COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held April 7, 1979

Judge Sloper's Courtroom

Marion County Courthouse

Salem, Oregon

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

The meeting was called to order by Chairman Don McEwen at 9:40 a.m. The following guests were in attendance:

Henry A. Carey, Jr., Portland
Raymond J. Conboy, Portland
Eric B. Lindauer, Portland (representing Oregon Trial Lawyers Association)
Stanton F. Long, Eugene (representing Oregon State Bar Procedure and Practice Committee)
Frank N. Pozzi, Portland
John D. Ryan, Portland
Bruce E. Smith, Eugene (representing Oregon State Bar Procedure and Practice Committee)

Frank N. Pozzi addressed the Council, expressing his concerns about class actions, third party practice, and summary judgments, which he had submitted to the legislature in written and oral testimony. Henry A. Carey also spoke relating to class actions and the desirability of the Uniform Class Action statute. John D. Ryan and Eric B. Lindauer suggested to the Council that the promulgation of the existing class action statutes as Rule 32 would be interpreted by the legislature as an expression of approval by the Council of the Oregon statutes over any alternative class action approaches that could be considered and that Council promulgation of Rule 32 would be a barrier to any legislative consideration of the class action question. The Executive Director stated that the nature of the action taken by

the Council in relation to class actions had been carefully explained to the legislative Judiciary Committees during hearings on the rule. The Chairman stated that after consulting with James O'Hanlon, Charles Paulson, and Judge Dale, he would submit a letter to the Chairman of the House Subcommittee and Senate Committee to set forth the nature of the Council's action relating to Rule 32.

Stanton F. Long and Bruce E. Smith presented the report of the Oregon State Bar Procedure and Practice Committee. The Council discussed the various suggestions made by the Bar Committee. Although the Council could not promulgate any new rules for this legislature, it was suggested that any changes approved be submitted for adoption by the legislature.

Regarding Rule 7, it was indicated that the concern was already covered by action of the legislative committees to amend Rule 7.

James O'Hanlon moved, seconded by Judge Dale, that the suggestion relating to ability to make one motion to raise problems of personal jurisdiction without waiver of all motions in Rule 21 F. be approved in the form of the language set out in the April 2, 1979, Council staff memorandum. The motion passed unanimously.

Laird Kirkpatrick moved, seconded by Dick Bodyfelt, that the suggested additional language in the Bar Committee report to clarify common law right to intervene in Rule 33 B. be approved. The motion passed unanimously.

Darst Atherly moved, seconded by Dick Bodyfelt, that the additional language for ORCP 55 A., relating to continuing duty of a witness to attend, suggested by the Corey Subcommittee of the Bar Committee and set out in the April 2nd Council staff memorandum, be approved. The motion passed unanimously.

Charles Paulson made a motion to recommend to the legislature that clarifying language be added to Rule 57 D.(2) to make clear that the trial judge mandatorily grant additional challenges to a single party plaintiff when there are three or four defendants. The motion was seconded by Judge Casciato. The purpose of the motion was to make it clear that once a judge decided to grant additional challenges to, say, multiple defendants, then it would be mandatory to grant additional challenges to the plaintiff in like number. Wendell Gronso felt that in fairness in picking any jury there should be the same number of challenges. Additional views were expressed that it should be left to the discretion of the trial judge. The motion failed, with Messrs. Gronso, Garrett, and Paulson and Judge Casciato voting in favor of the motion.

The Council discussed the proposed modification to Rule 44 D. relating to discovery of plaintiff's medical reports at length and briefly considered the balance of the suggestions from the Corey Subcommittee report. No motions were made to approve any other suggested changes to the rules as promulgated.

The Executive Director reviewed the changes adopted by the legislature on March 29 and April 5. It was suggested that under Rule 7 D.(2)(b) on Page 6 of the March 29 changes, rather than changing "certified" to "true", the change should be "certified to be true" or some definition be given for "true copy". It also was suggested that "affidavit" be changed to "certificate" in 7 F.(2)(a)(i) on Page 13.

The Executive Director stated Rules 43 through 64 would be considered by the Judiciary Committees at the April 12th meeting. The Council reviewed each proposed change to be considered at the work sessions and considered whether proposed modifications submitted by Council staff should be disapproved.

It was moved by Charles Paulson, seconded by Dick Bodyfelt, that when dismissal for want of prosecution is considered at the April 12th hearing, the language of 54 B.(4) be changed from "with" to "without" prejudice. The motion passed unanimously.

A motion was made by Wendell Gronso, seconded by Charles Paulson, that Rule 60 be changed to provide that a dismissal is without prejudice if made at the conclusion of the plaintiff's case. The motion failed, with Judge Casciato, Carl Burnham, Charles Paulson, Laird Kirkpatrick, James Garrett, and Wendell Gronso voting in favor of the motion.

A motion was made by Charles Paulson, seconded by Carl Burnham, that the Council recommend to the Judiciary Committee that Rule 64 B.(5), excessive damages as grounds for new trial, be deleted. The motion passed, with Judge Sloper, Darst Atherly, and Dick Bodyfelt voting against the motion.

No motion was made to disapprove suggested language changes which had been submitted to the legislative committees by the Executive Director or to recommend acceptance of any other suggested changes submitted to the legislature at the hearings on the rules.

The Council discussed the portion of SB 121 pending in the legislature relating to referral of juvenile procedural rules to the Council. It was pointed out that ORS 1.735 gave the Council authority to promulgate civil rules for all civil cases in all courts in the state and if SB 121 passed and rules were submitted, the Council might have to deal with them.

The minutes of the meeting held January 27, 1979, were approved unanimously.

The Chairman indicated that another meeting should be scheduled to set an agenda for Council work during the next biennium but that probably should await legislation or legislative work on rules submitted this biennium. The Chairman indicated he would schedule a meeting when the legislature completed its review.

The meeting adjourned at 12:40 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

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RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

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

COMMENT: The language of this rule should be reversed, requiring affirmative action on the part of the court to dismiss a case with prejudice. A dismissal under this rule includes a dismissal for want of prosecution and would include situations where an attorney's inattention to his client's case may result in its being dismissed with prejudice. It is unfair to the litigants of this state that their cases be dismissed without any wrongdoing on their parts as they may wish to seek the assistance of other counsel and they should not be precluded by a dismissal with prejudice, as the dismissal would not be upon the merits of their claims.

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

COMMENT: This rule provides the court with the power to tax costs of the action previously dismissed as the court may deem proper without any definition of what the term "proper" means. There are many reasons why a case may have to be dismissed prior to trial, one of which would include the ligitimate inability to try the case at the time it is set. In the event of a dismissal, the defendant is entitled to file his cost bill and this rule should restrict the taxing of costs solely to the cost bill. As the rule is presently written, a court could go beyond this proposal and include inconvenience of parties' attorneys, etc., and tax the refiling plaintiff with amounts that could preclude his day in court.

RULE 55

SUBPEONA

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

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

COMMENT: Section B. of Rule 55 adds another provision to present Oregon statute, and increases the number of motions available to litigant's attorneys. Likewise, it increases the power of the judiciary in this state.

Under Section B.(1), a party would be able to claim that essential evidence in its possession should not be subject to subpoena because the evidence is allegedly

based upon an "unreasonable or oppressive" request. Neither "unreasonable" nor "oppressive" is defined. No specific enumeration of grounds is given for a judge to determine what is or is not "unreasonable or "oppressive." Therefore, Section B.(1) should be deleted from the rule.

Section B.(2) leaves undefined the meaning of "cost of producing." Does that phraseology refer to handling charges, as certainly one does not want non-original documents produced for trial? And if so, does that mean that a culpable defendant can escape liability by claiming documents or items (e.g., products) in its possession should not have to be produced at trial unless an arbitrarily high, but "reasonable" cost is paid the opposing party?

If, on the other hand, "cost of producing" refers to photocopying, the rule also makes no sense. For a party needs to observe the original documents, not copies. Should the party request copies of the original, after having them produced for reviewing, he rightly is required to bear the expense of that copying.

Therefore, Section B.(2) should be deleted.

D. Service; service on law enforcement agency; proof of service.

D.(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person over 18 years of age. The service shall be made by delivering a copy to the witness personally and giving or offering

to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

D.(2) Service on law enforcement agency.

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

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

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

agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

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

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

COMMENT: Rule 55 D.(2)(b) requires that a police officer be served a subpoena at least 10 days before trial. In a large county, this requirement is particularly burdensome for litigants because often an attorney will not know whether his case is going to trial until less than 10 days before the trial itself.

To make the rule consistent internally, the language of Section D.(1) should be sufficient without a special and arbitrarily fixed time designated for police officers. This would result in a savings of unnecessarily issued subpoenas and conceivably would result in less burdensome paperwork and scheduling for police departments as a result of trial cancellations and postponements, which is now the case.

RULE 57

JURORS

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.

COMMENT: New language is added to the present statute (ORS 17.160) by Rule 57 C., but the authors claim they intend no change in Oregon's present practice of jury selection. To avoid the suggestion that a change is intended by the language of Rule 57 C. that new language should be deleted. Rule 57 C. should read as follows:

"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 thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant."

The language appears to suggest, and undoubtedly will be taken to mean by some judges, that the federal practice of having the judge almost exclusively conduct jury selection is the intent of the language.

The second (new) sentence of 57 C. should be deleted as it appears to give the court unlimited discretion in

questioning potential jurors itself, and the power to arbitrarily limit jury selection questioning by attorneys. The language may be interpreted to allow the judge to do all the examining via questions submitted for asking by the attorneys. This, of course, is the current federal practice.

The federal practice has resulted in a significant erosion of the quality and effectiveness of jury questioning. There is no reason to hazard its arrival in state court practice by a loosely drafted rule.

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 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.

COMMENT: Without acknowledging the fact, the authors have substantially changed present law to give an unfair advantage to multiple parties in exercising

peremptory challenges.

ORS 17.155 now states:

> "A peremptory challenge or a challenge for cause may be taken by either party. When there are two or more parties plaintiff or defendant, they must join in the challenge or it cannot be taken. Either party shall be entitled to three peremptory challenges, and no more."

It is likewise a substantial change from the original text which, in its relevant part, reads as follows:

> "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."

The present language of Rule 57D(2) is fundamentally unfair. The language would allow multiple parties of plaintiff or defendant to exercise more than three peremptory challenges. The effect of this rule would be most noticeable in a case where there were multiple defendants and only one plaintiff. (Not an atypical situation.) The plaintiff would be limited to its three peremptory challenges. The multiple defendants, at the court's discretion, would have additional peremptory challenges, potentially far in excess of the three the plaintiff's counsel was limited to.

There should be no place for such fundamentally

unfair rule in Oregon procedure. The rule should be changed to reflect that the parties plaintiff and defendant are entitled to three peremptory challenges, and no more.

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RULE 59

INSTRUCTIONS TO JURY AND DELIBERATION

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

COMMENT: This rule changes existing ORS 17.255 in that it is now in the discretion of the court to reduce the instructions to writing. Whereas, in the past, either attorney had the right to request that written instructions be given to the court. This is a desirable feature of existing law and should be retained in the new rules by simply adding that either party has the right to request written instructions.

RULE 60

MOTION FOR A DIRECTED VERDICT

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

COMMENT: This rule completely changes prior Oregon practice by eliminating the non-suit provision. Under prior practice a non-suit is a dismissal without prejudice and a decree of dismissal after the trial of the fact is a dismissal with prejudice. The rule should be re-written to embody the following ORS statutes which preserve the distinction and preserve the rights of all parties.

ORS 18.220 Decree of dismissal after trial.

"Whenever upon the trial of a suit it is determined that the plaintiff is not entitled to the relief claimed or any part thereof, a decree shall be given dismissing the suit, and such decree shall have the effect to bar another suit for the same cause or any part thereof, unless such determination is on account of a failure of proof on the part of the plaintiff, in which case the court may, on motion of the plaintiff, give such decree without prejudice to another suit by the plaintiff for the same cause or any part thereof."

ORS 18.230 When judgment of nonsuit given.

"(1) A judgment of nonsuit may be given:

(a) As a matter of right on motion of the plaintiff filed with the court and served on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded; if a counterclaim has been pleaded or if it is less than five days prior to the day of trial, the allowance of the motion shall be subject to the discretion of the court.

(b) On motion of either party upon the written consent of the other filed with the clerk.

(c) On motion of the defendant, when the action is called for trial, and the plaintiff fails to appear, or when after the trial has begun, and before the final submission of the cause, the plaintiff abandons it, or when upon the trial the plaintiff fails to prove a cause sufficient to be submitted to the jury, or upon a trial without a jury when the evidence is not sufficient to establish a prima facie case for plaintiff.

(2) A judgment of nonsuit may be given against a defendant asserting a counterclaim or cross-claim in the same manner and upon the same grounds set forth in paragraph (c) of subsection (1) of this section.

(3) A motion for judgment of nonsuit is not a waiver of the right of the moving party to present evidence if the motion is denied."

ORS 18.240 Cause not sufficient to be submitted to jury, defined.

"A cause not sufficient to be submitted to the jury is one which, if the jury were to find a verdict for the plaintiff, upon any or all of the issues to be tried, the court ought, if required, to set aside for want of evidence to support it."

ORS 18.250 Effect of judgment of nonsuit.

"When a judgment of nonsuit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause."

REPORT OF OREGON STATE BAR COMMITTEE
ON PROCEDURE AND PRACTICE
ON PROPOSED OREGON RULES OF CIVIL PROCEDURE

The Committee on Procedure and Practice has reviewed the proposed Oregon Rules of Civil Procedure dated December 2, 1978, as promulgated by the Council on Court Procedures. Five subcommittees of the Committee on Procedure and Practice studied the proposed rules and reported to the Committee as a whole, which makes the following recommendations.

Jurisdiction and Process

Rule 7, Summons, should be expanded to incorporate by appropriate language the substance of ORS 15.190 which provides for service upon the Department of Motor Vehicles. ORS 15.190 provides a clearly defined standard of due diligence for substituted service upon non-resident motorists and resident motorists who depart from or cannot be found within the state. The statute is fair, workable and provides a certainty of adequate service that will not exist under the proposed rules.

Pleading

Rule 21F requires that all motions be made at the same time except those motions in subsection G(2). Rule 21F should be modified to provide that a motion challenging jurisdiction would not need to include all other available motions. Motions challenging jurisdictions should be handled separately to avoid unnecessary time and expense for counsel and courts in preparing and arguing all available motions. If the motion challenging jurisdiction is successful, all of their motions are moot and unnecessary.

Parties

Rule 33B, "Intervention of right," does not recognize any existing common law right of intervention. The rule should be modified to provide: "At any time before trial, any person shall be permitted to intervene in an action when a statute of this state, these rules, or the common law, confers an unconditional right to intervene.

Discovery

The Committee objects to that portion of Rule 44D which requires a party to either obtain a medical report from

an examining physician or, if it is not obtained, permits a deposition of the physician. The rule should be modified to provide that, if a claimant does not have a physician's written report, there is no obligation to obtain and furnish a report to the defense with one exception. If the defense obtains an independent medical examination, the defense must obtain a medical report and furnish it to the claimant, and the claimant must obtain a medical report and furnish it to the defendant in exchange.

Trial Procedure

Cleveland Cory was chairman of the subcommittee on trial procedure. The committee as a whole did not have sufficient time to review in depth the recommendations of the subcommittee. However, the committee believes further consideration should be given to the concerns expressed about Rules 55, 57, 58, 59, and 64. A copy of the subcommittee comments on these rules is attached to this report.

Bruce Smith

Bruce Smith, Secretary
Committee on Procedure and Practice

M E M O R A N D U M

TO: Senate and House Committees on the Judiciary

February 6, 1979

RE: In Support of the Council on Court Procedure: Proposed Rules of Civil Procedure

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1. The Council on Court Procedure was established by HB 2316 in the 1977 Legislative Session. It incorporated a successful four-year effort by the Judicial Conference and the Oregon State Bar to develop a workable mechanism to provide continuous review and modernization of civil procedure in the state judicial system. The purpose was and remains twofold: to provide more efficient handling of civil litigation and to avoid the costly piecemeal legislative process of dealing with civil procedure. The Council statute creates a balanced Council on Civil Procedure composed of judges and lawyers and a public member. The Council is charged with responsibility for promulgating rules governing pleading, practice and procedure which must be submitted to each legislative session and which go into effect 90 days after the close of each session unless amended or repealed by statutory enactment that session. The Legislature likewise retains the power to amend or repeal by statutory enactment any rules previously adopted and in effect at the time of its action.

2. Piecemeal legislative enactment does not provide comprehensive review of civil procedure as a whole and tends to introduce changes which impair the effective functioning of the courts. Example: The many procedural amendments adopted in recent sessions, including expanded joinder of parties and causes of action, class actions, third-party practice, and claims for indemnity, converted simple lawsuits into complex cases with multiple parties and multiple claims which are far more difficult for courts to handle. Comparable provisions were not enacted giving trial courts power to handle such complex litigation or to present it in an intelligible manner to a jury. Insufficient attention was paid to the impact of procedural changes upon other statutory requirements concerning the conduct of trial and judicial manpower. Members of the judiciary committees will be keenly aware of how hard it is to deal with an entire scheme of legislation on a piecemeal basis.

3. The only other realistic alternative to the Council approach is to vest procedural rulemaking power in the Supreme Court. This method has now been adopted by 33 states, and is obviously a reasonable approach. However, the Judicial Conference and the Judicial Reform Commission which reported to the 1975 Legislative Assembly, believed that the Procedural Council which preserves a legislative role while relieving the Legislature of responsibility for continuous meticulous study of the entire

process, is as good and perhaps a better approach than exclusive judicial rulemaking, provided the Legislature allows the method to function. Rulemaking, either in the Supreme Court or in a Procedural Council, is a substantial improvement over piecemeal enactment because both provide a systematic, rational continuous review of civil procedure. However, in this state, the bench and the bar--who have direct responsibility for making civil litigation work--agreed that the Council approach is a satisfactory compromise. It had the support of those who have in the past favored judicial rulemaking, as well as those who have in the past opposed it.

4. I enclose herewith copy of the Report of the Practice and Procedure Committee of the Judicial Conference in 1974, marked Exhibit A, which explains the basic concept in greater detail and which also sets forth the manner in which the proposal was developed by a committee of the Conference which included members of the Bar, which was broadly representative of both. That report was accepted by the entire Judicial Conference, which then endorsed the measure which became law in 1977. Judicial members of the Council include Judge Dale, the Vice Chairman, who served on the Conference committee which developed the statute.

5. Insofar as the constitutionality of the Council is concerned, we would simply point out that we are satisfied that the power to make rules of civil procedure is inherently judicial at common law. Legislative intervention in the form

of enacted codes since the middle 19th Century has obscured that fact. A large majority of the states have revested that power solely in their courts. We see no constitutional problem in allowing that power to be exercised by a Council composed of judges and lawyers who are both by statute officers of the court and part of the judicial branch, nor do we see any constitutional problem in giving the legislative branch the power to override a rule enacted by the Council. The roles of both branches in establishing civil procedure are traditionally constitutional.

6. The Council during the first biennium of its existence has organized itself, conducted extensive hearings and promulgated rules covering roughly one-half of its jurisdiction. The product is workmanlike and represents a rational, pragmatic approach to civil procedure. The conflicting interests of the plaintiff and defense sides of the Bar have been accommodated, and the interest of the judiciary in rules of civil procedure which enable the trial courts to function efficiently have been fully represented. The Judicial Conference strongly supports the Council, and urges these committees to review the Council's product with the thought in mind that its work product should be permitted to stand the test of experience without extensive change which would interfere with the orderly process

undertaken so far successfully.

Respectfully submitted,

John C. Beatty, Jr.
Chairman, Legislative Committee
Judicial Conference

JCB/ser

Enclosure

cc: Hon. Arno Denecke, Chief Justice
Hon. Herbert Schwab, Chief Judge
Hon. Jason Boe, President of the Senate
Hon. Hardy Myers, Speaker of the House
Executive and Legislative Committees,
Judicial Conference (without exhibits)

COUNCIL ON COURT PROCEDURES

Staff Memorandum

RE: Constitutionality of ORS 1.725-.750

The Council on Court Procedures was established by the 1977 Legislative Assembly. Oregon Laws 1977, Ch. 890. Membership on the Council consists of 10 judges (one Supreme Court justice, one Court of Appeals judge, six Circuit Court judges, and two District Court judges), 12 attorneys, and one public member. ORS 1.730. The judges are appointed by the Supreme Court, the Court of Appeals, the Executive Committee of the Circuit Judges Association, and the Executive Committee of the District Judges Association; the attorneys are appointed by the Board of Governors of the Oregon State Bar;[1] and the public member is appointed by the Supreme Court. ORS 1.730.

The statute provides that the Council ". . .shall promulgate rules governing pleading, practice, and procedure in all civil proceedings of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant." The rules authorized, however, do not include rules of evidence or rules of appellate procedure. Any rules promulgated must be submitted to the legislative assembly at the beginning of each regular session and go into effect 90 days after the close of that session. The legislature "may, by statute, amend, repeal or supplement any of the rules." ORS 1.735. The legislation also states that all laws relating to pleading, practice, and procedure in civil proceedings are deemed to be rules of court and remain in effect as such until "modified, superseded or repealed by rules which become effective under ORS 1.735." ORS 1.745.

