N O T I C E

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

FROM: COUNCIL ON COURT PROCEDURES
University of Oregon Law Center
Eugene, Oregon 97403

The next meeting of the COUNCIL ON COURT PROCEDURES will be held Saturday, May 10, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

At that time, the Council will discuss and hear suggestions regarding proposed Oregon rules of civil procedure.

# # # #

4-30-80

A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, May 10, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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1. Approval of minutes of meeting held April 12, 1980

2. Report of subcommittee - recommendation for Council action - ORCP 65-73 and 90-92

3. Corrections to ORCP 1-64

4. NEW BUSINESS

# # #

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held May 10, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

Present:	Darst B. Atherly	Donald W. McEwen
	Anthony L. Casciato	Charles P.A. Paulson
	John M. Copenhaver	Val D. Sloper
	Austin W. Crowe, Jr.	James C. Tait
	William M. Dale, Jr.	Wendell H. Tompkins
	William L. Jackson	Lyle C. Velure
	Garr M. King	William W. Wells
	Harriet R. Krauss	David R. Vandenberg, Jr.
Absent:	Carl Burnham, Jr.	Berkeley Lent
	John Buttler	Frank H. Pozzi
	Wendell E. Gronso	Robert W. Redding
	Laird Kirkpatrick	

The meeting was called to order by Chairman Don McEwen at 9:50 a.m. in Judge Dale's Courtroom in the Multnomah County Courthouse, Portland, Oregon. Bruce C. Hamlin attended as a guest.

The minutes of the meeting held April 12, 1980, were unanimously approved.

The Council discussed and took the following action regarding the staff memorandum dated May 5, 1980, relating to ORCP 1-64 (attached).

Item 1, page 1, ORCP 4 E. The question presented was whether ORCP 4 E. should be amended in light of State ex rel. Sweere v. Crookham. After discussion it was decided that no Council action be taken until there is further case law.

Item 2, page 3, ORCP 4 M. A motion was made by Judge Wells, seconded by Judge Jackson, to change the words "sections B. through L." to "sections A. through L." in section 4 M. The motion passed unanimously.

Item 3, page 3. The Council discussed the inconsistency between ORCP 7 C.(2) and 7 D.(6)(b), which refer to the date of the first publication and allow 30 days for response from that date, and 7 D.(6)(g), which states that "service by publication shall be complete at the date of the last publication." A motion was made by Garr King, seconded by James Tait, that the inconsistency should be eliminated by removal of subsection 7 D.(6)(g). The motion passed unanimously.

Item 4, page 3, 7 D.(2)(d), ORCP D.(4)(c). The Council discussed the questions of when 30 days begin to run for default purposes under ORCP D.(4)(c) in a motor vehicle case and when service is complete under ORCP 7 D.(2)(d). The Council generally discussed the desirability of service upon the Department of Motor Vehicles as a service method in motor vehicle cases, and the Executive Director was asked to prepare a draft of a rule providing such service for discussion at the next meeting.

Item 5, page 5, ORCP 9 B. On motion made by Charles Paulson, seconded by Lyle Velure, the Council unanimously voted to add the following language to section 9 B.: Service of any notice or other paper to bring a party into contempt may only be upon such party personally.

Item 6, page 5, ORCP 10 C. On motion made by Judge Dale, seconded by Austin Crowe, the Council unanimously voted that section 10 C. should be prefaced by "Except for service of summons, . . .".

Item 7, page 5, ORCP 21 A.(7), 21 G.(3), and ORCP 30, and Item 8, page 6, ORCP 21 A. The Council discussed the problems raised under these sections and suggested any confusion might be alleviated by official commentary to the rules rather than by making any changes at this time.

Item 9, page 6, ORCP 21 F. It was unanimously decided that the cross reference to G.(2) should be changed to G.(3).

