and when the state or any officer thereof in its behalf is a party, the [verification] *subscription, if not made by the attorney,* may be made by any person to whom all the material allegations of the pleading are known. *Verification on pleadings shall not be required. The subscription on a pleading constitutes a certificate by the person signing that he has read the pleading, that to the best of his knowledge, information and belief there is a good ground to support it and that it is not interposed for delay.*

(2) Any pleading not duly [verified and] subscribed may, on motion of the adverse party, be stricken out of the case.

Section 2. ORS 30.350 is amended to read:

30.350. In the actions and suits described in ORS 30.310 and 30.315 to 30.330, the pleadings of the public corporation shall be [verified] *subscribed* by any of the officers representing it in its corporate capacity, in the same manner as if such officer was a party, or by the agent or attorney thereof, as in ordinary actions or suits.

Section 3. ORS 30.610 is amended to read:

30.610. The actions provided for in ORS 30.510 to 30.640 shall be commenced and prosecuted by the district attorney of the district [where] *in which* the same are triable. When the action is upon the relation of a private party, as allowed in ORS 30.510, the pleadings on behalf of the state shall be [verified] *subscribed* by the relator as if he were the plaintiff, or otherwise as provided in ORS 16.070 [; in]. *In* all other cases the pleadings shall be [verified] *subscribed* by the district attorney in like manner or otherwise as provided in ORS 16.070. When an action can only be commenced by leave, as provided in ORS 30.580, the leave shall be granted when it appears by affidavit that the acts or omissions specified in that section have been done or suffered by the corporation. When an action is commenced on the information of a private person, as allowed in ORS 30.510, having an interest in the question, such person, for all the purposes of the action, and as to the effect of any judgment that may be given therein, shall be deemed a coplaintiff with the state.

Section 4. ORS 16.080 is repealed.

EXHIBIT D

A BILL FOR

AN ACT

Relating to interrogatories and discovery procedures.

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

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

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

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

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

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

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

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

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

EXHIBIT E
A BILL FOR
AN ACT

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

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

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

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

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

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

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

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

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

EXHIBIT F
A BILL FOR
AN ACT

Relating to summary judgment.

OBJECTIONS TO ANY INTERROGATORIES

A. Are interrogatories necessary?

1. The state courts have been in existence for way over 100 years and have functioned adequately and competently without any form of interrogatories.

2. Any information desired by a party can be obtained by deposition or motions to produce or inspect.

3. Having interrogatories in the federal court has not materially increased the proficiency of that judicial system.

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

1. Although no survey has been made, my conclusion upon talking with people is that most lawyers do not want interrogatories in the state court system.

2. Even the lawyers who practice extensively in the federal court feel that the information shown by interrogatories can be obtained by other means.

3. I am also informed that sole practitioners generally are against interrogatories.

C. Interrogatories in the federal court are flagrantly abused.

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

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

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

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

D. Interrogatories are extremely costly and time consuming.

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

2. The cost of litigation materially increases.

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

E. Limited interrogatories no solution.

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

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

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

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F. Practical application

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

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

3. Substantially increase the cost of litigation.

James B. O'Hanlon
February, 1978

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Donald W. McEwen
February 18, 1978

INTERROGATORIES TO PARTIES

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

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

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

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

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

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

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

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

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

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

(a) The names and addresses of the witnesses;

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

(c) The identity of any third party who manufactured

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

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

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

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

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

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

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

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

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