There is a strong presumption that the action of the 1977 Legislature is constitutional.[2] In any case, the matter was considered before the legislation was enacted. The Governor's Commission on Judicial Reform

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1. The statute requires (a) that at least two of the attorneys be from each of the four Congressional districts in the state; (b) that the appointments include, but not be limited to, appointments from members of the bar active in civil trial practice so that lawyer members be broadly representative of the trial bar; (c) and one lawyer appointed be a person who by profession is involved in legal teaching or research. ORS 1.730(1)(e).

2. Admin. Vets Affairs v. U.S. Nat. Bank, 191 Or 203, 229 P2d 276 (1951); Miles v. Veatch, 189 Or 506, 220 P2d 511, 221 P2d 905 (1950); Marr v. Fisher, 182 Or 383, 187 P2d 966 (1947); Woodward v. Pearson, 165 Or 40, 103 P2d 737 (1940); Anderson v. Thomas, 144 Or 572, 26 P2d 60 (1933).

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had previously considered the question and concluded that the promulgation of procedural rules by a council of lawyers and judges established by the legislature would be constitutional.[3] The Governor's counsel carefully considered the question of constitionality before recommending that the Governor sign the Bill. An Attorney General's opinion was requested by the Governor's counsel. Although never formally issued, the opinion draft, written by W. Michael Gillette, Solicitor General, concluded that the questioned procedure was constitutional.[4]

The promulgation of Rules of Procedure by the Council on Court Procedures subject to the control of the legislature is an effective and responsible method of regulating Rules of Civil Procedure. The 1977 Legislature found that there was a need for a coordinated system of continuing review of Oregon laws relating to civil procedure which was not being met by the existing approach of statutory enactments relating to civil procedure; it further determined that creation of the Council on Court Procedures was necessary to develop a system of continuing review of Oregon laws of civil procedure. ORS 1.725. The creation of the Council to make Rules of Civil Procedure, while innovative, was not entirely unique. There is an enormous diversity in rule making in different jurisdictions. The details of the rule making process in any jurisdiction is the result of development of a practical approach to secure the most effective court procedures.[5] Some rule making power relating to civil procedure is vested in some body other than the legislature in at least 44 states and in the federal system.[6] In California rule making power is vested in a Judicial Council consisting of representatives of various courts.[7] In New York it is the Judicial Conference which makes rules subject to legislature veto.[8] In almost all states and the federal system Advisory Commissions and Judicial Councils are involved in the rule making process.[9]

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3. Kirkpatrick, Procedural Reform in Oregon, 56 Or.L.Rev. 539, 565 (1977).

4. Id.

5. Weinstein, Reform of Court Rule Making Procedures 18, Ohio State University Press (1977).

6. See Summary in: American Judicature Society, A Study of Procedural Rule Making Power in the United States (1973).

7. Cal. Const., Art. VI, § 1(a).

8. N.Y. Jud. Law, §§ 212(5) and 229(3). Also, in England the Rules of Civil Procedure are made by a Rules Committee which includes judges, barristers, and solicitors. Judicature Act of 1925, Sec. 99(4).

9. Weinstein, supra note 5, at pp. 85-86.

The vesting of rule-making power in a Council consisting of various judges and lawyers representing different elements of the judiciary and bar is in line with the current suggestions relating to development of effective procedural rule making. In 1973 the ABA Commission on Standards of Judicial Administration changed from recommending rule making power in the highest court in a jurisdiction to a recommendation that rule making power be vested either in the court or a rule making body comprised of lawyers, judges, legal scholars, and representatives of the legislature.[10] Problems encountered by the U.S. Supreme Court in recent rule-making activities have led commentators to suggest that rule making should be vested in some other body comprised of other judges and lawyers.[11] It is pointed out that: (a) the Supreme Court is too busy to actually make rules; (b) it is inappropriate to have the same body make procedural rules and then pass on their validity when challenged; and (3) legislative review of rules adopted by the highest court creates unseemly conflict between the Supreme Court and Congress.[12] All these problems arguably would exist in Oregon and caused the 1977 Legislature to develop a rule making procedure that would avoid them.

Finally, it should be pointed out that the Council was designed to be a body that makes rules responsive to the needs of this State. In addition to the safeguards imposed by the representative nature of the Council and the legislative review before rules become effective: (a) the Council is required to comply with the Oregon open meetings law, ORS 1.730(3)(a); (b) the Council must adopt rules of procedure, ORS 1.730(3)(b); (c) the Council must give notice to all members of the bar of any meeting where final action is to be taken to promulgate rules, including the substance of the agenda, and also must make copies of proposed rules available on request, ORS 1.735(3)(b); and (d) the Council must hold at least one public hearing in each Congressional district between regular legislative sessions. ORS 1.740(2). The rules submitted to this legislature were promulgated in compliance with all of these requirements.

In summary, the legislation establishing the Council on Court Procedures is an innovative, effective, and responsible procedure established by the legislature to develop Rules of Civil Procedure for Oregon courts. It is clearly a constitutionally valid exercise of governmental authority.

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10. See ABA, Standards Relating to Court Administration, Tentative Draft, §§ 130 and 131 (1973). The final draft adopted by the House of Delegates in 1974 preserves this approach.

11. Lesnick, The Federal Rule Making Process: A Time for Re-Examination, 61 A.B.A.J. 579 (1975); Weinstein, supra note 5, pp. 89-118.

12. Weinstein, supra note 5, pp. 102-104.

2/1/79

COUNCIL ON COURT PROCEDURES

Staff Memorandum

QUESTION:

DOES STATUTE GRANTING POWER TO MAKE RULES OF PLEADING PRACTICE AND PROCEDURE FOR CIVIL CASES TO COUNCIL ON COURT PROCEDURES VIOLATE OREGON CONSTITUTIONAL PROVISIONS PROHIBITING DELEGATION OF LEGISLATIVE POWER? OR.CONST. art. I, section 21, and art IV, section 1.

ANSWER:

NO.

BASIS:

Most of the cases in other jurisdictions involving constitutionality of statutes specifically vesting procedural rule making power in the judiciary have considered the question of delegation of legislative power. (See cases cited in memorandum, "Judicial Rule Making Power - Source and Constitutional Challenge", 2/1/79). In all cases the courts have concluded that no violation of constitutional prohibitions against delegation of legislative power exist because the power to make rules of procedure is inherently a judicial power. The inherent power is subject to control by the legislature, but legislation granting rule making power is not a delegation of a legislative power.

A typical example of these opinions is found in State ex rel. Foster-Wyman Lumber Co. v. Superior Court, 148 Wash 1, 267 P 770 (1928):

> "Assuming the right of the Legislature to make rules for the court, and acknowledging its continued action in that respect, it does not follow that such action is a legislative function. Not all acts performed by a Legislature are strictly legislative in character. A failure to recognize this distinction often gives rise to the belief that one of our law-making bodies has abdicated its duty, and attempted to transfer its legislative mantle to the shoulders of another body, not legislative, thereby subverting the purpose of its creation and denying the people of the commonwealth the right to have the laws which govern them enacted by their duly chosen representatives."
>
> * * * *

2/5/79

> "We think it follows that the Legislature, although formerly functioning in this state as the source of rules of practice and procedure in the courts, did not, in so doing, perform an act exclusively legislative, and may, if it so desires, transfer that power to the courts without such act being a delegation of legislative power." 267 P at 771-773

The power to make Rules of Civil Procedure is clearly a judiciary power in Oregon. This was recognized as early as 1871 in Carney v. Barnett, 4 Or 171 (1871). In Coyote G. and S. M. Co. v. Ruble, 9 Or 121 (1881), the court said:

> "Without the aid of any statutory regulation, it has been repeatedly decided that every court of record possesses the inherent power to establish and enforce rules for regulating the practice before it, not repugnant to any constitutional or legislative enactments. 'Under our system,' says Justice McArthur, in Carney v. Barrett, 'all courts have certain inherent powers, to be exercised for the purpose of methodically disposing of all cases brought before them. (4 Oregon, 471) They can establish such rules in relation to the details of business as shall best serve this purpose, having proper regard for the rights of the parties litigant, as guaranteed and recognized by the constitution and the laws.'"
>
> "It may, then, be safely affirmed, in the absence of any legislative authority, that the supreme court has the inherent right to prescribe rules for the orderly conduct of its business not contrary to law. But if this were questionable, the authority of 'every court of justice to provide for the orderly conduct of proceedings before it,' is expressly conferred by the statute. (Civil Code, sec. 884, sub. 3.)." 9 Or at 122

The supreme court has never retreated from this position. See State v. Blount, 200 Or 35, 75, 264 P2d 419 (1953).[1] Although the court has on occasion declined to exercise rule making power, it has never said the judiciary does not have inherent power to make rules of practice and procedure. See American Timber and Trading v. First National Bank, 263 Or 1, 10, 500 P2d 1204 (1972).

As early as 1852, and prior to the enactment of any statutes conferring rule making power, both the supreme and circuit courts were promulgating rules. See Dezendorf, Survey of the Administration of Justice in the State of Oregon, 5 Bar Bulletin 100 (1939). The statutes conferring rule making power

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1. See also State v. Birchard, 35 Or 484, 59 P 464 (1899); Zeuske v. Zeuske, 55 Or 65, 103 P 648 (1909). For a detailed discussion of the historical basis of rule making power as an inherent judicial power and the Oregon judiciary, see: Report of the Committee on Judicial Administration, 5 Bar Bulletin 15 (1939).

(ORS 1.160 - general, 1.002, 2.120, and 2.130 - supreme court, 2.560 - court of appeals, 3.220 and 3.880 - circuit courts, 46.280 - district courts, and 305.425 - tax court) have been held simply declaratory of an inherent power. Francis v. Mutual Life, 61 Or 141, 14 P 921 (1912). None of these statutes has been challenged as a delegation of legislative power.

A specific Oregon statute that gave a court the power to prescribe manner of serving notice upon defendant in a proceeding relating to a drainage district assessment was upheld against a challenge based upon an unconstitutional delegation of legislative power in Drainage District No. 7 v. Bernhands, 89 Or 531, 549, 174 P 167 (1918). The court relied upon general authorities holding that legislation directing a court to provide procedural rules was not a delegation of legislative power because the rule making power was inherently judicial. The Oregon court has also held that a statute directing the supreme court to codify, publish, and distribute the Oregon statutes was not a delegation of legislative power because the court already had the power to do this. Woodward v. Pearson, 165 Or 40, 46, 103 P2d 737 (1940).[2]

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2. See also Moore v. Packwood, 5 Or 325 (1874), and O'Kelly v. Territory of Oregon, 1 Or 51 (1853), upholding statutes directing courts to set their own terms against challenges that this delegated legislative power. In the O'Kelly case the court said, ". . .in one view of the subject, the appointment of a time is as much an incident of the judicial authority as an emanation of legislative power." 1 Or at 53.

REVISED SCHEDULE FOR JOINT HOUSE AND SENATE HEARINGS

As most of you are aware, the Committee switched the meeting date from Tuesday to Thursday to secure a larger room. The following is the revised schedule. All meetings are at 1:00 p.m. in Hearing Room A, First Floor of the Senate wing in the Capitol.

Thursday, February 15, 1979

Harriet Krause
Dick Bodyfelt

Thursday, February 22, 1979

Judge Buttler
Jim Garrett
Laird Kirkpatrick

Thursday, March 1, 1979

Judge Casciato
Darst Atherly

Thursday, March 8, 1979

Carl Burnham
Mike King
Charles Paulson
Judge Tompkins

Thursday, March 15, 1979

Judge Dale
Judge Sloper
Sid Brockley

Thursday, March 22, 1979

James O'Hanlon
Don McEwen

Anyone else who wishes to attend is, of course, welcome. The presentation by Council members at the first meeting was extremely effective. If you have a conflict at the scheduled time, please let me know.

Our budget was approved by the full Ways and Means Committee on Friday, February 9th, and has been sent to the House and Senate floor.

FRED MERRILL

Organization?
No Feb. meeting for March?
Just this memo?

2/12/79

CHANGES SUGGESTED TO
OREGON RULES OF CIVIL PROCEDURE
SENATE AND HOUSE JUDICIARY COMMITTEE MEETING
FEBRUARY 15, 1979

RULE 1

SCOPE; CONSTRUCTION; APPLICATION; CITATION

A. Scope. These rules govern procedure and practice in all circuit and district courts of this state, except in the small claims department of district courts, for all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin except where a different procedure is specified by statute or rule [.] of pleading, practice, and procedure established by ORS 1.745 or promulgated under ORS 1.735. These rules shall also govern practice and procedure in all civil actions and special proceedings, whether cognizable as cases at law, in equity, or of statutory origin, for the small claims department of district courts and for all other courts of this state to the extent they are made applicable to such courts by [rule or] statute[.] or rule of pleading, practice, and procedure established by ORS 1.745 or promulgated under ORS 1.735, 2.130, or 305.425. Reference in these rules to actions shall include all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin.

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

C. Application. These rules, and amendments thereto, shall apply to all actions pending at the time of or filed after their effective date[.], except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which

event the former procedure applies.

D. Citation. These rules may be referred to as ORCP and may be cited, for example, by citation of Rule 7, section D., subsection (3), paragraph (a), subparagraph (i), as ORCP 7 D. (3)(a)(i).

E. Local rules. These rules do not preclude a court in which they apply from regulating pleading, practice, and procedure in any manner not inconsistent with these rules.

* * * * *

RULE 4

PERSONAL JURISDICTION

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

Sections A. through K.(2) unchanged.

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

Sections L. through O. unchanged.

* * * * *

RULE 7

SUMMONS

Sections A. through D.(3)(d) unchanged.

D.(4) Particular actions involving motor vehicles.

D.(4)(a) Actions arising out of use of roads, highways, and streets -- service by mail. In any action arising out of any accident,

collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, may be served with summons by mail except a defendant which is a foreign corporation maintaining an attorney in fact within this state. Service by mail shall be made by mailing to: (i) the address given by the defendant at the time of the accident or collision that is the subject of the action, and (ii) to the most recent address furnished by the defendant to the administrator of the Motor Vehicles Division, and (iii) to any other address of the defendant known to the plaintiff, which might result in actual notice.

D.(4)(b) Notification of change of address. Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highway, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the administrator of the Motor Vehicles Division of any change of such defendant's address within three years of such accident or collision.

D.(4)(c) Default. No default shall be entered against any defendant served by mail under this subsection who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident, or residing at the most recent address furnished by the defendant to the administrator of the Motor Vehicles Division, or residing at any other address actually

known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail.

(Numbering of sections D.(4), Service in foreign country, on Page 24, through D.(5)(g), Completion of service, on Page 27, renumbered D.(5) through D.(6)(g), inclusive).

* * * * *

ORS 1.735. The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules regulating form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. 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 Legislative Assembly at the beginning of each regular session and shall go into effect 90 days after the close of that session, unless the Legislative Assembly shall provide an earlier effective date. The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.

ORS 1.745. All provisions of law relating to pleading, practice and procedure in all civil proceedings in courts of this state, including rules regulating form and service of summons and process and personal and in rem jurisdiction, are deemed to be rules of court and remain in effect as such until and except to the extent they are modified, superseded or repealed by rules which become effective under section 3 of this Act.

CHANGES SUGGESTED TO OREGON RULES OF CIVIL PROCEDURE
SENATE AND HOUSE JUDICIARY COMMITTEE MEETING
FEBRUARY 22, 1979

RULE 17

[SUBSCRIPTION] SIGNATURE OF PLEADINGS

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

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

RULE 21

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

Sections A. through F. unchanged.

G. Waiver or preservation of certain defenses.

G.(1) A defense of lack of jurisdiction over the person, [that a plaintiff has not legal capacity to sue,] that there is another action pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, [or that the party asserting the claim is not the real party in interest,] is waived (a) if omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is niether made by motion under this rule nor included in a responsive pleading.[or an amendment thereof permitted by Rule 23 A. to be made as a matter of course; provided, however,] The defenses [denominated (2) and (5) of section A. of this rule] referred to in this subsection shall not be raised by amendment.

G.(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived [if it appears on the face] of an opponent's pleading and (a) is omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment

thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted upon a showing by the party seeking to amend that such party did not know and reasonably could not have known of the existence of the defense or that other circumstances make denial of leave to amend unjust.

G.[(2)](3) A defense of failure to state ultimate facts constituting a claim, [a defense that the action has not been commenced within the time limited by statute,] a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B. or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B. in light of any evidence that may have been received.

G.[(3)](4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

M E M O R A N D U M

TO: Dennis Bromka and Jim McCandlish

FROM: Fred Merrill

RE: CONSIDERATION OF FURTHER SUGGESTED CHANGES

DATE: February 23, 1979

A. Defining "rule".

After suggesting the changes to Rule 1 to clarify "rule", it has occurred to me that we have a number of references to "rule" elsewhere in the ORCP. For example, Rule 4 B., Rule 5, Rule 7 D.(1), and Rule 17. These were all included to mean other rules appearing in ORS sections and perhaps overriding supreme court or tax court rules. I suggest that instead of changing section 1 A., we leave it as it is, and make the new section 1 E. read as follows:

> E. "Rule" defined and local rules. References to "these rules" shall include Oregon Rules of Civil Procedure numbered 1 through 64. General references to "rule" or "rules" shall mean only rule or rules of pleading, practice, procedure established by ORS 1.745, or promulgated under ORS 1.735, 2.130, and 305.425, unless otherwise defined or limited. These rules do not preclude a court in which they apply from regulating pleading, practice, and procedure in any manner not inconsistent with these rules.

B. Suggestions from Michael Hall.

1. Rule 12. I think his suggestion here is ridiculous. Rule 9 refers to whether a "clerk" has to accept a paper. This rule sets the basic standard for "court" interpretation of

pleadings. This suggested language would reverse liberality in interpreting pleading and return us to the common law approach.

2. Rule 16. Why does the language of 16 A. have to conform to 9 D.? Again, 9 D. refers to accepting for filing. Rule 16 A. describes captions for pleadings. Rule 9 says all papers must have an attorney's name on the front and does not deal with captions. He also seems to be slipping in a number of other requests, telephone number, Bar membership, etc., which are better left to local rules. If any change is necessary, the last sentence of 9 D. should go. I think the Council only left it in as it appears to have been put in by the court clerks for their benefit.

3. Rule 17. His first point here is the most sensible. Many lay people might be confused by subscription. Black's Law Dictionary defines "subscribe" as writing one's name at the bottom or under a writing. Although I thought subscription includes making a mark, it apparently only differs from signing in where the name ought to be put. The federal rule uses "signature", and I am therefore suggsting the change indicated in the attached statement.

The second suggestion does not make sense. This

rule cannot eliminate verification entirely. In any case, it seems reasonable to retain the possibility that the Council or legislature may wish to provide for verification in a special case. Having defined "or rule" in Rule 1 E. to exclude local rules, this would not allow local rules to require verification.

C. Suggestions from Bob Harris

I have gone through the redraft of Rule 7 submitted by Bob Harris and have underlined his language changes and noted omissions in the attached draft. His suggested changes and my reaction are as follows:

I. C.(2) Time for response. He changes the uniform time for response to 20 days instead of 30 days and eliminates reference to time for response to publication.

Apparently, the argument for the first change is that if the complaint is filed just before the limitations period expires and invalid service is made, a 20-day response time would be more likely to require the defendant to appear and raise the summons question in enough time to re-serve within 60 days and still relate the summons back to filing under ORS 12.020. There are three problems with this approach:

a. Reducing to 20 days to respond seems unreasonably short for service outside the state, particularly outside the United States.

b. The argument assumes that a defendant appearing before 20 days would have to assert the summons defect, i.e., the argument is based upon the special appearance concept that defendant could do nothing except assert a jurisdictional defect without consenting to jurisdicton. That is not necessarily true. It is true that a defendant who filed a motion under Rule 21 or who filed an answer would have to assert the defense or waive it (see 21 G.(1)); but a defendant could do a number of other things, such as move for an extension of time or a summary judgment and not waive.

c. Most important, any defendant who showed up promptly and raised a process objection would, in fact, have actual notice and under 7 D.(1) and 7 G. would not succeed in challenging process. Defendants who did not receive actual notice would not show up until after default and well after the chance to re-serve within 60 days.

I don't understand why the reference to publication is eliminated. That has to be covered by specific language.

2. D.(2) Service methods. In paragraphs D.(2)(b) and (c), he eliminates the statements as to when service is complete. These statements cover only when time periods (such as, default and discovery utilization which are keyed to service) begin to run. Determination as to when service is complete for statute of limitations purposes is not within the rule making power of the Council and would be governed by ORS 12.020. I suppose that it could be argued that

12.020 only makes specific reference to publication; for all other cases the statute says that relation back occurs when summons is "served"; and therefore the court might look to this rule. The problem seems to be in 12.020 and not in the rules. It was not intended to specify how the limitations period is tolled, and again, the Council coult not do this. It may be desirable to add some disclaimer to this effect. It would make more sense to have the legislature modify ORS 12.020.