Item 10, page 6, ORS 57.779. The Council discussed the language of ORS 57.779(2) set out in the staff memorandum and its inconsistency with ORCP 13 C., 21 A., C., F., and G. Don McEwen made a motion, seconded by Judge Jackson, that a letter be written to the Corporation Commissioner suggesting an amendment to ORS 57.779(2). The motion passed unanimously.

Item 11, page 7, 23 D. and E. A motion was made by Charles Paulson, seconded by David Vandenberg, to add the following sentence to 23 D. and E.: If the motion is denied, the objection or defense asserted by such motion shall not be deemed waived by filing a responsive pleading. A discussion followed. Council members indicated they favored the concept. It was, however, suggested that this language might be combined with the existing last sentence of 23 D. and E. The Executive Director was asked to try a redraft of those sections. It was decided to defer action until further consideration of a redraft.

Item 12, page 8, ORCP 26 A. Judge Wells moved, seconded by Judge Jackson, that "conservator" should be included after "guardian" in the second setence of section A. The motion passed unanimously.

Item 13, page 8, ORCP 31 B. The Council decided that "thereafter" should not be removed from this section and that the rule should not be changed.

Item 14, page 8, ORCP 36 A. The Council decided that the language from the federal rule should not be included in this section.

Item 15 and 16, page 8, ORCP 36 B.(3) and ORCP 46 A.(2). Judge Wells moved, seconded by Austin Crowe, that "and subsection B.(4) of this rule" should be deleted from the first sentence of 36 B.(3) and that "to furnish a written statement under 36 B.(4), or if a party fails" should be deleted from the first sentence of 46 A.(2). The motion passed unanimously.

Item 17, page 9, ORCP 46 D. Judge Wells moved, seconded by Austin Crowe, to delete the following language from 46 D.: ["or (3) to inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 that there is a question regarding the existence of coverage,"]. The motion passed unanimously.

Item 18, page 9, ORCP 52 A. Judge Sloper moved, seconded by Judge Wells, that the last sentence of section A. be changed to read as follows: "At its discretion, the court may grant a postponement, with or without terms." The motion passed unanimously.

Item 19, page 9, ORCP 55 D. On motion made by Judge Casciato, seconded by Judge Wells, the Council unanimously voted to change "over 18 years of age" to "18 years of age or older" in 55 D.(1) to conform to ORCP 7 E. and 7 F.(2)(a).

Item 20, page 9, ORCP 55 F.(2). The Council discussed the suggestion of adding "by subpoena" after "required" in both sentences of F.(2). It was pointed out that the section does not make any distinction between "parties" and "non-parties" and a suggestion was made to include the language "a resident of this state and not a party." The Council decided to defer action until consideration of a redraft of the section.

Item 21, page 10, ORCP 60. On motion made by Judge Sloper, seconded by Austin Crowe, the Council unanimously voted to change "defendant" to "party against whom the claim is asserted" in the last sentence of the rule.

Item 22, page 10, ORCP 62. The Executive Director was asked to prepare a draft of ORCP 62 which would not require findings of fact or conclusions of law for cases subject to de novo review upon appeal.

Judge Jackson stated that the judgments subcommittee would be meeting soon and would have a report at the next meeting.

Don McEwen stated that he had written a letter to all circuit court judges requesting their views and comments regarding any problems with third party practice.

The Council discussed the question of use of Rule 36 B. to authorize interrogatories relating to expert witnesses. It was pointed out that:

(a) Rule 36 B. does not create interrogatories or any other discovery device but merely defines scope of discovery for these devices authorized elsewhere in the rules and that there is no rule authorizing interrogatories in the ORCP; and, (b) the matter of discovery of experts is not covered by ORCP 36. Rule 36 therefore does not need to be amended.

James Tait reported that under the Family Abuse Prevention Act it appears possible to obtain restraining orders for up to one year without a hearing. It was suggested that this be amended in connection with draft Rule 90, which authorizes injunctions.

