M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: FRED MERRILL

RE: Questions for November 3, 1978, Meeting

DATE: October 30, 1978

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

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

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

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

ALTERNATIVE A.

"A. Voluntary dismissal; effect thereof.

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

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

* * * *

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

This alternative incorporates the existing provisions of ORS 18.230.

ALTERNATIVE B.

"A. Voluntary dismissal; effect thereof.

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

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

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

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

In view of the last sentence giving the plaintiff only

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

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

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

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

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

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

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

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

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

This is the language in the existing statutes.

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

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

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

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

B.4(d) As used herein, the term, "expert witness", includes any person who is expected to testify at trial in an expert capacity, and regardless of whether the witness is also a party, an employee, agent or representative of the party, or has been specifically retained or employed.

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

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

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

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

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

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

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

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

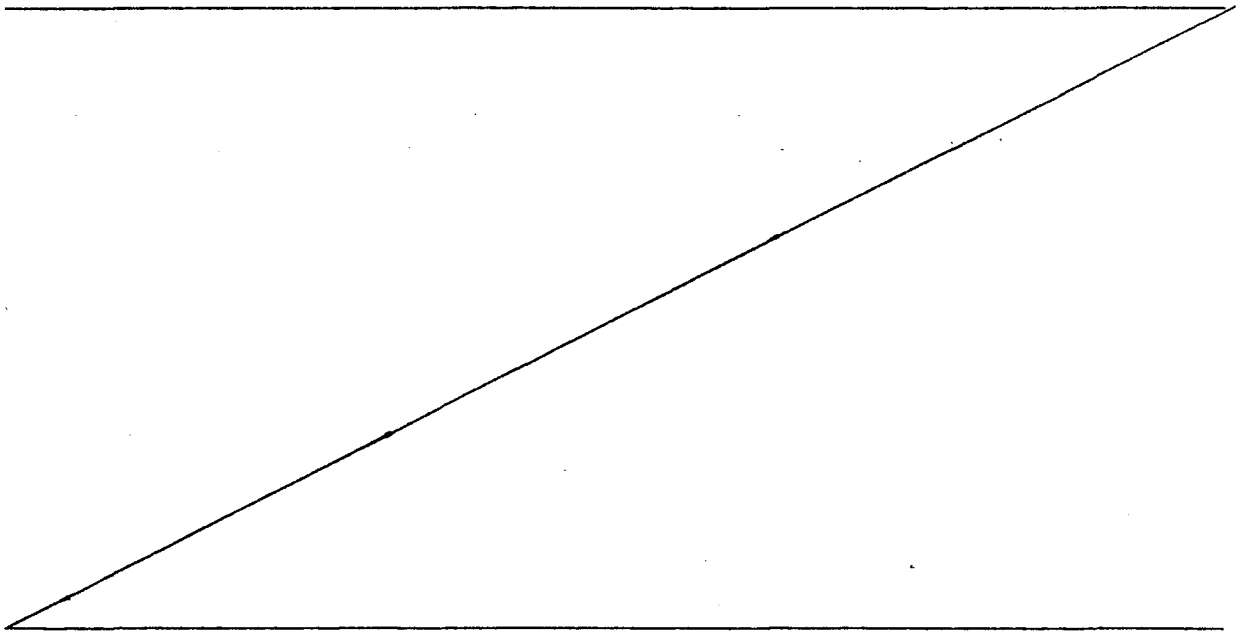
In Section D., although the language is changed slightly, the grounds for challenge for cause are the same in most cases. Soundness of mind and no prior jury service within a year are part of the qualifications for jury service and are encompassed by D.(1)(a). In D.(1)(b) the reference to mental or physical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

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

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

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

The remainder of the rule is unchanged.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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