The change to 7 D.(2)(c) to eliminate reference to an office maintained for the conduct of business is contrary to the intent of the Council. That paragraph was debated at some length and the language relating to "office for the conduct of business" was added to avoid a possibility that a personal office in a home would qualify. That still makes sense to me.

The suggested changes to 7 D.(2)(d) seem to be intended to accomplish the same thing as our proposed addition in the suggested changes following the February 15th meeting. This, however, is the wrong place to put it, as D.(2) describes how service may be made -- not when it may be used. The only two differences in his suggested language are: (a) he would specifically require the Motor Vehicles Division to furnish a paper showing the address, and (b) he specifically says the

limitations period is satisfied by mailing. I am not particularly opposed to either provision, but they don't belong in our rules. The Council's rule making power does not extend to telling the DMV what to do or saying what tolls the statute of limitations. The first provision belongs in the DMV statutes, and the second in ORS 12.020.

3. D.(3)(b) Corporations. From talking to Harris, I believe the changes here are motivated by misreading the rule. He argued that it is difficult to get personal service on registered agents because they are usually lawyers and we should provide for serving someone in their office. He missed the fact that 7 D.(3)(b)(i) provides office service on registered agents, officers, directors, partners, and managing agents as a primary service record. His formulation also seems to eliminate serving any agent and service by mail. And the substituted service reference is incomplete. This would be a much less flexible rule, and the only reason for eliminating mail would be to require more use of process servers.

4. D.(5)(a) Publication and mailing. The changes in this section arguably do eliminate a suggestion that publication is preferred over mailing or something else as a last-ditch service method. His approach, however, eliminates anything but publishing and mailing and takes away the court authority to order a special response time. The only thing that might be useful would be to clarify lines 5 and 6 of the

paragraph as follows: ". . .the court, at its discretion, may order service by publication, by mailing, etc., . . .".

5. F. Return. In F.(1) I don't understand why mailing the return to the clerk is eliminated.

The main change is in F.(2)(a)(i) and (ii) where he (a) makes it possible for a private server to use a certificate instead of an affidavit; (b) eliminates the requirement of recitation of knowledge of who was served; (c) deletes the requirement of attaching the return receipt for mail service.

I agree with none of these changes. Under existing ORS 15.061 and 15.160, although it is not apparent, no affidavits are required, but under 15.110 an affidavit is required for out-of-state service. The choice then is to provide a certificate for all service, make a distinction between in-state and out-of-state service, or require everyone except a sheriff to do this by affidavit. The Council chose the last, and it seems reasonable. The primary significance of the return is in default. Given the consequence of a default, I feel at least a minimal requirement of a formal oath (and it seems minimal) for a person without an official duty should be required to establish the service. I am sure there would be no problem with Harris' service as they have a business intent in accuracy of their returns, but I cannot say the same about all individuals

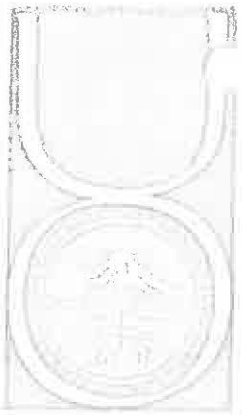
who may serve summons. In the federal system only marshals can serve without court order. I think the present Oregon approach was a 1977 amendment, and it may be argued the legislature intended that approach. I don't think the change was widely debated, and I think this is one case where the Council should deviate from a recent legislative action.

The rest of the changes are less well taken. At the minimum, the return should show the correct person was served; flexible service methods require some flexibility in the return, and why require a return receipt if it is not submitted to the court.

C. Pozzi-Conboy suggestions

On the point raised regarding amendments and the statute of limitations, I think the suggested change to Rule 21 should cover the Pozzi-Conboy argument. I am sending both Rule 7 changes and Rule 21 changes to them for their reaction.

On the summary judgment point, I have no opinion at this point whether the rule should be revised. I am positive that it would be a mistake to try without some detailed research into its operation and securing some reaction from the total Bar.



School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

February 23, 1979

Representative Dave Frohnmayer
2875 Baker Boulevard
Eugene, Oregon 97403

Dear Dave:

I am sorry I missed your message Thursday, but I came to Salem in the morning. From our brief conversation, I understand you are thinking about the method of implementing changes.

I have been talking with Dennis, and at this point, I am working with him to develop language changes in the rules that would accommodate points raised by committee members or testimony. These would be saved for work sessions following the hearings. I am enclosing copies of what I have submitted. As you can see from the enclosed memo to the Council, I hope to get Council approval of these changes on April 7, 1979. We also will be getting some suggestions from the Bar Procedure and Practice Committee at that meeting which may result in the Council agreeing on other changes. If we can then present these in work sessions, it would be better than trying to draft rule changes at that point. I must confess some irritation at Pozzi and company and the Bar committee; if they had brought these questions up before the Council adopted the rules, it would have been much simpler. On the other hand, this probably is unavoidable with a new system, and the net result should be better rules.

On your suggestion that we use a self-destructing statute, why is this necessary? Is there some problem with title reference or more than one subject? If not, why not just have a bill titled, "Amends, repeals, and supplements Rules of Civil Procedure", and have it say:

"Section 1. Oregon Rule of Civil Procedure 1 shall read as follows:"

and then set out the rules as changed, and do the same for each rule amended. ORS 1.735 says the assembly may "by statute, amend, repeal or supplement any of these rules." The bill would have to pass both Houses and be signed by the Governor, but it could have the same effective date as the rules, and thus the rules actually going into effect would be as amended by the legislature. The statute would never need to be codified, and the revised rules would be the ones in ORS.

Legislation is not my field, however, and it is yours, so I will be glad to work on any format you think advisable.

Sincerely,

Fredric R. Merrill

FRM:gh

KF
165
.A5

JOHNSON, HARRANG & MERCER
ATTORNEYS AND COUNSELORS AT LAW
400 SOUTH PARK BUILDING
101 EAST BROADWAY
EUGENE, OREGON 97401
TELEPHONE (503) 485-0220

JAMES F. HARRANG
ARTHUR C. JOHNSON
KENDRICK M. MERCER
LESLIE M. SWANSON, JR.
JAMES W. KORTH
STANTON F. LONG
JOHN C. WATKINSON
JOHN L. FRANKLIN
JOHN B. ARNOLD
DONALD R. LAIRD
JOYCE HOLMES BENJAMIN
BARRY RUBENSTEIN
R. SCOTT PALMER
MARTHA W. REIDY
MICHAEL L. WILLIAMS
TIMOTHY J. SERCOMBE

H. V. JOHNSON (1895-1975)
HAROLD V. JOHNSON (1920-1975)

ORVAL ETTER
OF COUNSEL

February 23, 1979

Mr. Jere Webb
Attorney at Law
900 S.W. Fifth Ave., 23rd Floor
Portland, OR 97204

Re: Uniform State Laws Committee

Dear Jere:

Enclosed please find Don McEwen's reply to my letter of January 24. As you can see, the Council on Court Procedures has not studied or considered the Uniform Audio-Visual Deposition Act. I suppose the next question is whether you want our committee to study and make a recommendation on the Uniform Act, or whether the matter is simply referred to the Council on Court Procedures for its review.

Please let me know what your plans are, and I will answer the question implicit in the last paragraph of Don's letter.

Sincerely,

John B. Arnold

JBA:js

enc

cc: Bernard Brink, Secretary

DAVIES, BIGGS, STRAYER, STOEL AND BOLEY
LAW OFFICES
TWENTY-THIRD FLOOR 900 SW FIFTH AVENUE
PORTLAND, OREGON 97204

TELEPHONE (503) 224-3380
CABLE ADDRESS: HARTPORT

JEFFREY MICHAEL ALDEN
PAUL L. BOLEY
PHILLIP D. CHADSEY
HARRY S. CHANDLER
CLEVELAND C. CORY
THOMAS P. DEERING
RICHARD DEVERS
BARNES H. ELLIS
EDWARD L. EPSTEIN
HOWARD M. FEUERSTEIN
RICHARD A. FRANZKE
GEORGE H. FRASER
GERSHAM GOLDSTEIN
RONALD S. GROSSMANN
JOHN R. HAY
DAVID G. HAYHURST
HENRY H. HEWITT
CHARLES F. HINKLE
ROBERT H. HUNTINGTON
VELMA JEREMIAH
WILLIAM M. McALLISTER
CHARLES J. McMURCHIE
DAVID P. MILLER
MILO E. ORMSETH
TERRENCE R. PANCOAST
CAMPBELL RICHARDSON
ROBERT L. RIDGLEY
RICHARD E. ROY
JOHN M. SCHWEITZER
THOMAS B. STOEL
MANLEY B. STRAYER
JERE M. WEBB
CLARENCE R. WICKS
WILLIAM W. WYSE

DAVID L. DAVIES
HUGH L. BIGGS
COUNSEL

ALLAN R. ABRAVANEL
CHARLES F. ADAMS
RICHARD E. ALEXANDER
STEPHEN E. BABSON
MARGARET M. BAUMGARDNER
MATTHEW W. CHAPMAN
BERTRAND J. CLOSE
NANCY L. COWGILL
KAREN K. CREASON
C. PAUL DAGLE
E. JOSEPH DEAN
MARK R. FEICHTINGER
RANDOLPH C. FOSTER
SUSAN P. GRABER
DAVID W. GREEN
THOMAS G. P. GUILBERT
SUSAN M. HAMMER
NORMAN D. HOLLY
STEPHEN T. JANIK
PETER R. JARVIS
JENNIFER J. JOHNSON
RICHARD C. JOSEPHSON
JOEL D. KUNTZ
CHARLES S. LEWIS, III
GREGORY H. MACPHERSON
GREGORY R. MOWE
THOMAS R. NICOLAI
MARGARET HILL NOTO
BRUCE K. POSEY
GUY A. RANDLES
LOIS O. ROSENBAUM

February 28, 1979

Mr. John B. Arnold
Johnson, Harrang & Mercer
400 South Park Building
101 East Broadway
Eugene, OR 97401

Dear John:

Re: Uniform State Laws Committee

This is in response to your letter of February 23, 1979. The issue you raised will have to be passed on by the Committee. My own thought is that, assuming we are in favor of the uniform act, we recommend its adoption so that (subject to approval at the bar convention) it will become a bar bill at the next legislative session. In the interim, we should keep the Council on Court Procedures informed and should make available to them a copy of whatever report our committee issues on the uniform act.

We will take this matter up at our next committee meeting which is scheduled for Friday, March 30, 1979.

To save you having to pass this information along to Don McEwen I am sending him a copy directly.

Very truly yours,

Jere M. Webb

jek
cc: Mr. Bernard Brink, Secretary, Uniform State Laws Committee
Mr. Donald H. McEwen
Mr. Garr M. King
Mr. Frederic R. Merrill
Mr. George H. Corey

P.S. We should also establish some liasion with the Trial Practice Section so that it will have an opportunity for whatever input it deems appropriate.

JMW

YOUNG, HORN, CASS & SCOTT
ATTORNEYS AT LAW
SOUTH PARK BUILDING, SUITE 200
101 EAST BROADWAY
EUGENE, OREGON 97401

LEO F. YOUNG
JOHN H. HORN
PHIL CASS, JR.
MALCOLM H. SCOTT
ROBERT D. WOODS
BRUCE E. SMITH
EDWARD P. THOMPSON
NICK E. RAUCH
RICHARD K. QUINN
DOUGLAS R. SCHULTZ
JACOB K. CLIFTON, JR.
STUART M. BROWN
JUDITH TEGGER

OF COUNSEL
ORLANDO JOHN HOLLIS
THOMAS E. BROWNHILL

TELEPHONE 687-1515
AREA CODE 503

March 1, 1979

TO: Members of the Oregon State Bar
Committee on Procedure and Practice

FROM: Bruce Smith, Secretary

Enclosed are comments to Rules 50-64 prepared by Cleveland C. Cory.

Rule 50 Jury Trial of Right

Rule 50 is merely a restatement of existing law. The Council on Court Procedures would repeal ORS 17.033 at the same time it adopted Rule 50. ORS 17.033 merely declares what Article I, §17, and Article VII (amended), §3 say, when read together.

Rule 50 takes the approach of Federal Rule 38 and simply refers the reader to a statutory or constitutional right. It does not deal with the procedure by which a party demands a jury trial.

Rule 51 Issues; Trial By Jury or By the Court

Subsection A is taken from the first sentence of ORS 17.005. The second sentence, which indicates that there are issues of law and of fact, is unnecessary because the first sentence mentions both issues of law and of fact.

Subsection B is taken from the first sentence of ORS 17.030. Statutory provisions relating to referees are retained (ORS 17.705 to 17.765). The first sentence of Subsection C is taken from the second sentence of ORS 17.030. Subsection C(1) restates the rule of waiver found in ORS 17.035. Subsection (1) of ORS 17.035 is not retained for the simple reason that a failure to appear at trial would result in a default judgment in any event. Subsection C(2) is new, but does not change existing practice.

The Council considered the merits of the demand-waiver system, but retained the existing Oregon procedure of having jury trial waivable only by affirmative action of the parties rather than the federal system of requiring a demand for jury trial.

Subsection D is a new provision in Oregon law. It tracks the language of Federal Rule 39(c) quite closely, providing for advisory juries and trial to a jury by consent, with binding effect.

Rule 52 Postponement of Cases

Rule 52(A) is new. The "good cause" requirement, however, is clearly part of existing case law. [Rickenbach v. Flavel, 273 Or 398, 541 P2d 455 (1975); State v. Needham, 5 Or App 388, 391, 484 P2d 1123 (1971).]

Rule 52(B) generally tracks the procedure for postponement provided by ORS 17.050, with only minor changes.

Rule 53 Consolidation; Separate Trials

Rule 53 is "substantially identical" to Federal Rule 42. [See: Vander Veer v. Toyota Motor Distributors, Inc., 282 Or 135, 577 P2d 1343 (1978); and Weiss & Auld v. Northwest Acceptance Corporation, 274 Or 343, 546 P2d 1065 (1976).] In Subsection A involving consolidations, there is a major difference: Federal Rule 42 allows the court to consolidate sua sponte, while Rule 53(A) requires the order to be entered "upon motion of any party."

Prior to the 1973 adoption of ORS 11.050 and ORS 11.060 (from which Rule 53 is derived), Oregon had only a statutory provision for consolidation. Orders for separate trial were possible in the absence of a statute [State, ex rel. Perry v. Sawyer, 262 Or 610, 614, 500 P2d 1052 (1972)], but only on a showing of "exceptional circumstances."

When ORS 11.050 and ORS 11.060 were adopted in 1973, the Oregon Supreme Court recognized that Oregon had essentially adopted the Federal Rule. In Vander Veer, supra, at 144, the court noted that the new statutes were "less opposed to bifurcation than our statements" in Perry, supra.

Rule 54 Dismissal of Actions; Compromise

Rule 54(A)(1) preserves that right to take a non-prejudicial dismissal without prejudice up to five days before the trial unless as specified in ORS 18.210 and ORS 18.230. The next to the last sentence of Rule 54(A)(1) was intended to prevent harrassment of a defendant by repeated filings and dismissals of complaints by the plaintiff. Under the terms of that sentence, the plaintiff is allowed one dismissal without prejudice. The second dismissal "operates as an adjudication upon the merits." The reference to Rule 32(E) in this subsection indicates that class actions have more detailed requirements for dismissal due to the representative character of the class plaintiffs.

Rule 54(A)(2) is based upon Federal Rule 41(a)(2). A dismissal by order of the court would be required any time after five days prior to trial. Counterclaims filed prior to the motion to dismiss could proceed. The order of dismissal could be with or without prejudice.

Rule 54(B) covers involuntary dismissal. Rule 54(B)(1) makes only one change in existing law, providing for dismissal for failure to comply with rules or court orders. This language comes from the first sentence of Federal Rule 41(b). Rule 54(B)(3) is taken from ORS 18.260 (dismissal for want of prosecution) and defines the procedure by which the court can clear its docket. Only minor changes were made in incorporating ORS 18.260 into Rule 54.

Rule 54(B)(2) is based upon Federal Rule 41(b) and covers the judgment of dismissal at the close of a claimant's case for insufficiency of the evidence in cases tried without a jury. The Oregon State Bar has a bill on this same subject, H.B. 2196, which will probably be consolidated for hearing with Rule 54 during this session of the legislature. This rule also changes the former rule that a judgment of dismissal at the close of a claimant's case did not bar another suit; under Rule 54(B)(4) the judgment of dismissal is with prejudice unless the court specifies otherwise. The last sentence of Rule 54(B)(2) requires findings only when they would be required for a judgment under Rule 62.

Rule 54(B)(4) is somewhat like the last sentence of Federal Rule 41(b). The Federal Rule states the effect of all dismissals and lists many exceptions. Rule 54 (B)(5) only defines the effect of dismissals under Section B and so is stated in broader terms.

Section C provides that the rule applies to counterclaims, cross-claims and third-party claims. They would be either voluntary, under Rule 54(A), or involuntary, under Rule 54(B).

Section D is derived from Federal Rule 41(d). It provides for costs of previously dismissed actions to be paid to the defendant, if they have not already been. The court can order the payment of costs and stay the proceedings until the plaintiff has done so.

Rule 54(E) is derived from ORS 17.055 with only minor changes in language.

Rule 55 Subpoena

Rule 55 appears, to a great extent, to be a recodification of Chapter 44 ORS, with certain exceptions.

ORS 44.150, providing for service of a subpoena on a concealed witness, was omitted from these proposed rules. Although this provision has rarely been used, there is no other provision which would cover this situation. The omission should be reviewed by the committee.

Rule 55(A), which defines a subpoena, omits the portion of ORS 44.110 that requires a witness to remain until the testimony is closed, unless sooner discharged, but at the end of seven days' attendance the witness may demand of the party, or his attorneys, the payment of his legal fees for the next following day, and if not then paid, he is not obliged to remain longer in attendance. This omitted language may be necessary to cover certain situations involving multiple depositions where some of the depositions must be carried over to the following day.

Rule 55(G) does not take in ORS 44.180, ORS 44.210, and ORS 44.220. These statutes should not be eliminated as being unnecessary. They are the only statutes that provide for enforcement of the provisions for subpoenaing witnesses.

Rule 56 Trial by Jury

The second sentence of Rule 56 broadens the power of the parties to stipulate to the binding effect of a nonunanimous verdict.

Rule 57 Jurors

Rule 57(D)(2), with respect to peremptory challenges, states that each party shall be entitled to three peremptory challenges and no more. (Emphasis added.) Thereafter, the last sentence of the rule allows the court, in its discretion and in the interest of justice, to give any of the parties, single or multiple, additional peremptory challenges, and to permit them to be exercised separately or jointly.

The present statute (ORS 17.155) is specific in relation to cases where there are two or more parties, plaintiff or defendant. It states that they must join in the challenge, or the challenge cannot be taken. It further states that each party shall be entitled to three peremptory challenges and no more.

The proposed rule is vague, as well as being contradictory. As written, the proposed rule could give a party a great advantage if the trial court allowed additional peremptory challenges and permitted them to be exercised separately or jointly. Rule 57(D)(2) should be reviewed by the committee.

Rule 58 Trial Procedure

Rule 58(B)(5), which was taken from ORS 17.210, absolutely limits final argument to no more than two hours on either side. In complex cases two hours may be insufficient. ORS 17.210(4) allowed the trial court discretion to extend such time beyond two hours. The discretionary power of the court to allow such an extension should be added to this rule. This very important right should not be taken away by omission, and this should be reviewed by the committee.

Rule 59 Instructions to Jury and Deliberation

Rule 59(D) concerning the subject of further instructions to the jury states that the court is given certain further instructions "either orally, or in writing." It would appear that the information should be given by the court orally, if the instructions were given orally; or in writing, if written instructions had been submitted to the jury.

Rule 60 Motion for a Directed Verdict

Rule 60 does make a substantial change in Oregon trial practice by eliminating the device of a judgment of nonsuit. It adopts the concept of Rule 50(a) FRCP. It may be noted that the remainder of Rule 50 is embodied in Rule 63 relating to "Judgment Notwithstanding the Verdict." No reason is given by the Council for separating the two motions.

In my opinion elimination of the nonsuit concept is a step forward and will do away with certain confusing decisions of the Oregon Supreme Court. (Compare Karoblis v. Liebert, 263 Or 64, 75, 501 P2d 315 (1972), with Adamson v. West Valley Associates, 274 Or 11, 17, 544 P2d 578 (1976).)

Rule 61 Verdicts, General and Special

While the draft of December 2, 1978 eliminated Rule 61E of the previous draft, its substance was included in Rule 61A(2) together with the additional sentence: "A specific designation by a jury that no amount of money shall be had complies with this subsection." The amended comment states the Council's reasoning.

As noted by the Council, the language of Rule 61B and C is taken from Rule 49(a) and (b) FRCP. By superseding ORS 17.405 through ORS 17.425 the Council has broadened and liberalized the procedure for returning special verdicts. Some of the considerations involved using interrogatories as the basis for a special verdict are reviewed in a law review note at 4 Willamette Law Journal 86-96 (1966).