The next meeting of the Council will be combined with the public hearing on class actions to be held June 28, 1980, commencing at 9:30 a.m., County Commissioners' Meeting Room, Rm. 602, Multnomah County Courthouse, Portland, Oregon.

The meeting adjourned at 11:45 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: OVERSIGHTS AND WARTS IN ORCP 1-64

DATE: 5-5-80

ORCP 4

(1) 4 E.

In State ex rel. Sweere v. Crookham, ____ Or. ____ (April 8, 1980), the Oregon Supreme Court held that a general manager of a foreign corporation would not be subject to jurisdiction in Oregon. The case included an action based upon a guarantee, executed in Minnesota for payment of the purchase price of goods, already shipped from Oregon by an Oregon resident. The court distinguished State ex rel. Ware v. Hieber, 267 Or. 124 (1973) (where the court had found jurisdiction) on the grounds that in the Ware case the guarantee agreement induced the Oregon plaintiff to ship the goods and also the defendants in Ware were officers and majority stockholders of the corporation whose indebtedness was guaranteed. Although the motion to quash had been denied and mandamus filed before the effective date of the ORCP, the plaintiff tried to rely on ORCP 4 E. The court said:

> We do not determine whether the rules are applicable to this proceeding. Rather, we hold that because of the due process restrictions of the Fourteenth Amendment, the rule cannot be constitutionally applied to provide that the plaintiff can obtain jurisdiction over defendant. World-Wide Volkswagen Corp. v. Woodson, ____ US ____, S Ct ____, 62 L Ed2d 490 (1980).

Rule 4 provides:

> "A court of this state having jurisdiction of the subject matter has jurisdiction over a party served in an action pursuant to Rule 4 under any of the following

circumstances:

> "* * * * *.
>
> "E.(1) Arises out of a promise, many anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state, to pay for services to be performed in this state by the plaintiff, or to guarantee payment for such services; or
>
> "* * * * *."
>
> The phrase, "to guarantee payment for such services" was probably intended to incorporate the statement in State ex rel Ware v. Hieber, supra, 267 Or 124, which we previously discussed and which we observed was, as a general proposition, too broad. As we just previously stated, the courts in Liberty Leasing Co., Inc. v. Milky Way Stores, Inc., supra, 352 F Supp 1210, and All Lease Company v. Betts, supra, 294 Minn 473, held that if the only contact with the state seeking jurisdiction was the execution of a guaranty that state could not because of the due process clause of the Fourteenth Amendment, gain jurisdiction. We likewise so hold.

Given the facts, ORCP 4 E.(4) actually would have been the more applicable provision. In any case, the court says that the rule would be unconstitutional if it authorized jurisdiction in the case. After Sweere, the guarantee provisions of 4 E. must be read to apply only to guarantee for prospective conditions to be performed in Oregon, and the language may be misleading.

ORCP 4 E. has been the section of Rule 4 that has continually raised suggestions that it may go beyond constitutional limits.

The Sweere case suggests that a mere promise to pay for goods already shipped from the state is not sufficient if that is "the only contact with the state." One way to conform ORCP 4 E. to this would be to add the following words at the end of the five subsections: ", when there are sufficient related minimum contacts to satsify due process requirements."

Since Sweere basically boils down to a promise to send money into the state by defendant, we could also add a new section:

> E.(6) As used in this section, money payment is not a "thing of value."

(2) 4 M.

This section makes jurisdictional bases in sections B. through L. carry over to a personal representative. Under ORCP 4 A.(5), express consent by decedent probably should carry over to decedent. Under 4 A.(1), (2), and (4), an individual would have to be alive when the action was commenced; however, the decedent could have died pendente lite and the representative be substituted. The section should say, "sections [B.] A. through L."

(3) 7 C.(2) and 7 D.(6)(g) are inconsistent. The first says the response time for a published summons is 30 days from first publication; the second says service by publication is complete on the last publication. I supposed the second could mean complete for all purposes other than response time, but it still seems strange to have a default taken just as the last publication is made. We should change 7 C.(2) as follows:

> "The date so stated in the summons shall be the date of the [first] last publication."

This, of course, would not change the rule on the statute of limitations. Under ORS 12.020(2), the summons relates back to filing if the first publication occurs within 60 days.

(4) ORCP 7 D.(2)(d) says service by mail is complete when "mail is delivered and the return receipt signed or when acceptance refused."

Thus, for mail service on a corporation the 30 days to respond would begin when the mail was either delivered or they refused to accept delivery.

Under ORCP D.4(c), in a motor vehicle case, the ability to take a default is conditioned upon having made inquiry at defendant's addresses prior to mailing. The section says no default shall be entered against a defendant served by mail "who has not either received or rejected" the mailed summons without such inquiry. The question is when do the 30 days begin to run in such a case? ORCP 7 D.(2)(d) assumes that summons is to defendant's actual address and that defendant must refuse or accept the letter. ORCP 7 D.(4) covers the situation where possibly the mail is sent to addresses where a defendant does not reside and hence is "not either received or rejected" which seems to mean the same is "delivered . . . or acceptance refused." In other words, normally for mail service, the letter must be actually delivered to defendant's address, but motor vehicles cases contemplate mailing to an address that once was, but no longer is, defendant's address. We should change the word [rejected] in ORCP 4 D.(4)(c) to "refusal to accept." We should also add the following to ORCP 4 D.(4)(d):

> "For the purpose of computing any period of time prescribed under these rules, service by mail, when defendant has not either received or refused to accept the registered or certified letter containing the copy of the summons and complaint, shall be complete when such letter cannot be delivered to all of the addressses to which it was mailed pursuant to paragraph (a) of this subsection because defendant is no longer at such addresses. If such letter is received by defendant or defendant refuses acceptance, service shall be complete as provided in paragraph D.(2)(d) of this rule."

(5) ORCP 9 B.

In the conversion of the ORS sections into this rule, we lost that portion of ORS 16.810 that required personal service or a notice or other paper to bring a party into contempt. We should add the following to ORCP 9 B.:

"Service of any notice or other paper to bring a party into contempt may only be upon such party personally."

(6) ORCP 10 C.

This provision could create a small trap if applied to a mailed summons. It could be read to require 33 days instead of 30 days for response. We could cure this by adding "except for service of summons" at the beginning of the rule.

(7) ORCP 21 A.(7), 21 G.)3), and 30 seem a bit confusing about proper procedure for raising non-joinder. ORCP 21 A.(7) refers to a motion to dismiss for failure to join a party under Rule 29. Under 29 A., in most cases, the court is directed to join a party who is necessary and can be joined. It is only under 29 B. where a missing party is so necessary ("the absent person being thus regarded as indispensable") that if an action cannot proceed without them and they cannot be joined, dismissal would be appropriate. The more appropriate motion under 29 A. would be to add a party under Rule 30. ORCP 21 G.(3), also, in referring to the waiver rule applicable to Rule 21(a) objections, refers only to "a defense of failure to join a party indispensable under Rule 29." This implies that the waiver rule applies only to 29 B. situations. One solution would be to change 21 A.(7) to say, "Failure to join a party indispensable under Rule 29." This would leave the more normal 29 A. situation of failure to join

a party who should and could be joined totally outside Rule 21 and subject to a motion to add a party under Rule 30. This would mean such motion would not be subject to the preclusion limits of 21 F. Waiver of the defense would not be governed by Rule 21 F.

(8) ORCP 21 A. says every one of the listed defenses shall be raised by pleading "except that the following defenses may at the option of the pleader be made by motion to dismiss:". This could be read to allow the party asserting the objection to assert it both in an answer and by motion. That is, defendant could raise an objection by motion and lose, and then reassert the same objection in answer. It clearly was not the intent to allow or require defendants to reassert objections. This could be made clearer by adding the words " instead of by pleading" before 21 A.(1).