Rule 62 Findings of Fact

As noted by the Council, Rule 62, except sub F, is taken directly from ORS 17.431 and subdivision F is taken from ORS 17.441. The only new concept is the last sentence of sub A, which states: "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact or conclusions of law appear therein." This language was taken directly from the 1948 amendment to Rule 52(a) FRCP. This change is minor and may be of assistance to the trial courts, as well as the litigants.

Rule 63 Judgment Notwithstanding the Verdict

As noted by the Council, Rule 63 is taken directly from ORS 18.140 with minor changes in language. The only significant change is in sub F, which adds the language of Rule 50(c)(2) FRCP, allowing a party, whose verdict has been set aside on motion for judgment NOV, to serve a motion for a new trial not later than ten days after entry of the judgment NOV.

Rule 64 New Trials

The Council's amended comment is self-explanatory, and the language of this Rule is very similar to ORS 17.605 through 17.630. It should be noted that although the amended comment states that the last sentence of ORS 17.630 "*** is not included and will remain as a statute as it relates to appellate procedure, ***" ORS 17.630 is one of the statutes which is stated to be "superseded" (p. 201). This minor technicality should be called to the attention of the legislature.

This Committee is greatly concerned with Rule 64C which allows a new trial to be granted in a nonjury action on the same grounds as in a jury action. It is feared that in many marriage dissolution actions the aggrieved party will insist upon filing such a new trial motion, thus postponing and delaying the finality of the proceedings. This Committee recommends that Rule 64C be amended to be not applicable to proceedings under Chapter 107 ORS.

To: Cleveland C. Cory
Davies, Biggs, Strayer, Stoel and Boley
900 S. W. Fifth Avenue
Portland, Oregon 97204

From: Douglas L. McCool
Luvaas, Cobb, Richards & Fraser, P.C.
777 High St., Suite 300
Eugene, Oregon 97401

COPY

Re: Proposed Oregon Rules of Civil Procedure - 50, 51, 52 53, and 54.

RULE 50

JURY TRIAL OF RIGHT

Rule 50 is merely a restatement of an existing law. TheConstitution Art.I, § 17 says: "In all civil cases the right of Trial by Jury shall remain inviolate." In 1910, the Constitution was amended by adding Art. VII (Amended). Section 3 of that Article qualifies that right to controversies exceeding $200. The 1910 amendment did not repeal but only modified the right to jury trial. Johnson v. Ladd, 144 Or 268, 293, 14 P2d 280, 24 P2d 17 (1933) (collecting cases).

The Council on Court Procedures would repeal ORS 17.033 at the same time it adopted Rule 50. ORS 17.033 merely declares what Article I, §17, and Article VII (amended) §3 say, when read in conjunction. Rule 50 states it more simply: "The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate."

Any abolition of statutory references to law in equity would not affect the right to a jury trial. The right is not controlled by a labelling 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. The test is the same whether or not procedural distinctions between law in equity are made.

Rule 50 does not attempt to describe the types of cases where a jury trial is allowed. Instead, it takes the approach of Federal Rule 38 and simply refers the reader to a statutory or Constitutional right. Similarly, Rule 50 does not deal with the procedure by which a party demands or weighs his right to a jury trial.

RULE 51

ISSUES; TRIAL BY JURY OR BY THE COURT

Subsection A is taken from the first sentence of ORS 17.005. The second sentence, which indicates that there are issues of law and of ct, is unnecessary in light of the fact that the first sentence mentions both issues of law and of fact.

Subsection B is taken from the first sentence of ORS 17.030. Provisions for reference are retained as statutes in ORS 17.705 to 17.765. The first sentence of Subsection C is taken from the second sentence of ORS 17.030 with the elimination of cross references to ORS 17.035(waiver --- now covered by subsection C(1): ORS 17.205(order of proceedings --- now covered by ORCP 58): ORS 17.431 (findings of fact -- now covered by ORCP 62); ORS 17.435 (same) and ORS 17.705 to 17.765 (reference).

Subsection C.(1) restates the rule of waiver found in ORS 17.035. ORS 17.035 (2), providing for written waiver, and (3) providing for written waiver, are both stated in C.(1). Subsection (1) of ORS 17.035 is not retained for the simple reason that a failure to appear at trial would result in a default judgment in any event. Subsection C.(2) is new, but does not change existing practice.

The Council considered the merits of the demand-waiver system, but retained the existing Oregon procedure of having jury trial waivable only by affirmative action of the parties rather than the Federal system

of requiring a demand for jury trial.

Subsection D is a new provision in Oregon law. It tracks the language of Federal Rule 39(C) quite closely, providing for advisory juries and trial to a jury by consent, with binding effect.

RULE 52

POSTPONEMENT OF CASES

Rule 52(A) is new. The "good cause" requirement, however, is clearly part of our case law already. Rickenbach v. Flavel, 273 Or 398, 541 P2d 455, (1975); State v. Needham, 5 Or App 388, 391, 484 P2d 1123, (1971) (" Under the circumstances there was ample opportunity to prepare for trial, and continuance was properly refused.").

Rule 52(B) generally tracks the procedure for postponement provided by ORS 17.050. Only minor changes were made in it.

RULE 53

CONSOLIDATION; SEPARATE TRIALS

Rule 53 is "substantially identical" to Federal Rule 42 and the Oregon Court has so recognized. Vander Veer v. Toyota Motor Distributors, Inc., 282 Or 135, 577 P2d 1343 (1978); Weiss & Auld v. Northwest Acceptance Corporation, 274 Or 343, 546 P2d 1065 (1976). In subsection A dealing with consolidations, there is only one major difference: The Federal Rule allows the Court to consolidate sua sponte, while Rule 53(A) requires the order to be entered "upon motion of any party." For a statement of the Federal rule, see Huffmaster v. U.S., 186 F.Supp. 120, 124 (No.Dist.Cal. 1960). No other difference in Rule 53(A) or (B) seems significant, though there are minor differences in language.

Prior to the 1973 adoption of ORS 11.050 and ORS 11.060 (from which Rule 53 is derived), Oregon had only a statutory provision for consolidation. ORS 11.040 (since repealed). Separation orders were possible in the absence of a statute, State, ex rel Perry v. Sawyer, 262 Or 610, 614, 500 P2d 1052 (1972), but only on a showing of "exceptional circumstances."

When ORS 11.050 and ORS 11.060 were adopted in 1973, the court recognized that Oregon had essentially adopted the Federal Rule. In Vander Veer, supra, at 144, the court noted that the new statutes were "less opposed to bifurcation than than our statements" in Perry, supra. Since 1973, there are reported decisions of consolidations in the following types of cases: (1) whether the transaction involved the sale of "securities" under the Oregon Securities Law (Bergquist v. Int. Realty, Ltd., 272 Or 416, 537 P2d 553 (1975); (2) actions by president of bankrupt corporation and by Trustee in Bankruptcy (Weiss & Auld, supra); (3) consolidation of liability issue in four cases arising out of the same auto accident (Vander Veer, supra). Segregation has been ordered in the following cases: (1) issue of whether action was commenced within statute of limitations (Tischauscer v. Trottman, 271 Or 267, 531 P2d 905 (1975)); (2) issue of estoppel (Jones v. Flanagan, 273 Or 563, 542 P2d 907 (1975)); (3) issue of release (Black v. Funderburk, 277 Or 157, 560 P2d 272 (1977)); and (4) determination of damages for four plaintiffs (Vander Veer, supra).

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

Rule 54 (A)(1) is based on Federal Rule 41(A)(1). Federal Rule 41(A)(1) allows voluntary dismissal up to the time an answer or motion for summary judgment

is filed. Rule 54(A)(1) preserves that right to take a non-prejudicial dismissal up to five days before the trial unless a counter-claim is filed as specified in ORS 18.210 and ORS 18.230. The next to the last sentence of Rule 54(A).(1) was intended to prevent harrassment of a defendant by repeated filings and dismissals of complaints by the plaintiff. Under the terms of that sentence, the plaintiff is allowed one dismissal without prejudice. The second dismissal "operates as an adjudication upon the merits." The reference to Rule 32(E) in this subsection indicates that class actions have more detailed requirements for dismissal due to the representative character of the class plaintiffs.

Rule 54(A)(2) is based upon Federal Rule 41(A)(2) to which it is substantially identical. A dismissal by order of the court would be required any time after five days prior to trial. Counterclaims filed prior to the motion to dismiss could proceed. The order of dismissal could be with or without prejudice.

Subsection B to Rule 54 covers involuntary dismissal. B.(1) makes only one change in existing law, providing for dismissal for failure to comply with rules or court orders. This language comes from the first sentence of Federal Rule 41(B). Rule 54(B)(3) is taken from ORS 18.260 (dismissal for want of prosecution) and defines the procedure by which the court can clear its docket. Only minor changes were made in ORS 18.260 when incorporating it into Rule 54.

B.(2) is also from the Federal Rule and covers the judgment of dismissal at the close of a claimant's case for insuffiency of the evidence in cases tried without a jury. Existing ORS 18.210 and ORS 18.220 refer to equity cases. The former equity rule that a party could move for

dismissal at the close of a claimant's case only at the price of waiving the right to present evidence is specifically changed. The Oregon State Bar has a bill on this same subject, H.B. 2196, which will probably be consolidated for hearing with Rule 54 during this session of the legislature. This rule also changes the former rule that a judgment of dismissal at the close of a claimant's case did not bar another suit; under Subsection B.(4) the judgment of dismissal is with prejudice unless the court specifies otherwise. There is no provision in the rule for a motion to dismiss in a non-jury case at the close of all the evidence. Since the Judge decides the case at that point, no such motion is necessary. A decision of the case at the close of all the evidence would have prejudicial effect; a judge who, for some reason, wished to grant non-prejudicial dismissal at the close of all the evidence would either reserve ruling on a motion to dismiss at the close of the plaintiff's case if there was such a motion, or grant a non-prejudicial voluntary dismissal under Section 54(A). The last sentence of subsection B.(2) requires findings only when they would be required for a judgment under Rule 62.

B(4) is somewhat like the last sentence of Federal Rule 41(B). The Federal Rule states the effect of <u>all</u> dismissals and so must list many exceptions. B(4) only defines the effect of dismissals under Section B and so is stated in broader terms.

Section C provides that the Rule applies to counter-claims, cross-claims and third-party claims. They would be either voluntary, under Rule 54(A), or involuntary, under Rule 54(B).

Section D is derived from Federal Rule 41(D). It provides for costs of previously dismissed actions to be paid to the defendant, if they have not already been. The court can order the payment of costs or stay the proceedings until the plaintiff has done so.

Section E is derived from ORS 17.055. Only minor changes in language are made, none of them substantive. ORS 17.065 through 17.085 determining when compromises are allowed, and ORS 17.990, penalizing compromises between an employer and employee, are left as statutes because they are not procedural rules.

DLM:kh

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

March 6, 1979

Mr. Jere M. Webb
DAVIES, BIGGS, STRAYER, STOEL AND BOLEY
Attorneys at Law
Twenty-third Floor
900 S. W. Fifth Avenue
Portland, Oregon 97204

Re: Uniform State Laws Committee

Dear Jere:

Thank you for a copy of your letter to Mr. John Arnold relating to the Uniform Audio-Visual Deposition Act. I received a copy of Mr. Arnold's original letter to Don McEwen, but with the legislative hearings on the new rules, I have not had time to respond.

Basically, I believe all major aspects of the Uniform Act have already been incorporated into Rule 39 of the new rules. The Council followed the approach recommended by the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October 1977), and revised the deposition rules to specifically accommodate and encourage non-stenographic depositions. A non-stenographic deposition would include a video taped deposition. (See Comment to Rule 39). I am enclosing a copy of Rule 39 with the specific language relating to non-stenographic depositions underlined.

You will note that under section 39 C.(4), the party taking the deposition may simply serve a notice of a video taped deposition, and this procedure is followed unless the court orders otherwise. Under sections 1 and 3 of the Uniform Act, such a deposition on notice is possible with two differences: (a) there appears to be no discretion on the part of the court to order a stenographic deposition; the Uniform Act does provide that a party may use a simultaneous stenographic or audio record; our rule does not specifically say this but there is no reason why it may not be done; (b) section 3 of the Uniform Act requires

that the subpoena notify a non-party witness that the deposition will be video taped. Our rules have no similar requirement but, if this is important, our Rule 45 could be easily modified to require that a copy of the deposition notice be served with a deposition subpoena.

Both section 1 of the Uniform Act and section 39 D. and subsection 39 G.(4) of our rules provide that a party at his own expense may secure a copy or transcript of the deposition. The Uniform Act specifically says either the video tape of the proceeding or a transcript prepared by an official court reporter is the official record. Under our rule, section 39 G., certification and filing is provided for either a recording or a stenographic transcript, with the additional possibility that a transcript of the video tape can be used or filed if the parties wish. The Uniform Act does not seem to contemplate use of transcripts prepared by anyone other than a court reporter.

Section 2 of the Uniform Act specifies that the video taped deposition can be used in the same manner as a stenographic record. Under Rule 39 the video taped deposition could be used in the same manner as any deposition, under ORS 45.250.

The procedure for the video tape deposition described in section 4 of the Uniform Act is more specific in some respects. Our rule does require that the oath be administered on the video tape and objections be recorded but does not deal with formalities, such as case names, operator identification, etc. One would assume this would be done in any case, and if any problem were anticipated, this could be the subject of a court order.

The uniform rule requires use of a time generator which is not covered in our rule. The Uniform Act, § 4(8), appears to contemplate the possibility of editing the tape, making reference to an editing order without specifying how such order is secured and what it would cover. Under our Rule 39 D., the party taking the deposition must retain the tape without alteration and if the deposition is filed or used, the party must certify the tape has not been altered (ORCP 39 C.(1)). If the parties wished to edit a deposition, however, this could either be done by stipulation or the court would have power to order it under its general powers to supervise a deposition (see ORCP 36 C., 39 C.(4), and 39 E.).

The Uniform Act contemplates automatic filing. Under Rule 39 G.(2), filing of a non-stenographic deposition, or any deposition, is required only if requested by a party. Note, after filing, 39 G.(2) also deals with the possibility of a transcript which is not covered by the Uniform Act.

The Uniform Act makes specific reference to the video tape expense as "costs". Under our disbursements statute, ORS 20.020, "the necessary

expenses of taking a deposition" are recoverable. Finally, the Act refers to power in the supreme court to specify equipment and guidelines. That is not provided by the rules.

The Uniform Act does not have several provisions incorporated in Rule 39. As noted above, the possibility of a transcript being used is not covered. There is no reference to certification by a person making a transcript. The manner of filing and person who must file are not covered. The most important omission in the Act seems to be the right of the witness to view and to object, which is covered by section 39 F. If an unaltered video tape is used, this probably is not important, but for an edited or transcribed video tape the witness should have a right to see that the tape or transcript accurately reflected the testimony. In any case, the approval by the witness is another guarantee of accuracy.

In summary, I believe that, in all important respects, our rules make use of video tape depositions easily available, which is the object of the Uniform Act. I also believe that integration of the video tape provisions into the general deposition statute makes more sense than a separate Act or Rule. It avoids questions, such as whether a video tape deposition notice could be served on a corporation under Rule 39 C.(6). As noted above, I also believe that the Act has several missing elements, particularly a specific provision covering court control, transcripts of the video tape, and witness review.

To the extent Mr. Arnold feels that some of the details of the Act need to be in our rule, I suggest that he, or the section, submit proposed changes in the rule to the Council for review and possible modification during the next biennium.

Very truly yours,

s/ Fredric R. Merrill

Fredric R. Merrill
Executive Director

COUNCIL ON COURT PROCEDURES

FRM:gh
Encl.
cc: John B. Arnold (Encl.)
Donald W. McEwen (Encl.)
Garr M. King (Encl.)
Charles P.A. Paulson (Encl.)
James B. O'Hanlon (Encl.)
Hon. Wm. M. Dale, Jr. (Encl.)
Bernard Brink (Encl.)
George H. Corey (Encl.)

RULE 39

DEPOSITIONS UPON ORAL EXAMINATION.

A. When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C.(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

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

C. Notice of examination.

C.(1) General requirements. A party desiring to take the

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

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

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

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

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

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

C.(6) Deposition of organization. A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection

does not preclude taking a deposition by any other procedure authorized in these rules.

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

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

or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if the transcription or recording is to be used

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

G. Certification; filing; exhibits; copies.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

G.(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition shall enclose it in a sealed envelope, directed to the clerk of the court or the

justice of the peace before whom the action is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be transcribed upon request of any party under such terms and conditions as the court may direct.

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

G.(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party

taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H. Payment of expenses upon failure to appear.

H.(1) Failure of party to attend. If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

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

COMMENT

This rule is based upon Federal Rule 30, existing ORS 45.151, 45.161, 45.171, 45.185, 45.200, 45.230, and 45.240 (which were based upon the pre-1970 federal rule language), and the proposed changes to accommodate non-stenographic depositions of the ABA Special Committee Report (see Comment to ORCP 38). The term "non-stenographic" includes video tape and any other

recording device capable of producing a permanent and accurate record. ORS 45.020, 45.030, 45.110, and 45.140 were eliminated as unnecessary.

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

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

Subsections C.(1), (2), (3), (5), and (6) change the language of ORS 45.151 and 45.161 to conform to the 1970 amendments to the federal rules. Subsection C.(4) is based upon the recommendations of the ABA Special Committee Report and reverses the existing requirement for a court order to take a non-stenographic deposition. Subsection B.(7) is new. The ABA Special Committee Report recommended that a party be allowed simply to specify a deposition by telephone in the notice. This rule requires a court order for such a deposition.

Except for the addition of the last sentence, section 39 E. is the same as ORS 45.185. Sections 39 D., F., and G. are generally the modified form of the corresponding federal rule sections recommended by the ABA Special Committee Report. Use of non-stenographic depositions requires special provisions relating to the manner of taking, signing, certifying, and filing depositions because the person administering the oath will not necessarily be present or transcribing the deposition. The ABA approach did not contemplate filing of depositions with the court. This rule does provide for filing upon request of any party in subsection G.(2). For non-stenographic depositions, the rule contemplates that the oath will be administered on the recording and the recording will be preserved by the party taking the deposition unless the recording is filed with the court. Testimony would only be transcribed if requested by a party. If the recording or a transcription thereof is to be filed or used in the proceeding, it must be submitted to the witness for examination unless the parties and the witness waive the examination. A procedure for preserving changes by a witness and the reasons for such changes are provided, and the witness then signs a written statement affirming the correctness of the transcription or recording subject to any changes made. If a witness refuses to make such a statement within the time allowed, the deposition may be used as fully as though signed, unless suppressed by the court. For a non-stenographic deposition, the

party taking the deposition certifies to the authenticity of the recording, and if transcribed, the person making the transcription also certifies that the oath was administered and that the transcription is accurate. Other than changes related to non-stenographic depositions, the procedures described in these sections are not notably different from existing Oregon practice. Subsection F.(3) provides a simplified method of dealing with exhibits.

Section 39 H. is based on ORS 45.200.

February 27, 1979

To the Members of:

Senate Judiciary Committee
House Judiciary Committee

My name is John H. Donnelly and I am here today on behalf of the Oregon Association for Court Administration. Occupationally, I am administrative services coordinator for the Circuit Court, Fourth Judicial District (Multnomah County).

My oral testimony today will be confined to those Rules which our Association feels need revision. In addition, I have attached written testimony regarding Rules 1 - 10 (heard on February 15) as you requested.

Our Associaton, composed of members who have years of experience in fulfilling the clerk-of-court function, hope that you will give this commentary your careful attention.

Respectfully submitted,

John H. Donnelly
Legislation Committee
Oregon Association for Court Administration

JHD/sb

Attachment

OREGON ASSOCIATION FOR COURT ADMINISTRATION

Rule 1:

The language of Rule 1 is confusing regarding the term, ". . . by statute or rule.", and should be clarified. This clarification is especially important for those courts which adopt rules internally to enhance administrative and/or judicial process. In addition, these local rules, which may supplement statutes, are questionable as to enforcement by the clerk-of-the-court. Recommend that Rule 1 be amended to include the clarification noted, and that the status and enforcement of local court rules be included within Rule 1.

Rule 3:

Rule 3 is incomplete in that it deals with "filing", which is defined in Rule 9(D). This definition should be included in Rule 3. Recommend that "filing" be defined in Rule 3.

Rule 7:

The suggested language within the sample notices has caused difficulties for clerk's offices since time began. The problem is the term, "This paper . . . ". More often than not, persons who appear at the clerk's offices state that the notice said to bring "the notice", not their answer, motion, etc. Consequently, their statutory time has run out. Recommend that sample notices identify exactly what is to be filed with the clerk within the time frame allowed. Sample notices should be the "best" example, not just "an example".

Rule 9:

The provision in Rule 9(B) for, ". . . leaving it with the clerk of the court." should be stricken. This provision is currently in the statutes, but should be eliminated in order to remove the clerk as a private litigant's accomplice. Actions by the clerk are "public" actions, and, therefore, actions which incur public liability. "Leaving it with the clerk" does not sufficiently identify actions for the clerk to take, or specify what legal position the clerk is assuming. Recommend the language be stricken.

9(D) defines filing procedures to be taken by the clerk which are minimal at best. Most courts require filings to bear parties names, addresses and names of attorneys, name of the court, title of the cause, and the title of the paper being filed. However, since this requirement varies from one court to another, proper form and style of pleadings are best decided upon and required by local court rules. The rule should allow specifically for this variety. Recommend the language read, "unless, at a minimum, the name of the court, the title of the cause, and the paper, the names of the parties, the name and address of the attorney, if there be one . . .", be substituted. In addition, language authorizing local court supplementation should be included.

Finally, the issue of contents being "readable" by, ". . . a person of ordinary skill.", is vague and open only to decision by the court, not the clerk. Yet, language of 9(D) allows the clerk to refuse receipt of the document(s). Again, public liability is involved. Does the statement concern legibility or semantics? The rule should clarify.

Rules 12, 16 and 17: (Already submitted on Feburary 22, 1979)

Rule 31:

Section B of this rule provides for the court to act as a depository, accountant, or temporary protector of both property and monies during the course of private litigation. This act places the court, a public body, in the position of accepting a public liability on behalf of the litigants. Courts should not be placed in this position without some corresponding capability of assessing proper fees to protect this public liability. Recommend language be included in Section B to authorize the court to assess a fee adequate to insure the public liability.

OREGON ASSOCIATION FOR COURT ADMINISTRATION

Rule 39

Section G.(3) provides, according to the Comment section, "a simplified method of dealing with exhibits." Yet, the language does not reflect that such exhibits may be large, heavy, valuable, bulky or dangerous. In the hands of the clerk, such safekeeping again becomes a public liability for which the clerk is provided no means of recovering costs for storage, handling, or other special protection requirements that may be required to adequately insure that safekeeping. Recommend that the language of Section G.(3) be amended to require that documents and things submitted for inspection during examination of the witness shall be maintained in a safe manner by the person producing such materials until such time as the action is commenced or is dismissed.

If this recommendation is not included, then language should be inserted to allow the clerk to charge such fees as is necessary to insure the proper safekeeping of said documents and things.

Respectfully submitted,

John H. Donnelly
Legislation Committee
Oregon Association for Court Administration

To the Members of:

Senate Judiciary Committee
House Judiciary Committee

My name is Michael D. Hall, court administrator of the Circuit Court, Fourth Judicial District (Multnomah County). I am here today on behalf of the Oregon Association for Court Administration.

Mr. John Donnelly of our Association pointed out in his testimony of February 15 that the Association is interested in amending, eliminating or clarifying rules and statutes which accrue "public" liability for the Clerk of the Court during the course of "private" litigation. As Mr. Donnelly pointed out in his discussion, such opportunities should be eliminated; "public" liability has no place in "private" litigation. If elimination is impossible, then language must be explicit enough to insure effective public protection.

As was the case for Rule 1 - 10, we have testimony to submit today for those Rules scheduled to be reviewed. That commentary is attached. Our Association, composed of members who have years of experience in fulfilling the Clerk-of-Court function, hope that you will give this commentary your careful attention.

Respectfully submitted,

Michael D. Hall
Legislation Committee
Oregon Association for Court Administration

Attachment

OREGON ASSOCIATION FOR COURT ADMINISTRATION

Rule 12

The language in Sec. B of this rule should be changed to eliminate possible conflicts with the clerk's responsibility to reject filings which don't conform to Rule 9, Sec. D. Since "filing" is the commencement of any action, this section may be open to interpretation; at a point when the clerk is not in an effective or legal position to challenge. Recommend language be changed to read:

> "The court shall, in every stage of an action except in regards to form and style of pleadings, disregard . . ."

Rule 16

Sec. A language does not conform to the language of Rule 9, Sec. D. Either this Section of Rule 16 should be changed, or Rule 9, Sec. D should be reworded. Recommend that every pleading require the name of the court; the title of the action or cause; the register number of the cause (if known); the names of the parties (except in pleadings other than the complaint, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties); and the name, address, telephone number and Oregon State Bar membership number of the attorney, if there be one, are legibly endorsed on the front of the document. If there is no attorney, then the name, address and telephone number of the party filing the pleading shall be legibly endorsed thereon.

Rule 17

"Subscription" is a confusing term for signature. Recommend the word signature be used. Subscription (signature) is further confused by the term, "verification", which was proposed for elimination by the Oregon State Bar at the last session of the Legislature. The Oregon State Bar proposal, in conjunction with this Rule's comments, is sufficient to eliminate verification entirely. Recommend the language, " . . . unless otherwise required by rule or statute.", in Sec. A be eliminated.

CIRCUIT COURT OF OREGON
SECOND JUDICIAL DISTRICT
EUGENE

:WIN E. ALLEN
JUDGE

March 5, 1979

The Honorable Harlow F. Lenon
Circuit Court Judge
362 Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, Oregon 97402

The Honorable Albin W. Norblad, III
Circuit Court Judge
Marion County Courthouse
Salem, Oregon 97310

RE: Proposed Oregon Rules of Civil Procedure

Gentlemen:

I recently had a caller in my office whose firm and he personally does a considerable amount of domestic relations business. By considering together Rule 2 and Rule 64 of the proposed Oregon Rules of Civil Procedure, he came to the startling conclusion that motions for new trials would be applicable in domestic relations cases.

I concur with him in his opinion that we have a difficult time as the statutes presently exist in obtaining any finality in domestic relations cases. To make the remedy of a new trial also available in those cases would certainly aggravate this problem.

If you share my opinion, perhaps it would be appropriate for you to express your concerns to members of the legislature involved. As judges who deal in domestic relations only, I am confident your views would carry more weight than would those of us who deal in domestic relations only on a part-time basis.

Kindest personal regards, I am

Sincerely yours,

EDWIN E. ALLEN
Circuit Judge

EEA:ct

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

March 12, 1979

The Honorable Edwin E. Allen
Circuit Court of Oregon
Second Judicial District
Eugene, Oregon 97401

Dear Judge Allen:

Your letter of March 5, 1979, to Judge Lenon and Judge Norblad has been furnished to me.

It is true that Rule 64 of the Oregon Rules of Civil Procedure would apply to all cases, whereas the prior new trial statute, ORS 17.605, applied to an action at law. The change, however, is more one of form than substance. In any equity case, including a divorce case, a court of equity always had had the inherent power to vacate the decree and receive new evidence or re-try the issues. Ruiz vs. Ruiz, 29 Or App 273 (1977); Holemar vs. Holemar, 35 Or App 111 (1978); Handy vs. Handy, 14 Or App 286 (1973); Miller vs. Miller, 228 Or 301 (1961). The correct form of motion was a motion to vacate rather than a motion for new trial. In re Shepherd's Estate, 152 Or 15 (1935). But the grounds available to vacate the equity decree would include any grounds available in the new trial statute applicable in a non-jury setting. In Ruiz vs. Ruiz, supra, at p. 275, the court of appeals said:

> Although this is an equity proceeding, the applicable rule is the same as the statutory rule governing motion for a new trial in actions at law.
> 29 Or App at 275.

Of course, in an equity case there usually would be no necessity for an entire retrial but only for a reopening of the case. This is specially covered by Rule 64 C.

I would suggest that, rather than reducing the finality of a divorce decree, the Oregon Rules of Civil Procedure increase finality. The motion to vacate in equity could be made at any time during the term of the court at which the judgment was entered and a "reasonable" time

after expiration of the term. Miller v. Miller, supra, at p. 305. Under the rules the time for making a new trial motion in any action is specifically provided. Thus the motion for new trial in an equity case would have to be made and ruled upon in conformance with the 10-day and 55-day limits of ORCP 64 F. Nendel vs. Meyers, 162 Or 661 (1939).

If this does not answer your question in this area, please let me know.

Very truly yours,

Fredric R. Merrill
Executive Director
COUNCIL ON COURT PROCEDURES

FRM:gh

cc: Honorable Harlow F. Lenon
Honorable Albin W. Norblad, III
Honorable Wm. M. Dale, Jr. (Encl.)
Donald E. McEwen (Encl.)
James B. O'Hanlon (Encl.)

bcc: R. Vernon Cook (Encl.)
David B. Frohnmayer (Encl.)
Dennis Bromka (Encl.)
Jim McCandlish (Encl.)
Honorable Arno H. Denecke

CHANGES SUGGESTED TO OREGON RULES OF CIVIL PROCEDURE
SENATE AND HOUSE JUDICIARY COMMITTEE MEETING
MARCH 1, 1979

RULE 22

COUNTERCLAIMS, CROSS-CLAIMS, AND
THIRD PARTY CLAIMS

A. through B.(3) unchanged.

C. Third party practice.

C.(1) At any time after commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff. The third party plaintiff need not obtain leave to make the service if the third party complaint is filed not later than 10 days after service of the third party plaintiff's original answer. Otherwise the third party plaintiff must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties [.] including, but not limited to, causing unwarranted delay in trial of the plaintiff's claim. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in sections A. and B. of this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's

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

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

[D. Joinder of persons in contract actions.]

[D.(1) As used in this section of this rule:]

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

[D.(1)(b) "Contract" includes any instrument or document evidencing a debt.]

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

D. Joinder of additional parties.

D.(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29.

D.[(3)](2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection:

D.(2)(a) "Maker" means the original party to the contract which is the subject of the action who is the predecessor in interest of the plaintiff under the contract; and

D.(2)(b) "Contract" includes any instrument or document evidencing a debt.

D.[(4)](3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E. unchanged.

* * * *

3/1/79

RULE 7

SUMMONS

Sections A. through C.(2) unchanged.

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.]to respond to a counterclaim under Rule 22 D.(1) and (2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form: (remainder of subsection unchanged)

C.(3)(b) Service [on maker of contract] for counterclaim. A summons to join a party to respond to a counterclaim pursuant to Rule 22 D.[(2)](1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form: (remainder of subsection unchanged)

D.(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D.[(3)](2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form: (remainder of subsection unchanged)

D. through D.(3)(d) unchanged.

SEE CHANGES DATED 2/15/79 FOR OTHER SECTIONS REVISED IN RULE 7.

* * * *

RULE 13

KINDS OF PLEADINGS ALLOWED; FORMER PLEADINGS ABOLISHED

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

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

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

* * * *

RULE 15

TIME FOR FILING PLEADINGS OR MOTIONS

A. Time for filing motions and pleadings. A motion or answer to the complaint or third party complaint [or] and the reply to a counterclaim or answer to a cross-claim of a party summoned under the provisions of Rule 22 D. shall be filed with the clerk by the time required by Rule 7 C.(2) to appear and defend. Any other motion or responsive pleading shall be filed not later than 10 days after service of

the pleading moved against or to which the responsive pleading is directed.

B. through D. unchanged.

* * * *

RULE 28

JOINDER OF PARTIES

It was suggested that the requirement in Rule 28 that claims arise out of the same transaction and occurrence, or series of transactions or occurrences, might be too limiting where a plaintiff had one back injury and was involved in two separate accidents. That requirement is a key element in control of case size. If eliminated there would be nothing to stop 30,000 persons who were injured by 20 banks using an improper method of calculating interest from joining as parties in one case. That situation is better handled under a class action which requires only a common factual or legal question and no transactional relationship. The class action representative approach and court control makes such litigation manageable.

In any case, after doing some research it appears that the plaintiff could join the two defendants under the language of the rule. The language comes from Federal Rule 20 by way of the Oregon statute. Under the federal rule, an injured plaintiff can join an original tort feasor and a second tort feasor whose subsequent negligence aggravated plaintiff's original injuries. Lucas v. City of Juneau, 127 F. Supp. 730, (D.C. Alaska 1955), 7 Wright and Miller § 1653, pp 273-274.

3/1/79

RULE 29

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(Possible elimination of 29 D., subject to research by committee staff)

* * * *

RULE 34

SUBSTITUTION OF PARTIES

A. through C. unchanged.

D. Death of a party; surviving parties. In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be shown upon the record by a written statement of a party signed in conformance with Rule 17 and the action shall proceed in favor of or against the surviving parties.

E. through G. unchanged.

* * * *

3/1/79

CHANGES SUGGESTED TO OREGON RULES OF CIVIL PROCEDURE
SENATE AND HOUSE JUDICIARY COMMITTEE MEETING
MARCH 8, 1979

RULE 38

PERSONS WHO MAY ADMINISTER OATHS
FOR DEPOSITIONS; FOREIGN DEPOSITIONS

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

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

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

C. Foreign depositions.

C.(1) and C.(2) unchanged.

* * * * *

RULE 44

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

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

and scope of the examination and the person or persons by whom it is to be made.

Note

The language used in the promulgated rule is that of Federal Rule 35. Looking at 10 states at random, I found that all of them have adopted the Minnesota physical examination rule which was submitted as a proposed amendment to the federal rules and was never adopted. The primary difference is the specific reference to agent or employee as well as person under legal custody and control of a party. The suggestion made at the hearing was that this might be desirable; otherwise the plaintiff might join an employee, such as the bus driver in Schlagenhauf v. Holder, 379 U.S. 104 (1964), not because they expected to recover against the agent but simply to get a physical examination. The exact language used relating to employees was taken from New York CPLR 3121.1.

If the rule required a non-party to submit to a physical examination in an action brought by someone else and subjected the non-party to contempt for refusal, there would be some constitutional problems. If the rule required the party to produce someone who could not be produced, the rule would be of questionable validity. The order is directed to a party and can only require the party to produce a person in custody or control. Thus if the agency or employment relationship is terminated or a child has reached majority, no order can be entered. Further, the only sanction available under ORCP 46 B.(2)(e) is against the party and then only when the party could have produced a person in custody or under control. Thus if a child or employee refuses to submit to examination, despite a direction to do so from the party, neither the party nor the non-party can be held in contempt.

The one situation not clearly covered is a loss of consortium case. Wright and Miller say:

> It is not quite so clear, but it would seem that when a husband has a substantive right to recover for injuries to his wife, the wife is under his legal control for this purpose and he can be ordered to produce her for a physical examination. 8 Wright and Miller § 2233, p 669.

There is some doubt on this, and no case has so held. At least, one state court has held that, although the rule does not specifically cover the situation, a court has inherent power to order a wife to submit to a physical examination in a loss of consortium case. St. Louis Public Serv. Co. v. McMullan, 297 S.W. 2d 431 (1957). The Oregon courts

have recognized inherent court power to order physical examinations, including possibly blood tests of a child in a divorce case, but have never dealt with the consortium situation. Parsons v. Parsons, 197 Or 420 (1953).

To clarify the situation, I added the language in parenthesis.

B. through D.(2) unchanged.

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with [the hospitalization of the injured person.] any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B.

Note

This approach more clearly reflects the intent of the Council but does not comply with the suggestion offered by Mr. Atchison. Presumably, some types of prior records might be clearly irrelevant, e.g., the 20-year old mental hospital records in an action to recover for a broken arm. In most cases the only way to determine if prior hospital records were relevant to a defense of pre-existing injury would be to examine them.

MEMORANDUM

TO: Dennis Bromka and Jim McCandlish

FROM: Fred Merrill

RE: HEARING HELD MARCH 8, 1979

DATE: March 9, 1979

The following is a list of matters raised at the March 8, 1979, meeting and not included in the attached list of changes, together with the reason no change was submitted.

RULE 36

I could not determine what committee reaction was to Don Atchison's arguments on 36 B.(2) and 36 B.(4) relating to insurance policies and expert witnesses. The arguments have already been made to the Council and rejected. If the committees want to reinstate the automatic right to an insurance policy, the existing statute, ORS 41.622, has a couple of warts that should be ironed out.

RULE 39 F.

I think we straightened out the question raised about witnesses changing testimony in depositions. Since reporters and transcribers err, the witness has, and should have, the right to examine a transcript or recording and say, "I didn't say that." The language used in the rule differs from the Oregon statute, but the net effect is exactly the same.

RULE 39 G.(2)

The Council considered the possibility of eliminating filing of depositions but felt that for security with a non-stenographic deposition, or to provide a basis for summary judgment in any case, there

had to be some filing possibility. Note, the Council has mitigated the problem by providing for filing only when a party requests it.

RULE 39 G.(3)

There are situations where having the original of an exhibit is vitally important and one party does not trust the other to keep it. Donnelly's suggestion that the producing party always keep the original does not cover this.

On the question of fees, the matter is one which should be covered outside the rules.

RULE 43 B.

The telephone request for a change which was reported was to modify the second full sentence on Page 129 as follows:

> "A defendant shall not be required to provide or allow inspection or other related acts before the expiration of 45 days after summons, and in any case before 30 days from the date of the request, unless a court specifies a shorter time."

I assume the intent was to require that the notice specify 30 days or more to respond. The suggested approach would, however, apply this only to defendants. Any such limitation should apply to all parties. A new sentence could be added after the first full sentence on Page 129 as follows:

> "The time specified in the request shall be not less than 30 days after the date of service of the request, unless the court specifies a shorter time."

I did not include this as a change because it is too rigid. In most cases the request would be reasonable, usually at a time agreeable to the parties. In the unusual case, a cover order under 36 C. is easily available as the issue is fairly simple.

March 15, 1979

To the Members of: Senate Judiciary Committee
House Judiciary Committee

My name is John H. Donnely and I am here today on behalf of the Oregon Association for Court Administration. Occupationally, I am Administrative Services Coordinator for the Circuit Court, Fourth Judicial District (Multnomah County).

My testimony today will be confined to Rule 54, 55 and 64. The focus of the testimony is upon the accrual of a public liability due to specific ministerial duties required of the clerk-of-the-court by these rules. Testimony concerning Rule 54 is directed at the issue of caseflow management, which is a public policy issue.

Our Association hopes that you will give this testimony your careful attention.

Respectfully submitted,

John H. Donnelly
Legislation Committee
Oregon Association for Court Administration

OREGON ASSOCIATION FOR COURT ADMINISTRATION

Rule 54:

While Rules 52 and 54 specifically address the issue of trial delay, the provisions of Rule 54 B.(3) offer no enhancement to the current language of ORS 18.260. Currently, courts must wait 12 months from the last "activity" on a case before court-generated dismissal can occur. What most do not understand is the amount of labor trial courts must expend in order to "track" active caseloads in order to identify this "deadwood", and eliminate it. Unfortunately, such cases are more prevalent than is supposed.

"Deadwood" is a major contributor to court backlogs. Large trial courts such as Multnomah County must develop and implement systems such as Rule 4.0 (copy attached) to deal with case backlogging. The annual cost of this system exceeds $35,000 in labor and materials.

During the last Legislative session, this Committee was openly critical of court statistics reflecting backlog volume (cases over twelve months, eighteen months, etc.). However, unless courts have more exacting legislation and environments to attack backlogging, little can be done to move cases through the judicial system faster, and thereby contribute effectively toward reducing or stabilizing judicial system costs.

Several nationwide studies dealing with trial delay "causes and cures" focus on one universal "cure": courts must have the flexibility, either by rule or mandate, to actively "move" their caseloads as an integral part of an overall caseload management system. ORS 18.260 and Rule 54 B.(3) seriously inhibit that possibility in Oregon.

SB89, prepared by the Oregon Association for Court Administration, attempts to enhance court-generated dismissal situations by amended ORS 18.260 and 46.270 (Section 13 and 23; copy attached). Sections 13 and 23 would allow cirucit and district courts to dismiss cases in which no action has occurred during the previous 6 months. At that point, notice is provided to the parties that an Order of Dismissal shall become effective on the thirty-first day following the mailing date unless good cause is provided to set the order aside. The intent of reducing the time frame from twelve to six months was twofold: First, to eliminate from the pending backlog of cases those cases in which no answer has been filed and, generally, cases which are sitting idle "for want of prosecution". Secondly, to provide the Court with a valuable management tool, an inventory control mechanism to deal with cases in a timely manner. The net effect of these

ammendments would be to allow courts to "track" and purge backlogs on a monthly basis instead of only once annually.

This Committee should also consider that the deligent movement of cases through the judicial system is within the context of the public interest, and is, therefore, a question of public policy, and not solely one for private litigants to decide and control. OACA, therefore, recommends that the language contained in Section 13 and 23 of SB89 be substituted for the proposed language of Rule 54 B.(3).

OREGON ASSOCIATION FOR COURT ADMINISTRATION

Rule 55:

Section A contains an inconsistent statement concerning form and style of pleadings which the Joint Committee has already discussed under Rules 9 and 16, and for which the Association has already submitted oral and written testimony. Language concerning form and style of pleadings should be consistent throughout the Rules, and we recommend the Joint Committee take the necessary action to do so.

Section C (2)refers specifically to blank issuance of subpoena by the clerk. Section C (1) refers to issuance by the clerk. Yet, the two are inconsistent. Section C (1) authorizes the clerk to perform legal services on behalf of litigants, which compromises the clerk's impartiality and creates another public liability issue. Issuance of subpoena by by the clerk should only be in blank. Thus, we recommend that these two sections be amended as follows:

A. Section C (1):

" . . . (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; . . ."

B. Section C (2):

"Issuance by the clerk. Upon request . . ."