(9) ORCP 21 F.

When the legislature renumbered the subsections of G., it neglected to change this cross reference. It should say G.(3), not [G.(2)].

(10) ORS 57.779 refers to raising a defense of failure to register as a corporation or to pay taxes by "a plea" and requires that such issue be tried first and says the objection is non-waivable. The exact language is:

> (2) No domestic or foreign corporation delinquent in any of the respects as set forth in subsection (1) hereof, unless an appeal is pending with respect thereto under the provisions of this chapter, shall be permitted to maintain any suit, action or proceedings in any court while such delinquency continues. A plea that the corporation has not paid the tax or fee which is then due and payable, or has

> failed to file the annual statements, may be interposed at any time before trial upon the merits, and if issue is joined upon such plea, it shall be tried first. Such a plea cannot be made by the delinquent corporation.

This is inconsistent with ORCP 13 C., 21 A., C., F., and G. There seems to be no reason why this should be treated differently than any other capacity problem. The provisions are procedural and are subject to control by the Council. I suggest we change the second sentence of ORS 57.779(2) to read as follows: "An objection that a corporation has not paid the tax or fee which is then due and payable, or has failed to file annual statements, cannot be made by the delinquent corporation." This preserves the provision relating to availability of the defense, but leaves procedure to ORCP 21.

(11) In attempting to avoid any traps arising from the necessity of reasserting objections or pleading over after an objection is sustained in ORCP 23 D. and E., we do not clearly deal with one situation. The rules provide that if a motion is allowed, the pleader may replead without waiving anything and the objecting party does not have to reassert objections to an amended pleading which were already raised to the original pleading. The rule does not clearly say that if a party raises an objection or defense by motion and the motion is denied, the party may file a responsive pleading without waiving a defense or objection. For demurrers, at least, this was specifically covered by ORS 16.330, which was repealed. See Moore v. West Lawn Memorial Park, Inc., 266 Or. 244 (1973).

We should add the following sentence to 23 D. and E.:

"If the motion is denied, the objection or defense asserted by such motion shall not be deemed waived by filing a responsive pleading and the party filing the motion may challenge the court's ruling upon the motion after filing such responsive pleading."

(12) ORCP 26 A.

It has been suggested that the authority to sue in their own name should include "guardian and conservator", not just "guardian."

(13) ORCP 31 B.

The way this section is written, it seems to limit injunction of separate proceedings and discharge of the stakeholder to situations where the stakeholder deposits the fund with the court., i.e., "the court may thereafter enjoin." Is this what was intended? The Council could change this by taking out the word "thereafter" in the second sentence.

(14) In the redrafts of Rule 36 we lost the following sentence from 36 A.:

"Unless the court orders otherwise under section C. of this rule, the frequency of use of these methods is not limited."

This appears in the federal rule, which was the source of 36 A., and states the prevailing rule.

(15) ORCP 36 B.(3)

The words ["and subsection B.(4) of this rule"] should be removed from the first sentence; 36 B.(4) was eliminated by the legislature.

(16) ORCP 46 A.(2)

The words ["to furnish a written statement under 36 B.(4), or

if a party fails"] should be removed from the first sentence; 36 B.(4) was eliminated by the legislature.

(17) ORCP 46 D.

The words ["or (3) to inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 that there is a question regarding the existence of coverage,"] should be removed. The procedure referred to was changed by the legislature. The existing procedure is request and production of the policy. Failure to comply leads to a court order under 46 A.(2).

(18) ORCP 52 A.

The last sentence seems to imply that there must be terms. It should read: "At its discretion, the court may grant a postponement, with or without terms."

(19) ORCP 55 D.

This section says a subpoena may be served by a person "over 18 years of age." This could be interpreted as either a person who had reached his or her 18th birthday or reached his or her 19th birthday. It should say: "18 years of age or older." This would be consistent with the summons rule and the return requirement of 55 D.(3). See ORCP 7 E. and 7 F.(2)(a).