OREGON ASSOCIATION FOR COURT ADMINISTRATION

Rule 63:

ORS 18.030 and 18.140 currently require the clerk to mail both a copy of all judgments, orders, and decrees to every party not in default for failure to appear that are entered in the judgment docket and notice of the date of entry. Section E of this rule deals only with judgments notwithstanding the verdict (ORS 18.140), and maintains the current statutory action by the clerk.

Sections 11 and 12 of SB89 seek to amend these provisions, by placing such responsibility upon the parties to that litigation, and not upon the clerk. That rationale of SB89 is twofold:

a. Why should the clerk provide such services (at no cost) to private litigants? Why should the clerk, by statute, be given a responsibility which is the responsibility of the litigants and their representatives? Even more important, why the statutory provision of allowing the public to inherit a liability because of convenience to private parties in dispute? Both statutes create a public liability of serious magnitude simply because of a ministerial act which is purely of convenience to the litigants and is only a public cost and liability to citizens.

b. The costs which the public must assume under this current provision (and the two ORS citations shown above) are serious enough. Based upon the monthly average volume of judgments, orders and decrees entered in Multnomah County, their annual public costs of ORS 18.030 and 18.140 would exceed $20,000. Even at this cost for labor, materials, and postage the incurred public liability can be easily outmatched by a single judgment that is entered, but notice is not sent nor a copy mailed. Yet, they cannot meet this statutory requirement due to constraint budgeting requirements and the concomitant need to priortize mandated services in light of available dollars to expend.

Thus, the critical question for the Committee is one of fixing responsibility where it legitimately belongs. We of OACA believe that this responsibility is for litigants and their attorneys--not the clerk or the public. Therefore, we recommend that Rule 63.A be replaced with the language proposed in Section 12 of SB89.

days therefrom the clerk of the circuit court shall file with the clerk of the district court all of the original papers relating to the case. Thereupon the circuit court shall proceed no further with the cause. The case shall be considered transferred to the district court which shall then have jurisdiction to try and determine the cause.

(2) The responding party shall have 10 days after entry of the order transferring the case to district court within which to plead further. If the clerk of the circuit court fails to transfer the case within the time specified, a judge of the circuit court may order him to do so within a specified time.

Section 10. ORS 14.140 is amended to read:

14.140. The cost of a change of venue on the ground set forth in paragraph (a) of subsection (1) of ORS 14.110 shall be paid by the plaintiff[*, and failure to pay such cost within 20 days after entry of the order for change of venue is ground for dismissal of the action or suit*]. The cost of a change of venue on any other grounds shall be paid by the applicant. The cost of a change of venue on any ground shall not be taxed as a part of the costs of the case; and the clerk may require payment of such costs before the transcript and papers are transmitted.

Section 11. ORS 18.030 is amended to read:

18.030. All judgments shall be entered by the clerk [*in the journal*] **in the judgment docket.** All judgments shall specify clearly the judgment debtor, judgment creditor, the amount to be recovered, the relief granted or other determination of the action. [*The clerk shall, on the date judgment is entered, mail a copy of the judgment and notice of the date of entry of the judgment to each party who is not in default for failure to appear. The clerk also shall make a note in the docket of the mailing.*] **The attorney for the prevailing party shall, on the date the judgment is tendered to the court for filing, mail a copy of the tendered judgment to each party who is not in default for failure to appear.** In the entry of all judgments, [*except judgments by default for want of an answer,*] the clerk shall be subject to the direction of the court.

Section 12. ORS 18.140 is amended to read:

18.140. (1) When it appears from the pleadings that the court has not jurisdiction of the subject of the action or the person of the defendant, or that the facts stated in the pleadings of the plaintiff or defendant, as the case may be, do not constitute a cause of action or defense thereto, or when a motion for a directed verdict which should have been granted has been refused and a verdict is rendered against the applicant, the court may, on motion, render a judgment notwithstanding the verdict, or set aside any judgment which may have been entered and render another judgment, as the case may require.

(2) In any case where, in the opinion of the court, a motion for a directed verdict ought to be granted, it may nevertheless, at the request of the adverse party, submit the case to the jury with leave to the moving party to move for judgment in his favor if the verdict is otherwise than as would have been directed.

(3) A motion in the alternative for a new trial may be joined with a motion for judgment notwithstanding the verdict, and unless so joined shall, in the event that a motion for judgment notwithstanding the verdict is filed, be deemed waived. When both motions are filed, the motion for

judgment notwithstanding the verdict shall have precedence over the motion for a new trial, and if granted the court shall, nevertheless, rule on the motion for a new trial and assign such reasons therefor as would apply had the motion for judgment notwithstanding the verdict been denied, and shall make and file an order in accordance with said ruling.

(4) Any motion or motions provided for in this section, together with the supporting affidavits and counter affidavits, if any, shall be filed, heard and determined as provided in ORS 17.615.

(5) The [*clerk*] **attorney for the party in whose favor an order is made pursuant to this section** shall, on the date [*an order made pursuant to this section*] **said order** is entered or on the date a motion is deemed denied pursuant to ORS 17.615, whichever is earlier, mail a copy of the order and notice of the date of entry of the order or denial of the motion to each party who is not in default for failure to appear. [*The clerk also shall make a note in the docket of the mailing.*]

Section 13. ORS 18.260 is amended to read:

18.260. [*Not less than 60 days prior to the first regular motion day in each calendar year*] **The clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for six months immediately prior to the mailing of such notice,** unless the court has sent an earlier notice on its own motion.[*, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice,*] **The notice shall state** that each such case will be dismissed by the court for want of prosecution **30 days from the date of mailing the notice,** unless on or before [*such first regular motion day*] **the expiration of the 30 days, written** application[*, either oral or written,*] is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause not shown, the court shall dismiss each such case. Nothing contained in this section shall prevent the dismissing at any time, for want of prosecution, of any suit, action or proceeding upon motion of any party thereto.

Section 14. ORS 18.320 is amended to read:

18.320. Immediately [*after*] **upon** the entry of judgment [*in any action the clerk shall docket the same*] in the judgment docket, [*noting thereon the day, hour and minute of such docketing.*] **the clerk shall note the date of such entry.** At any time thereafter, so long as the original judgment remains in force under ORS 18.360, and is unsatisfied in whole or in part, the plaintiff, or in case of his death, his representative, may file a certified transcript of the original docket **or a certified copy of the original docket entry** in the office of the [*county*] **clerk of the court** of any county in this state. [*Upon the filing of such transcript the clerk shall docket the same in the judgment docket of his office, noting thereon the day, hour and minute of such docketing.*] **Immediately upon filing, the clerk shall enter the transcript in the judgment docket of his office, noting the date of such entry.** A certified transcript of the new docket entry of a judgment renewed under ORS 18.360 may likewise be filed in another county.

Section 15. ORS 18.400 is amended to read:

18.400. (1) When any judgment is paid or satisfied, that fact may be noted upon the judgment docket of original entry over the signature of the officer, **or his duly appointed deputy,** having the

such mailing shall be made by certificate of the clerk.]

Section 20. ORS 44.320 is amended to read:

44.320. Every court, judge, clerk of a court, justice of the peace or notary public is authorized to take testimony in any action, suit or proceeding, as are other persons in particular cases authorized by statute. Every such court or officer is authorized to administer oaths and affirmations generally, **and to charge an appropriate fee therefor,** and every such other person in the particular case authorized.

SECTION 21. Section 22 of this Act is added to and made a part of ORS chapter 46.

SECTION 22. The applications, provisions and procedures for enforcement of judgments and decrees in the circuit court shall apply in the district court.

Section 23. ORS 46.270 is amended to read:

46.270. The clerk of every district court shall mail a notice to each of the attorneys of record in every civil action, suit or proceeding in their respective courts in which no proceedings have been had or papers filed for a period of [*more than one year*] **six months immediately prior to the mailing of such notice,** unless the court has sent an earlier notice on its own motion. The notice shall state that each such case will be dismissed by the court for want of prosecution [*60*] 30 days from the date of mailing the notice, unless, on or before the expiration of the [*60*] 30 days, written application,[*either oral or written, be*] is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause is not shown, the court shall dismiss each such case. Nothing contained in this section shall be construed to prevent the dismissing at any time, for want of prosecution, of any suit, action or proceeding upon motion of any party thereto.

Section 24. ORS 87.445 is amended to read:

87.445. An attorney, **provided that a proper notice of claim of lien as specified in ORS 87.450 to 87.470 has been filed with the clerk of the court,** has a lien upon actions, suits and proceedings [*after the commencement thereof*], and judgments, decrees, orders and awards entered therein in his client's favor and the proceeds thereof to the extent of his fees and compensation specially agreed upon with his client, or if there is no agreement, for the reasonable value of his services.

Section 25. ORS 87.450 is amended to read:

87.450. (1) When an attorney claims a lien under ORS 87.445, if the judgment or decree is for a sum of money only, the attorney must file a notice of claim of lien with the clerk of the court that issues the judgment or decree [*within three years after the judgment or decree is given*]. The clerk shall enter the notice in the records of the action or suit and shall also make a note of the filing of the notice in the judgment docket of the court.

(2) When an attorney files a notice of claim of lien under subsection (1) of this section, he shall send forthwith a copy of the notice to his client by registered or certified mail sent to him at his last-known address.

(3) A lien under ORS 87.445 on a judgment or decree for a sum of money only remains a lien on that judgment or decree for as long as the judgment or decree remains valid under ORS 18.360.

(4) For purposes of this section, a "judgment or decree for a sum of money only" does not

REDRAFTS SUGGESTED
AT MARCH 22, 1979, JOINT JUDICIARY
WORK SESSION

RULE 4

K.(3) [In any action involving paternity] In any proceeding for filiation or action for declaration of paternity, when the act of sexual intercourse which resulted in the birth of the child is alleged to have taken place in this state.

RULE 7

(7 D.(6) and 7 D.(6)(a) appear on Page 25 of printed rules as D.(5) and D.(a) -- renumbered because of addition of mail service in motor vehicle cases).

D.[(5)](6) [Service by publication or mailing to a post office address; other service by court order.] Court order for service; service by publication.

D.[(5)](6)(a) [Order for publication or mailing or other service.] Court order for service by other method. 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] specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: [by publication; or at the discretion of the court,] publication of summons; [by] mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or [by any other method] posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

D.[(5)](6) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C.(3) shall state: "This paper must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

CHANGES SUGGESTED TO OREGON RULES OF CIVIL PROCEDURE
SENATE AND HOUSE JUDICIARY COMMITTEE MEETING
MARCH 15, 1979

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

A. Voluntary dismissal; effect thereof.

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

A.(2) through C. unchanged.

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court

may make such order for the payment of [costs of] any unpaid judgment for costs and disbursements against plaintiff in the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

E. unchanged.

* * *

RULE 55

SUBPOENA

A. and B. unchanged.

C. Issuance.

C.(1) By whom issued. A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C., or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths

or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

C.(2) through H.(5) unchanged.

* * *

RULE 57

JURORS

A. through B. unchanged.

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.] The court may examine the prospective jurors to the extent it deems appropriate, and thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant.

D. through F. unchanged.

* * *

MEMORANDUM

TO: COUNCIL

FROM: Fred Merrill

RE: LEGISLATURE HEARINGS

DATE: March 19, 1979

The last public hearing was conducted on March 15, 1979. The committee plans to begin joint work sessions on Thursday, March 22nd.

I am enclosing a copy of the rest of the changed material, together with memos relating to other testimony. Also enclosed is a complete set of the written testimony which we presented.

The hearings generally went well. At this point, the plan seems to be to draft a Bill in work sessions, making some changes. Whether the changes will go beyond the material which we have submitted is not clear. By the April 7th meeting, I should have a better indication of the proposed legislation.

The State Bar Committee on Procedure and Practice have completed their review, and a copy of their report is also enclosed. We did not receive the trial procedure subcommittee's comments mentioned in the last paragraph. As soon as Bruce Smith and Stan Long return to the city next Monday, I will attempt to obtain that material and send it on to you.

Enclosures:

Changes suggested (dated 3/1/79, 3/8/79 and 3/15/79)
Public testimony (Summaries of Rules dated 2/15/79, 2/22/79, 3/1/79, 3/8/79, and 3/15/79)
Memos to Dennis Bromka and Jim McCandlish dated 3/9/79 and 3/19/79
Memos from Donald N. Atchison, John H. Donnelly, and Frank N. Pozzi
Letter from Judge Allen dated 3/5/79 and a copy of my letter dated 3/12/79
Report of State Bar Committee on Procedure and Practice

using a definition of basis of personal jurisdiction that said whatever is constitutional, and rejected it. Rule 4 maximizes bases for personal jurisdiction, but 4 A. provides some specific guidance for judges and attorneys, and 4 B. may influence constitutionality of specified bases because they are spelled out.

2. Other Issues

The fact pleading and interrogatories issues were carefully and exhaustively considered by the Council. Brunet suggests that Rule 19 could be interpreted to say no fact pleading is required in the answer. That most emphatically was not the Council's intent, and Rule 19 does not say that. The present statute requires that there be stated in the complaint facts constituting a cause of action and "a defense or counterclaim, in orderly and concise language, without repetition". ORS 16.290. The rules require that a complaint state ultimate facts constituting a claim for relief and state "in short and plain terms the party's defenses". Thus the requirement is actually the same -- a reference to facts in the complaint and a reference to stating defenses in the answer. Also note Rule 13 A., which describes all pleadings as written statements or "facts" constituting claims or "defenses".

C. DONNELLY'S SUGGESTIONS

Regarding Donnelly's suggested changes to conform to SB89 allowing a court to dismiss a case where there has been no action for six months, as opposed to 12 months, and requiring the parties, rather than the clerk, to serve a judgment notwithstanding the verdict, I don't

know what the Council's reaction would be. I will submit it to them at the April 7th meeting.

LEGISLATIVE WORK SESSIONS

Oregon Rules of Civil Procedure

RULE	SUBJECT	COMMENT
Rule 1 C.	Effective date.	Change submitted.
Rule 1 E.	Relationship to local rules.	Change submitted.
Rule 3	Define "filing".	Hall suggestion.
Rule 4 K.(3)	Filiation (slight word change).	Change submitted.
Rule 6	Limited appearance rule.	
Rule 7	Harris suggestions.	Harris draft (memo 2/23).
7 C.(3)(a)	Conform to change in 22 D.	Change submitted.
7 D.(4)	Service by mail - motor vehicle cases.	Change submitted.
7 C.(3)	"This paper" -- language clarification.	Hall suggestion.
7 D.(2)	Definition of "certified".	Hall suggestion.
Rule 9 B.	Leaving papers with court clerk	Hall suggestion.
Rule 12 B.	Language change re style and form of pleadings.	Hall suggestion. Memo 2/23/79.
Rule 13 B.	Conforming to change in 22 D.	Change submitted.
Rule 15 A.	Conforming to change in 22 D.	Change submitted.
Rule 16 A.	Conforming to Rule 9.	Hall suggestion. Memo 2/23/79.
Rule 17	Change "subscribe" to "sign".	Change submitted. Memo 2/23/79.
Rule 21 G.	Change waiver for capacity, real party in interest, and statute of limitations.	Change submitted.
Rule 22 C.	Reference to delay as reason to deny impleader.	Change submitted.

RULE	SUBJECT	COMMENT
Rule 22 D.	Joinder of persons to respond to counterclaim or cross-claim.	Change submitted.
Rule 28	Joinder of parties -- eliminate transaction requirement.	Change. Memo 3/1/79 meeting.
Rule 29	Possible elimination.	Committee staff.
Rule 31 B.	Assessing costs.	Hall suggestion.
Rule 34 D.	Showing death on record.	Change submitted.
Rule 36 B.(2)	Insurance policies.	Atchison suggestion. Memo 3/9/79.
Rule 36 B.(4)	Experts.	Atchison suggestion. Memo 3/9/79.
Rule 38 B.	Language change to clarify which court.	Change submitted.
Rule 39 F.	Correcting deposition.	Pozzi suggestion. Memo 3/9/79.
Rule 39 G.(2)	Filing depositions.	Pozzi suggestion. Memo 3/9/79.
Rule 39 G.(3)	Deposition exhibits.	Hall suggestion. Memo 3/9/79.
Rule 43 B.	30-day limit on production and inspection notice.	Bailey suggestion. Memo 3/9/79
Rule 44 A.	Physical examination -- employees.	Change submitted.

RULE	SUBJECT	COMMENT
Rule 44 E.	Hospital records.	Change submitted.
Rule 54 A.	Court discretion to allow third dismissal.	Change submitted.
Rule 54 B.(3)	Dismissal for failure to prosecute -- six months.	Hall suggestion. Memo 3/19/79.
Rule 54 B.(4)	Dismissal -- effect of failure to indicate prejudice.	Pozzi suggestion. Memo 3/19/79.
Rule 54 C.	Payment of costs -- prior dismissal.	Change submitted.
Rule 55 B.	Court order to protect witness -- subpoena duces tecum.	Pozzi suggestion. Memo 3/19/79.
Rule 55 C.(1)	Subpoena in blank.	Change submitted.
Rule 55 D.(1)	10-day limit -- service on law enforcement agency.	Pozzi suggestion. Memo 3/19/79.
Rule 57 C.	Questioning jury.	Change submitted.
Rule 57 D.(2)	Peremptory challenges -- court discretion to increase.	Pozzi suggestion. Memo 3/19/79.
Rule 59 B.	Written instructions -- court discretion.	Pozzi suggestion. Memo 3/19/79.
Rule 63 E.	Judgment notwithstanding verdict -- duty of clerk.	Hall suggestion. Memo 3/19/79.
Rule 64 B.(5)	Eliminate new trial for excessive damages.	Pozzi suggestion. Memo 3/19/79.

M E M O R A N D M

TO: JOINT SENATE AND HOUSE JUDICIARY COMMITTEES

FROM: FRED MERRILL

RE: REDRAFTS SUGGESTED AT MARCH 22, 1979, JOINT JUDICIARY WORK SESSION

DATE: March 28, 1979

A. CHANGES SUGGESTED FOR MATERIAL PREVIOUSLY SUBMITTED

RULE 4

K.(2) [In a filiation proceeding under ORS Chapter 109] In any proceeding to establish paternity under ORS Chapters 109, 110, or 419, or in any action for declaration of paternity, when the act [or acts] of sexual intercourse which resulted in the birth of the child is alleged to have taken place in this state [and the child resides in this state].

RULE 7

(7 D.(6) and 7 D.(6)(a) appear on Page 25 of printed rules as D.(5) and D.(a) -- renumbered because of addition of mail service in motor vehicle cases).

D.[(5)](6) [Service by publication or mailing to a post office address; other service by court order.] Court order for service; service by publication.

D.[(5)](6)(a) [Order for publication or mailing or other service.] Court order for service by other method. 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] specified in these rules or other rule or statute, the court, at its discretion, may order

service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: [by publication; or at the discretion of the court,] publication of summons; [by] mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or [by any other method] posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

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

B. UNRESOLVED QUESTION RAISED BY BOB HARRIS

After further consultation with Mr. Harris and Mr. Peterson, the following is a suggested revision of the provisions of Rule 7 relating to service upon corporations:

RULE 7

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership, or association[.] or by personal service upon any clerk on duty in the office of the registered agent.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found [and does not have an office] in the county where the action is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation, limited partnership, or association who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to [a registered agent, officer, director, general partner, or managing agent.] the last registered office of the corporation, limited partnership, or association, if any, as shown by the records on file in the office of the Corporation Commissioner or, if the corporation, limited partnership, or association is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation, limited partnership, or association, and, in any case to any address, the use of which the plaintiff knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

March 28, 1979

Honorable William M. Dale, Jr.
320 Multnomah County Courthouse
1021 S.W. 4th Avenue
Portland, OR 97204

Dear Judge Dale:

Your letter of March 20, 1979, relating to the impact of Vander Veer v. Toyota Motors, 282 Or 135 (1978), raises several problems of jury trial when issues are segregated for trial.

The Vander Veer case involved four actions for damages arising out of the same automobile accident. The court consolidated all four cases for trial on the liability issues only. The case was reversed because two alternate jurors were sent into the jury room and participated in the deliberations of the jury.

The problems raised are: (a) must the same jurors hear and agree on issues separately tried, and (b) are any special provisions necessary for handling alternate jurors when issues are tried separately. Both questions arise under Rule 53 B. Although Vander Veer involved a consolidation of our cases, the problems arose because the court had segregated the issues of liability and damages in each of the four cases. The questions are not addressed either under our rules or the ORS sections.

A. Constitutional questions. The first problem is whether we could promulgate any rules. Are there any constitutional limitations on use of separate juries in segregated trials or controlling alternate jurors in that situation? In the Vander Veer case the trial court and parties apparently assumed that Article 7, section 5, of the Oregon Constitution required at least nine jurors who voted for liability in the first trial to agree on damages in the three later trials:

> "If the jury in this case were to reach a nine-person plurality verdict in favor of the plaintiffs, the parties believed that four separate trials, all to the

> same jury, would be required on the damages issues and the same nine jurors would have to agree on damages." 282 Or at 139

The supreme court did not actually hold this. The defendants had raised the issue but the court said the statutory language on alternate juries clearly forbids sending alternate jurors into the jury room:

> "However, this argument is based on the assumption that the same nine jurors must agree on all the elements of a case, even in a bifurcated case, and that if one of the nine is unable to serve in the later trial, the judge must grant a mistrial.[3]
>
> Even if the efficiency argument were logically valid, it would not follow that the trial court's action was proper." 282 Or at 142

In the footnote the court pointed out that the federal practice allows different juries to decide the various issues in separate trials. The federal rules require 12 jurors to concur in a verdict; if the results of two trials of segregated issues were treated as one verdict, separate juries could not be used.

The point is the concurrence rule, be it unanimity or something less, only applies to the issues presented by one verdict. Article VII, section 5(7) (and identical language in ORS 17.355, now ORCP 59 G.(2)), say:

> "In civil cases three-fourths of the jury may render a verdict." (Emphasis added)

The cases relied upon by the parties in Vander Veer (cited in fn 2 at p 139 of the opinion) do not deal with segregated trials but with one trial involving a multiple issue verdict. There is no case, in Oregon or apparently in any other jurisdiction, saying this rule could apply to separate trials. A verdict is the result of a trial. Snyder v. Portland L & P Co., 107 Or 673, 680 (1923). If you have separate trials, these would be separate verdicts and the concurrence rule would not apply.

The next question is whether the general jury trial guaranty of Article VII, section 3, of the Oregon Constitution requires that at least the same jury hear the segregated trials, whether or not the same nine jurors agree. The provision guarantees a jury trial as it existed when the constitution was adopted. At that time, separate issues would generally not be segregated for trial, and thus the same jurors decided

all issues. Does this mean that a procedure allowing different juries diminishes the right to jury trial?

The question has never come up directly in Oregon. The Vander Veer opinion only suggests the federal practice and constitution permit this. Actually, the question has not been absolutely settled by the United States Supreme Court. A number of lower federal courts have so held, relying upon a Supreme Court case which held it was proper to grant a new trial for only part of the issues presented by a case:

> "Is there a violation of the constitutional provision if issues are separately submitted to separate juries? The answer rather clearly must be in the negative. When a single jury has passed on all issues, but error has tainted its verdict on one of the issues, it is now quite settled that there may be a new trial before a second jury limited to that single issue, provided that the error requiring a new trial has not affected the determination of any other issue. In this instance the result is that different juries ultimately resolve the issues. An argument that two juries may be used if one jury has first decided all the issues -- though its verdict as to one of them has passed out of the case -- but that two juries may not be used in the first instance seems untenable. The great guaranty of the Seventh Amendment will hardly support such a gossamer distinction." Wright and Miller, Federal Practice and Procedure, § 2391, p 302-303.

The same reasoning by analogy could be used in Oregon. In Maxwell v. Portland Terminal R. R. Co., 253 Or 573 (1969), although the constitutional aspect is not clearly discussed, the court does say that there may be cases where a new trial could be ordered on only part of the issues.

In the Maxwell case the court said the partial new trial could not be ordered because the liability and damages issues were so intertwined that they could not be considered separately. The same qualification would apply to using different juries for separate parts of the same case.

> "There is one limitation that must not be overlooked. In the case stating that a partial new trial may under some circumstances be used, the Supreme Court held that this practice cannot be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. Similarly separate trial of a particular issue cannot

> be ordered in the first instance where the issue is so interwoven with the other issues that it cannot be submitted to the jury independently of the others without confusion and uncertainty which would amount to a denial of a fair trial. But this issue goes beyond the question of whether two juries are to be used. In the circumstances described separate trial, even to the same jury, would be erroneous." Wright and Miller, supra at p 303-304.

That qualification actually is the same standard that ought to be applied in deciding whether to segregate issues at all. State ex rel. Perry v. Sawyer, 262 Or 610 (1972). (Credibility of plaintiff on liability issue related to damage claim for emotional injury). In other words, if the segregated issues are so intertwined that it would be unfair to have separate juries consider them, there never should be any separate trial. There are cases, even damage and liability issues in personal injury cases, where this is not true. The court specifically held Vander Veer was one (p 144-145). If the issues are properly segregated, separate juries should be proper.

Finally, if we wished to do anything relating to alternate jurors in segregated trials using the same jury, are there any constitutional problems? The answer is probably not. The alternate juror procedure in a single case has never been questioned. Even sending the alternates to deliberate would not seem to raise constitutional problems. The constitution does not specify a number of jurors. The statutes provide for six-person juries in district court. The Vander Veer result is based purely on statutory language -- not constitutional grounds.

B. Possible amendments. Assuming that neither the concurrence requirement or the general jury trial guaranty of the Oregon Constitution prevents separate juries in segretated trials of the issues in one case, a specific provision to this effect seems desirable. Actually, there is nothing in ORS or our rules that would prevent separate juries, but it is clear from the Vander Veer case that they might not be used in desirable situations. The federal rules do not specifically include this provision. Most state rules do not specifically cover the question. Since the issue arises in separate trials, it logically should be added at the end of ORCP 53 B. as follows:

> If a separate trial is proper under this rule, the court may at its discretion order that the separate trials shall be to the same jury or separate juries.

Rules 23 and 28 have separate provisions for separate trials of joined claims, cross-claims, etc., but Rule 53 also applies.

There is an argument that separate juries, while constitutionally permissible, might not be desirable. Many authors in the area suggest that in the ordinary case involving split damages and liability issues, even though the issues are separate and could be tried separately, it is still better to use the same jury. The familarity from one part of the case is useful and saves time in the second trial. Also, since the question of interrelationship between issues may be difficult, it is always safer to use the same jury. The amendment would not require a separate jury. I assume a judge would use the same jury, if possible, but if not possible would be able to use another jury.

We also could modify the alternate jury provisions to provide another way of dealing with the problem. The Vander Veer opinion is not clear that the error was in not following ORS 17.190 (Rule 57 F.) and discharging the alternate jurors when the jury retired. It is not absolutely clear why this is prejudicial error. The court cites ORS 17.305 (Rule 59 C. (5)), prohibitory contact with the jurors. The problem is that three nonjurors participated in deliberation and may have influenced the outcome. It seems reasonable that alternates should not deliberate or vote. But this does not mean that they ought to be discharged. In a case like Vander Veer they could be asked to stand by in case a regular juror was not available for trial on later issues. The judge might feel, even though not required, a jury consisting of 11 original jurors, plus one alternate who sat through the first trial, was preferable to 12 new people. We could amend 57 F. as follows:

> "An alternate juror who does not replace a regular juror shall be discharged as the jury retires to consider its verdict unless the court has ordered separate trials under 53 B. If the court has ordered separate trials under 53 B., the alternate jurors shall not retire for deliberation or participate in the verdict, but may be directed to replace a regular juror in any subsequent separate trial ordered under Rule 53 B. or may be directed to serve as an alternate juror in such trial."

Note this change assumes that the jury in the second trial would not go through voir dire and challenges. This would seem to be permissible as the challenge is available during the initial trial but seems a little inconsistent with the idea of separate trials. It would certainly provide another reason for using the same jury in that a new jury would require time to impanel. We might need some change in Rule 57 to specifically say this. For one thing, the attorneys should be aware of it at the time of voir dire and challenges at the initial trial.

Finally, although the concurrence rule is not controlling in separate trials, it does not appear in the rules either. Perhaps we could use the following language taken from one of the cases as an addition to 59 G.(2):

> "The minimum number of jurors necessary for a verdict must be the same jurors voting similarly on each separate issue submitted to the jury."

The language needs to be clarified, but the rule is hard to describe.

These changes are sufficiently difficult that they should be considered by the Council during the next biennium and run by the Bar, rather than suggested to the legislature for this session. I also would like to do some research on how other jurisdictions deal with the problem. If you think something needs to be done now, let me know.

Very truly yours,

Fredric R. Merrill
Executive Director

FRM:gh

cc: Donald W. McEwen
Laird Kirkpatrick

MEMORANDUM

TO: COUNCIL

FROM: Fred Merrill

DATE: April 2, 1979

Enclosed is the missing portion of the Bar Practice and Procedure Committee Report. I understand a member of the Committee will be present at our April 7 meeting.

COMMENTS ON SUGGESTIONS

Rule 7. Covered by additional material submitted to judiciary committees.

Rule 21 F. This suggestion makes sense. The following language could be added to 21 F.

> F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.(2) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

Rule 33 B. This clarification makes sense. The suggested language could be added to 33 B.

Rule 44. The committee members suggest that the provision of 44.620 requiring plaintiff's attorneys to furnish doctors reports creates

problems. Apparently, they do not like to get written reports as they tend to be more negative than actual testimony and the doctors resist a deposition. However, the only change we made was in 44 D., and that only clarifies the requirement that if the plaintiff's attorneys did not have a report, they had to request one from the doctor. ORS 44.620(2) seems to imply that but is not clear (apparently, opinions differ in the trial courts).

ORS 44.620 was a 1973 Bar Bill. It was the result of Neilsen v. Bryson, 257 Or 179 (1970), which held that under the Oregon Statutes, a plaintiff did not waive physician-patient privilege by filing a personal injury case. The Bill also amended the physician-patient privilege, ORS 44.040, to make the privilege subject to this rule. The purpose behind the Bill was stated by the Bar Committee as follows:

> "Under existing case law the medical reports of a bodily injury claimant's physician are not subject to discovery. However, the report of the independent examining physician is subject to discovery. This creates a disparity in the pretrial exchange of information. It delays settlements. In many cases, it causes delay because of the length of time it takes to schedule an independent medical examination. It causes added expense. In many cases, an independent medical examination would not be necessary if defense counsel were supplied with detailed reports by plaintiff's treating doctors.
>
> The purpose of this bill is to require plaintiff to produce copies of the medical reports of his treating physician."

Since the purpose appears to be to avoid the privilege problem, it would appear the original intent was to make the physician's knowledge accessible, whether or not a written report was ordered.

Rule 55. The first point raised relating to ORS 44.150 is a misunderstanding. That statute was not put in the rule and not superseded. It remains as a statute. The Council probably does not have authority to promulgate a rule authorizing a sheriff to break into a house to serve a subpoena.

On the second point, the following sentence from ORS 44.110 was not included in our rules. It generally is not necessary but if there is any question, it does no harm and could be added to ORCP 55 A.

> "It also requires that he remain till the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or his attorney, the payment of his legal fees for the next following day and if not then paid, he is not obliged to remain longer in attendance."

On the last point, ORS 44.180, 44.210, and 44.220 really are unnecessary. ORS 44.180 states an obvious power of the court, and 44.210 and 44.220 would be covered by ORCP 55 G. (formerly 44.190) under the civil contempt power which is the standard way of enforcing a subpoena.

Rule 57. This rule has been debated before the legislative committee. The only change in the rule is to give the court some discretion to take care of the situation when parties on the same side are so antagonistic they will not agree on challenges. This still seems reasonable.

Rule 58. The argument here is based on a misreading of the statute and the rule. Rule 58 B.(5) limits the court's inherent authority to restrict argument, not the ability to argue more than two hours.

Rule 59. Using the same mode of instruction for original and supplementary instructions makes sense and most courts would. Why make it a rigid rule?

Rule 64. The last sentence of ORS 17.630 is being prepared as a new section for ORS Chapter 19 and will be presented to the judiciary committees for action.

The question relating to new trials is covered by the letter to Judge Allen previously furnished to the Council. The rules do not diminish certainty of judgments in divorce cases and, in fact, increase it through specific time limits on motion and ruling.

Enclosures:

Trial Committee's Comments on Rules 55, 57, 58, 59, and 64

Legislative Changes as of March 29, 1979 (pages numbered 1 through 20)

Rule 55 Subpoena

Rule 55 appears, to a great extent, to be a recodification of Chapter 44 ORS, with certain exceptions.

ORS 44.150, providing for service of a subpoena on a concealed witness, was omitted from these proposed rules. Although this provision has rarely been used, there is no other provision which would cover this situation. The omission should be reviewed by the committee.

Rule 55(A), which defines a subpoena, omits the portion of ORS 44.110 that requires a witness to remain until the testimony is closed, unless sooner discharged, but at the end of ~~seven~~ each days' attendance the witness may demand of the party, or his attorneys, the payment of his legal fees for the next following day, and if not then paid, he is not obliged to remain longer in attendance. This omitted language may be necessary to cover certain situations involving multiple depositions where some of the depositions must be carried over to the following day.

Rule 55(G) does not take in ORS 44.180, ORS 44.210, and ORS 44.220. These statutes should not be eliminated as being unnecessary. They are the only statutes that provide for enforcement of the provisions for subpoenaing witnesses.

RESPONSE TO
TRIAL PRACTICE
SUBCOMMITTEE REPORT

Rule 55

Subpoena

ORS 44.150, providing for service of a subpoena on a concealed witness, was not superseded by the rules. ~~It remains as a statute.~~ An early Council comment noted: "This appears to [be] more than a procedural rule and for safety's sake should be retained as a statute."

The third sentence of ORS 44.110 was eliminated by the Council as "unnecessary". It reads:

> . It also requires that he remain till the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or his attorney, the payment of his legal fees for the next following day and if not then paid, he is not obliged to remain longer in attendance.

As the subcommittee report notes, there might be situations where parties would wish to hold a witness over from one day until the next. There is some difference of opinion as to whether a subpoena

creates a continuing obligation to attend, or whether the duty is limited to the day named in the subpoena. United States v. Snyder, 413 F.2d 288, 289 (9th Cir 1969) (continuing obligation: construing Federal Rule of Criminal Procedure 17); O'Brien v. Walker, 7 Ill Dec 372, 364 NE2d 533, (1977) (no continuing obligation); In re Rayland, 343 A2d 558, 559 (DC App 1975) (continuing obligation); Brady v. State 47 SE 535 (1904) (obligation to attend from term to term). Some states like Oregon, have a provision like the sentence quoted supra. See 3A ARK STAT ANN § 28-509 (1962); CAL CIVIL PRO CODE § 2064 (1955). I can find no case law interpreting such a section to impose a continuing obligation to attend. Indeed, in In re Grand Jury Subpoenas, 363 Fed 651 (La 1978) a specifically found a continuing obligation to attend, even in the absence of such "until discharged" language.

cert den. 396 US 907, 90 SCt 223

538-9

cert denied

Suppose Party A notices a deposition and subpoenas witness W. The deposition begins on Day 1, but cannot be completed by a reasonable hour. Can W be compelled to attend on day 2? Or, suppose W1 and W2 are noticed and subpoenaed to

be deposed. W1 is deposed on Day1 and the attorneys do not get to W2. Can he be compelled to return on Day2? There is at least some doubt as the rule is drafted now. Perhaps a sentence should be added to the end of Rule 55 A reading:

> "A subpeona creates a continuing obligation to attend until discharged."

That language would seem to be broad enough to include discharge by the parties deposing the witness, or by court order under Rule 36 C.

Rule 55 ~~[redacted]~~ supersceded ORS 44.180, 44.210 and 44.220. The subcommittee claims these are vital for the enforcement of subpeonas. ORS 44.180 provides for compelling a person present not on subpeona to testify and so has nothing to do with enforcement. I would think that a court would have inherent power to order a person appearing in court to testify. In a deposition situation the parties would have to subpeona the person

if he would not voluntarily be deposed. Presumably if he were present he would be willing to testify. But would that always be true? ORS 44.210 and 44.220 provide for a form of arrest to compel testimony. This ~~Possibly~~ ~~would~~ be accomplished on a citation for contempt under Rule 46 C, but at greater cost and delay. While body attachments appear to be infrequently used in civil cases, the statutes permitting them have been assumed to be ~~constitutional~~ permissible ~~allowed~~ in some courts. Allison v. County of Ventura, 68 Cal App 3d 684, 137 Cal Rptr 542 (1977). Ieieffer v. Miller, 560 SW2d 431 (Tex Civ App 1977). I can find no case holding such an attachment unconstitutional, though writ refnre they are strictly construed.

Rule 57 Jurors

Rule 57(D)(2), with respect to peremptory challenges, states that each party shall be entitled to three peremptory challenges and no more. (Emphasis added.) Thereafter, the last sentence of the rule allows the court, in its discretion and in the interest of justice, to give any of the parties, single or multiple, additional peremptory challenges, and to permit them to be exercised separately or jointly.

The present statute (ORS 17.155) is specific in relation to cases where there are two or more parties, plaintiff or defendant. It states that they must join in the challenge, or the challenge cannot be taken. It further states that each party shall be entitled to three peremptory challenges and no more.

The proposed rule is vague, as well as being contradictory. As written, the proposed rule could give a party a great advantage if the trial court allowed additional peremptory challenges and permitted them to be exercised separately or jointly. Rule 57(D)(2) should be reviewed by the committee.

Rule 57

Jurors

Whether the additional peremptory challenges are allowed is a policy issue which the Council has already decided. The subcommittee offers no new considerations. It simply restates the old law and says it is better. I do not agree that the rule as drafted is "vague, as well as being contradictory."

Rule 58 Trial Procedure

Rule 58(B)(5), which was taken from ORS 17.210, absolutely limits final argument to no more than two hours on either side. In complex cases two hours may be insufficient. ORS 17.210(4) allowed the trial court discretion to extend such time beyond two hours. The discretionary power of the court to allow such an extension should be added to this rule. This very important right should not be taken away by omission, and this should be reviewed by the committee.

Rule 5B

Trial Procedure

The subcommittee is simply wrong in its reading of Rule 5B and ORS 17.210 Although Rule 5B B.(5) does delete the last clause from ORS 17.210 ("and the court may extend such time beyond two hours") there is no change in the rule.

The only conceivable misconstruction which could be made is that once the judge sets a time limit for a party's final argument, it could not extend it when the attorney came up short. That would require a deliberate misreading of Rule 5B B.(5) which is only a limitation on the court's power, and not a grant. Perhaps a clarifying comment is in order, however.

Rule 59 Instructions to Jury and Deliberation

Rule 59(D) concerning the subject of further instructions to the jury states that the court is given certain further instructions "either orally, or in writing." It would appear that the information should be given by the court orally, if the instructions were given orally; or in writing, if written instructions had been submitted to the jury.

Rule 59

Instructions to Jury and Deliberation

The subcommittee's suggestion is sensible but hardly seems necessary.

Rule 64 New Trials

The Council's amended comment is self-explanatory, and the language of this Rule is very similar to ORS 17.605 through 17.630. It should be noted that although the amended comment states that the last sentence of ORS 17.630 "*** is not included and will remain as a statute as it relates to appellate procedure, ***" ORS 17.630 is one of the statutes which is stated to be "superseded" (p. 201). This minor technicality should be called to the attention of the legislature.

This Committee is greatly concerned with Rule 64C which allows a new trial to be granted in a nonjury action on the same grounds as in a jury action. It is feared that in many marriage dissolution actions the aggrieved party will insist upon filing such a new trial motion, thus postponing and delaying the finality of the proceedings. This Committee recommends that Rule 64C be amended to be not applicable to proceedings under Chapter 107 ORS.

Rule 64

NEW TRIALS

The sub committee is correct with regard to the last sentence of ORS 17.630 relating to appellate procedure. The omnibus bill will have to reflect the fact that this section is only partially superseded.

The subcommittee is wrong in its assessment of the law regarding new trials in equity cases. The Supreme Court has not said that the grounds listed in ORS 17.665 & 17.630 specifically apply, but has left the trial courts free to overturn their verdicts on any ground. There is a policy issue there as to whether the procedure is appropriate for divorce cases. Excluding them from ~~state~~ Rule 64C is not the answer since the common law was less restrictive. The answer, should the Council choose to follow the sub committee's recommendation, is to amend Rule 64C to read:

"* * * Proved that ~~no~~ a new

trial may not be granted in a civil action for dissolution of a marriage or for the custody of a child."

I have referred to a "civil action for dissolution of a marriage" instead of ORS ch. 107 which includes a number of other matters. If the policy is ~~to~~ in favor of excluding dissolution, child custody cases should probably be excluded as well.

LEGISLATIVE CHANGES AS OF MARCH 29, 1979

Rule 1

C. Application. These rules, and amendments thereto, shall apply to all actions pending at the time of or filed after their effective date[.], except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

D. "Rule" defined and local rules. References to "these rules" shall include Oregon Rules of Civil Procedure numbered 1 through 64. General references to "rule" or "rules" shall mean only rule or rules of pleading, practice, and procedure established by ORS 1.745, or promulgated under ORS 1.735, 2.130, and 305.425, unless otherwise defined or limited. Except for the Oregon tax court, rules do not preclude a court in which they apply from regulating pleading, practice, and procedure in any manner not inconsistent with these rules.

[D.]E. 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).

Rule 4

K.(3) [In a filiation proceeding under ORS Chapter 109] In any proceeding to establish paternity under ORS Chapters 109, 110, or 419, or any action for declaration of paternity where the primary purpose of the action is to establish responsibility for child support, when the act [or acts] of sexual intercourse which resulted in the birth of the child is alleged to have taken place in this state [and the child resides in this state].

7 C.(3) Notice to party served.

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

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

C.(3)(b) Service on maker of contract for counterclaim. A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

C.(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion"

or "reply." [This paper] The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

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

D.(2) Service methods.

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

D.(2)(b) Substituted service. Substituted service may be made by delivering a [certified] true copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff [immediately] , as soon as reasonably possible, shall cause to be mailed a [certified] true copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed by these rules, substituted service shall be complete upon such mailing.

D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a [certified] true copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff [immediately], as soon as reasonably possible, shall cause to be mailed a [certified] true copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which office

service was made. For the purpose of computing any period of time prescribed or allowed by these rules, office service shall be complete upon such mailing.

D.(2)d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a [certified] true copy of the summons and a [certified] true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time allowed by these rules, service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership, or association[.] or by personal service upon any clerk on duty in the office of the registered agent.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found [and does not have an office] in the county where the action is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation, limited partnership, or association who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to [a registered agent, officer, director, general partner, or managing agent.] the last registered office of the corporation, limited partnership, or association, if any, as shown by the records on file in the office of the Corporation Commissioner or, if the corporation, limited partnership, or association is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation, limited partnership, or association, and, in any case to any address, the use of which the plaintiff knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

D.(4) Particular actions involving motor vehicles.

D.(4)(a) Actions arising out of use of roads. highways, and streets -- service by mail. In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, may be served with summons by mail except a defendant which is a foreign corporation maintaining an attorney in fact within this state. Service by mail shall be made by mailing to: (i) the address given by the defendant at the time of the accident or collision that is the subject of the action, and (ii) to the most recent address furnished by the defendant to the administrator of the Motor Vehicles Division, and (iii) to any other address of the defendant known to the plaintiff, which might result in actual notice.

D.(4)(b) Notification of change of address. Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highway, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the administrator of the Motor Vehicles Division of any change of such defendant's address within three years of such accident or collision.

D.[(4)](5) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that county in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

(7 D.(6) and 7 D.(6)(a) appear on Page 25 of printed rules as D.(5) and D.(a) -- renumbered because of addition of mail service in motor vehicle cases).

D.[(5)](6) [Service by publication or mailing to a post office address; other service by court order.] Court order for service; service by publication.

D.[(5)](6)(a) [Order for publication or mailing or other service.] Court order for service by other method. 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] specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: [by publication; or at the discretion of the court,] publication of summons; [by] mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or [by any other method] posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

D.[(5)](6)(b) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C.(3) shall state: "This paper must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D.[(5)](6)(c) Where published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D.[(5)](6)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

D.[(5)](6)(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 shall proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy, at the time of the commencement of the action, and served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D.[(5)](6)(f) [Defending after judgment]. Defending before or after judgment. The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but tht title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D.[(5)](6)(g) Completion of service. Service shall be complete at the date of the last publication.

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

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

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

Affidavit of Publication

State of Oregon)
: ss.
County of)

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

(here set forth dates of issues in which the same was published).

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

_____
Notary Public for Oregon

My commission expires
____ day of _____, 19 ___.

Rule 9

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

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party or by mailing it to such attorney's or party's last known address.[or, if no address is known, by leaving it with the clerk of the court.] Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at

such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. Service by mail is complete upon mailing.

C. Filing; proof of service. All papers required to be served upon a party by section A. of this rule shall be filed with the court within a reasonable time after service. Except as otherwise provided in Rules 7 and 8, proof of service of all papers required or permitted to be served may be by written acknowledgment of service, by affidavit of the person making service, or by certificate of an attorney. Such proof of service may be made upon the papers served or as a separate document attached to the papers.

D. Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse upon such pleading or paper the time of day, the day of the month, 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 for the party requesting filing, if there be one, are legibly endorsed on the front of the document, nor unless the contents thereof [can be read by a person of ordinary skill] are legible.

Rule 14

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

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

RULE 17

[SUBSCRIPTION] SIGNATURE OF PLEADINGS

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

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

RULE 21

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

Sections A. through F. unchanged.

G. Waiver or preservation of certain defenses.

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

G.(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment

thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted upon a showing by the party seeking to amend that such party did not know and reasonably could not have known of the existence of the defense or that other circumstances make denial of leave to amend unjust.

G.[(2)](3) A defense of failure to state ultimate facts constituting a claim, [a defense that the action has not been commenced within the time limited by statute,] a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B. or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B. in light of any evidence that may have been received.

G.[(3)](4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

MEMORANDUM

TO: FRED MERRILL, COUNCIL ON COURT PROCEDURES
FROM: BCH
DATE: 3 April 1979

SB 121; JUVENILE COURT RULES

SB 121, now pending before the Legislature, establishes a Juvenile Service Commission with a variety of duties, one of them being to "[r]ecommend rules of procedure for juvenile courts to the Council on Court Procedures." Lee Penny, the administrator of the task force proposing the bill, suggested that the Council consider whether it wants to exercise that authority or not. The bill has been approved by Senate Judiciary and is now in Ways and Means, where hearings will be held soon. A quick response by the Council would be helpful.

LEGISLATIVE CHANGES ADOPTED ON APRIL 5, 1979

Rule 7

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.]to respond to a counterclaim under Rule 22 D.(1) and (2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" 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] The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

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

C.(3)(b) Service [on maker of contract] for counterclaim. A summons to join a party to respond to a counterclaim pursuant to Rule 22 D.[(2)](1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

D.(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D.[(3)](2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You 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] The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

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

Rule 13

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

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

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

* * * * * *

Rule 15

A. Time for filing motions and pleadings. A motion or answer to the complaint or third party complaint [or] and the reply to a counterclaim or answer to a cross-claim of a party summoned under the provisions of Rule 22 D. shall be filed with the clerk by the time required by Rule 7 C.(2) to appear and defend. Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.

* * * * * *

Rule 22

[D. Joinder of Persons in contract actions.]

[D.(1) As used in this section of this rule:]

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

[D.(1)(b) "Contract" includes any instrument or document evidencing a debt.]

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

D. Joinder of additional parties.

D.(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29.

D.[(3)](2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.

D.[(4)](3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

Rule 29

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

Rule 34

D. Death of a party; surviving parties. In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be shown upon the record by a written statement of a party signed in conformance with Rule 17 and the action shall proceed in favor of or against the surviving parties.

Rule 36

B.(2) Insurance agreements.

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

B.(2)(a) A party, upon the request of an adverse party, shall disclose the existence and contents of any insurance agreement or policy under which a person transacting insurance may be

liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

B.(2)(b) The obligation to disclose under this section shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this section as provided in section C. of this rule.

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

B.(2)(d) As used in this section, "disclose" means to afford the adverse party an opportunity to inspect or copy the insurance agreement or policy.

[B.(4) Expert witnesses.

B.(4)(a) Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and address of any person the other party reasonably expects to call as an expert witness at trial and the subject matter upon which the expert is expected to testify. The statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial.

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, an agent, or a 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 the party's right to obtain discovery of another party's expert not covered under this rule, if otherwise authorized by law.]

Rule 38

B. Outside the state. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

Rule 39

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes [in form or substance] which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with

the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

Testimony of Professor William J. Knudsen, Jr.
Lewis and Clark Law School
Regarding Proposed Oregon Rules of Civil Procedure

One of my primary interests in the law is the subject of Civil Procedure, which I have been teaching for twelve years. Before that, as a practicing lawyer in Arizona, I served on the State Bar's Civil Procedure Committee for about four-five years. In addition, the Willamette Law Journal published an article of mine on the subject in 1972.

As all lawyers know, the history of civil procedure in the United States began with the importation of common law procedure from England by our colonies in the 17th century. This worked, for better or for worse, until David Dudley Field of New York drafted the first code in 1848. The codes swept the country and by the early twentieth century constituted the majority system in the United States. Nevertheless, the codes were not the ultimate answer, having numerous deficiencies, and in 1938 the United States Supreme Court, pursuant to Act of Congress, adopted rules, which, in turn, have become the form of procedure used by some 42 states today.

For those non-lawyers on this Committee let me briefly explain the formal differences between common law procedure, the codes and the rules. Common law procedure, like the creation of substantive law, was a product of case, or judge-made, law. It developed over a period of centuries in England and

until 1848 in this country, and 1834 in England itself, was the sole source of procedural law, except insofar as it may have been changed in minor respects by legislation. The Field Code, on the other hand, was exclusively a product of the legislature, as were all of its progeny across the United States. And the rules, now predominant in the nation, are a product of the courts, generally, if not always, the highest court in the jurisdiction. However, most, if not all of the states using rules, as well as the federal government, provide a veto power to the legislature over any particular rule not acceptable to it.

So, we find procedure in this country moving from the case by case approach, to the legislative approach, to the promulgation of rules by the highest court, subject to a veto in the legislature.

Why do we adherents of the rules support them with such enthusiasm. For the simple reason that the courts should be, and are, more expert in matters of procedure than are legislative bodies. See in this respect, 1 Barron & Holtzoff, Fed. Practice & Procedure, § 10, p. 81 (1960 rev. ed.). The courts deal in procedural matters on a daily basis and are able to judge the value of a particular rule in the most empirical way, to wit: how does it actually work. Moreover, rules can be changed more easily than the codes. In fact, over the 41 years the federal rules have been in existence there have been numerous changes, resulting from their evaluation on the firing line for the most part by trial lawyers and judges. But every change has been

subject to legislative approval - as it should be. Do not for one minute think that supporters of rules want to give exclusive power over their content to the courts. Nothing could be further from the truth. The respository of all legislative change (and rules are, of course, a form of legislation) should be in the people's duly constituted legislatures, whether in the states or the United States (except for the right of the people to employ the initiative and referendum in certain states).

One final point before I discuss some of the rules specifically. Up to now I have merely talked about forms of procedure - not content. There is absolutely no reason that a code state and a rules state cannot have identical procedures. In fact, California, a code state, prided itself some years ago on going farther than the Federal Rules of Civil Procedure in the area of discovery. So whether a state uses the code or rules to guide its courts in their procedures has nothing to do with their respective contents.

Specific Comments on Proposed Rules

Rule 4. Personal Jurisdiction.

This rule, running more than five and one-half pages, attempts to deal with every possible basis of personal jurisdiction, including presence of the defendant, domicile, status as a domestic corporation, engaging in activities within the state,

consent, etc. The sections of this rule are quite detailed and even though the Supreme Court of Oregon has held that the present long-arm statute, ORS 14.035, goes as far as the federal constitution will allow, it is clear that if a specific state jurisdictional statute does not cover a particular factual or legal situation the constitution alone will not serve to permit jurisdiction in such a case. For example, prior to the amendments dealing with divorce in 1975, a wife in Oregon could not obtain personal jurisdiction over a husband who had left the jurisdiction and established domicile elsewhere, despite the fact that the federal constitution would allow such jurisdiction. As a consequence, any jurisdictional statute or rule which fails to go as far as the federal constitution will permit unnecessarily restricts the citizens of that state in actions against non-residents.

Now the sponsors of Rule 4 will argue that this is taken care of by Section L, entitled "Other actions", which reads as follows:

> "L. Other actions. Notwithstanding a failure to satisfy the requirement of sections B. through K. of this rule, in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States."

Moreover, the comments on Rule 4 L. expressly state:

> "This section is designed to extend jurisdiction in any case not covered in the specific sections, within the limits of due process."

If Section L is interpreted in accordance with the terms of the comment, namely, that any actions of a defendant which do not fall within the specific limits of Sections B-K are covered by Section L then obviously sections B-K are unnecessary.

The longer and more detailed a statute or rule is the more opportunities there are for litigation over its meaning or meanings. Of course, Section L actually will relieve the courts of bothering with the specifics of sections B-K and, if I may venture a forecast, will become the primary source of jurisdiction along with Section A. In my opinion, a short and precise jurisdictional rule will better serve the people of Oregon, and therefore I suggest, as a substitute for all of Rule 4 as proposed, the following, which is the law of California:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of the United States."
>
> (C.C.P. § 410.10)

Rule 18. Claims for Relief.

In 1972 I criticized "fact" pleading in the aforementioned law review article. Suffice it to say that my opinion has in no way been changed. I would merely like to bring to your attention what possibly the foremost authority in code pleading, Dean Charles E. Clark of Yale Law School, said of fact pleading

more than 50 years ago! "Text writers * * * have pointed out the illusory nature of the distinction between facts, law and evidence, [and] the attempted distinction between [them], viewed as anything other than a convenient distinction of degree, seems philosophically and logically unsound." Clark, on Code Pleading 231 (2nd Ed., 1947).

Rule 42 (withdrawn).

I doubt that there is a single rules state in the union which does not provide for the use of written interrogatories in its discovery arsenal. Probably there is no state, other than Oregon, which does not employ this extremely functional tool. Generally, interrogatories are used as the initial discovery device in order to obtain information of two kinds:

(1) names of witnesses, the existence and location of documents, and the like, and

(2) routine information about the opposing party and the facts of the lawsuit.

Once this is acquired by a party, he/she is able to limit the questioning in the oral depositions to follow and to avoid wasting time by deposing those persons with little or no information.

It is my understanding that the Oregon Bar is hostile to interrogatories because they are presumed to be expensive. But Professor Claude H. Brown of the University of Arizona College of Law in Proposed Changes to Rule 33 Interrogatories and Rule 37 Sanctions, 11 Ariz. L. Rev. 443 (1969) said:

"Interrogatories under Rule 33 of the Federal Rules of Civil Procedure are the least expensive and most convenient of the discovery devices."

(at p. 443)

It is noteworthy that Professor Brown then resided in the state which was the first in the United States to adopt rules of procedure and thus, at that writing, had 30 years of experience to draw upon.

Testimony of Professor Edward J. Brunet,

Lewis and Clark Law School, Regarding

Proposed Oregon Rules of Civil Procedure

(March 15, 1979)

My name is Professor Edward J. Brunet. I am a Professor of Law at Lewis and Clark Law School, where I teach courses in Economic Regulation (antitrust, regulated industries) and Procedure (Civil Procedure). My primary research interest is evaluating the economic impact of various laws.

This prepared testimony will begin with general comments regarding the entire package of Proposed Oregon Rules of Civil Procedure [hereinafter "Proposal"] and follow with comments on individual rules.

I. General Considerations:

Likely Economic Impact of Proposed Oregon Rules of Civil Procedure

A. Attorneys Fees

In general, it is likely that adoption of the entire package will have a favorable economic impact on attorneys fees charged Oregon consumers of legal services; fees should be reduced under the Proposal.

This conclusion is reached after comparing prior Oregon legislation and caselaw relating to Civil Procedure to the Proposal. There is no doubt that the proposed rules are much more detailed than existing law. Consider, for example, the detailed treatment of personal jurisdiction provided by Proposed O.R.C.P. 4. The attorney practicing under this rule receives

much more guidance than he would under O.R.S. 14.035 and its the numerous interpretive case holdings. This guidance should mean less research time and correspondingly lower attorneys fees. Another good example of this effect is provided by the proposed discovery rules, 36-46. As a group, these rules provide counsel a clear set of rules to govern discovery. These rules replace a sketchy group of discovery statutes and cases that have forced attorneys to use the expensive "agreement" process to control discovery. Pursuant to the agreement process counsel have regularly stipulated to various forms of discovery not clearly governed by existing Oregon law. The agreement process requires continuous time consuming and potentially disruptive interaction with opposing counsel. The time spent in this custom regulation of discovery is, of course, billed to clients. With proposed rules 36-46, this "agreement" time should be greatly reduced. A third example of reduced attorneys fees is presented by Rule 60 which provides for binding directed verdicts and replaces the costly present procedure of a non-suit, under which a party could be non-suited without prejudice and continue to subsequently litigate the same claim.

B. Judicial Resources

In general, it is likely that the Proposal will reduce expenditures on judicial resources.

The previously articulated "improved guidance" argument (see part A, supra) should likewise reduce the research time of judges hearing motions relating to civil procedure. Secondly,

the most critical discovery devices (most depositions, production of documents, requests for admissions) operate extrajudicially, without the court's participation. This should eliminate some motions currently expending some judicial resources.

Admittedly, for a short stack-up period, both judges and counsel will need to expend some effort acquainting themselves with changed procedures. This is likely to be a short-run effect and ultimately, judicial resources should be reduced under these clearer, more smoothly operating rules.

C. Quality of Justice

Probably the single most important positive economic effect of the Proposal is its greatly improved impact upon the quality of justice provided in the Oregon court system. By quality of justice, I refer to the improved results in litigation; the rules are likely to provide better, more accurate factfinding and better applications of law to facts.

The primary reason for this improvement is the meritorious effect these rules have on the adversary system of dispute resolution. The liberalized joinder rules (e.g., rules 29, 33) should interject more informative input into cases. As a group, the discovery rules should lead to the availability of more information which should help counsel evaluate the strengths and weaknesses of his and his opponent's case; proof of a higher quality is likely to result.

The impact of the Proposal's added factual and legal input into a case should be to improve the case output or outcome. Richard Posner, an acknowledged expert on the economic impacts

of laws, has stated that the goal of a procedural system is to minimize "the cost of erroneous judicial decisions." R. Posner, Economic Analysis of Law 429 (2nd. Ed. 1977). The increased factual and legal input likely to result from the Proposal should help reduce error costs present in any lawsuit.

II. Specific Considerations

Rule 18: Sadly, all of the above efficiencies are undercut by Rule 18 which retains fact pleading. Fact pleading is an expensive process both for attorneys and judges; these costs are, of course, ultimately borne by consumers of legal services and, in the case of judicial services, by taxpayers. The quest to plead "ultimate facts" requires an attorney to frequently expend discovery efforts before the proposed discovery rules are available. This non-rule discovery, really investigation, reveals, of course, less information than available later under formal discovery and represents an added litigation expense.

Proponents of fact pleading urge that the process sharpens the issues presented by the case. To be sure, this is accurate. Nonetheless, the proposed discovery rules also sharpen the issues and do so on the basis of exchange of actual facts, a process far superior than an exchange of mere alleged facts in a pleading.

The Proposal's use of two mechanisms to delineate issues (fact pleading and discovery) requires duplicitous attorney fees to be expended on this preliminary stage of litigation. Attorneys fees are likely to be less if the discovery rules (36-46) were combined with the notice pleading provision of Federal Rule 8.

Rule 42 [withdrawn]. The Limited Interogulatory rule of Rule 42 would have been of great help to consumers of legal services and, for that reason, should have been retained.

The limited use of written interrogatives can result in a real saving of attorneys fees. Written interrogatories are often used as a feeder device for other more expensive discovery mechanisms; they can be used to determine the identity of potential deponents and the location of critical documents. For example, limited intergatories requesting the identity of eyewitnesses are critical to tort litigation. Moreover, without interrogatories, the location of documents crucial to commercial disputes may be in doubt. Faced with no interrogatory rule counsel is faced with the risk of noticing the deposition of a witness who ultimately testifies of a lack of knowledge. Alternatively, counsel can request this information be devulged "by agreement" of opposing counsel. As has been previously stated, such reliance on the "agreement" process is risky and, moreover, costly.

The withdrawn Proposed Rule 42 advanced these cost saving purposes of interrogatories without providing a means to abuse the discovery process. Withdrawal of the device insures that costly reliance on alternative methods of discovery will be continued.

Absence of a Pre-Trial Rule: The Proposal is made less effective by the omission of a Pretrial rule. While it is true that Pretrial has been made available by local rule (e.g., Local

rules of Multnomah County Circuit Court), the Pretrial rule is an essential component to modern rules of civil procedure. A Pretrial conference is especially useful in cases involving numerous issues, claims, and parties. Given the Proposal's package of modern joinder mechanisms, the availability of a Pretrial Conference would be helpful to sort out potentially complex questions. Some of the potentially complex devices included in the Proposal could be simplified through the systematic use of a Pretrial Conference.

Rule 19: The language of this rule is taken from Federal Rule 8(b). The reference to a "short and plain" statement of a defense [1st. sentence, proposed rule 19(a)] seems to generally require federal notice pleading in the answer.

The "short and plain" language is identical to that used in the notice pleading formula of F.R.C.P. 8(a)(2) and has been interpreted to mean that the answer use only notice pleading. See 5 Wright and Miller, Federal Practice and Procedure, §1261 (page 265) (1969). This seems incongruous given the Council's specific rejection of notice pleading in the text of Rule 18 and the accompanying comment.

I have no real problems with requiring notice pleading in the answer and would only urge that the same be done with the complaint. It seems paradoxical to have one theory of pleading for the complaint and another for the answer.

Rule 1: This is an extremely useful addition to Oregon Civil Procedure. The message that the rules be interpreted to achieve a "just, speedy, and inexpensive determination of every action" should be emphasized. If the proposal had a

Pretrial Conference Rule the "inexpensive" language could be more easily achieved.

Rule 33: The intervention rule is particularly well drafted. It gives a large amount of discretion to the court hearing intervention motions. This is a positive feature, given the different abilities of different judges to efficiently administer multi-party disputes. It also avoids the nebulous intervention of right criteria of F.R.C.P. 24(a)(2) which have been construed in a loose and disparate fashion. See Kennedy, Let's All Join In: Intervention Under Rule 24, 57 Ky. L.J. 329 (1969); Brunet, A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria, 12 Georgia L. Rev. 701 (1978).

Rule 46: This rule regarding Sanctions and Failure to Make Discovery is a substantial improvement over ambiguous existing law. The enumerated sanctions are clear and warranted given the importance of discovery to civil litigation.