(20) ORCP 55 F.(2)

We should add the words "by subpoena" after the word "required" in both sentences of this section. A party deposition is not limited by this section.

(21) ORCP 60

The use of the word "defendant" in the last sentence of the rule is inconsistent with Rule 54 and seems to imply the option of non-prejudicial dismissal would not extend to directed verdict motions against counterclaims, cross-claims, or third-party claims. We should change "defendant" to "party against whom the claim is asserted."

(22) One aspect of the merger of law and equity procedures not discussed at length was the fact that ORCP 62 findings of fact and conclusions of law rules become applicable to equity cases. It could be argued that this is not necessary with de novo review. It could also be argued that since even in de novo review, the court gives great weight to the trial judge's fact determinations and findings of fact are useful.

M E M O R A N D U M

TO: COUNCIL

FROM: Fred Merrill

RE: DRAFTS FOR CHANGES IN ORCP 1 - 64 REQUESTED AT MAY 10, 1980, MEETING

TO BE READ WITH MINUTES OF 5/10/80 MEETING.

ORCP 7 D.(4)(a)

D.(4)(a) Actions arising out of use of roads, highways, and streets; service by mail.

D.(4)(a)(i) 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, except a defendant which is a foreign corporation maintaining an attorney in fact within this state, may be served with summons by service upon the Department of Motor Vehicles and mailing a copy of the summons and complaint to the defendant.

D.(4)(a)(ii) Summons may be served by leaving one copy of the summons and complaint with a fee of $2.00 in the hands of the Administrator of the Motor Vehicles Division or in the Administrator's office or at any office the Administrator authorizes to accept summons. The plaintiff shall, as soon as reasonably possible, cause to be mailed a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of

the action, and the most recent address furnished by the defendant to the Administrator of the Motor Vehicles Division, and any other address of the defendant known to the plaintiff, which might result in actual notice. For purposes of computing any period of time prescribed or allowed under these rules, service under this paragraph shall be complete upon such mailing.

D.(4)(a)(iii) The fee of $2.00 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

COMMENT

This version reinstates service on the Motor Vehicles Division. I assume this would have the advantage of creating a record of service for insurance counsel to consult. I also assume this would benefit the plaintiff if serving the Motor Vehicles Division satisfied the statutes of limitations.

This version makes the entire mailing responsibility fall on the plaintiff. The pattern is identical to substituted service or office service under ORCP 7 D.(2)(b) and (c). The last sentence of the proposal follows the pattern of making service complete for the 30-day default period on mailing. As with substituted or office service, the date of service for limitations purposes is not and could not be covered by rules.

The provisions of D.(4)(a)(iii) relating to fees and duty to record may exceed Council rulemaking power, and we probably should ask the legislature to enact this rule section by statute if we want this rule.

I have not submitted this to the Motor Vehicles Division for comment. Perhaps this should be done when there is tentative approval of a draft. This version may raise less objection by the DMV as it does not require them to do anything except receive and record the summons.

ORCP 23 D.

D. Amendment or pleading over after motion; non-waiver of defenses or objections. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. By filing any amended pleading pursuant to this section, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling.

E. Filing of amended pleading; objections to amended pleading not waived. If any amended pleading is filed, whether pursuant to sections A., B., or D. of this rule or pursuant to other rule or statute, a party who has filed a motion to strike, motion to dismiss, or motion for judgment on the pleadings does not waive any defenses or objections asserted against the original pleading by filing a responsive pleading or failing to reassert the defenses or objections.

* * *

ORCP 21 H. (adding section to ORCP 21)

H. Denial of motion; non-waiver by filing responsive pleading. If a motion to dismiss, motion for judgment on the pleadings, or motion to strike is denied, the party making the

21 H. CONTINUED

motion shall not waive any defense or objection asserted therein by filing a responsive pleading.

COMMENT

This is an attempt to clarify the waiver rules of 23 D. and E. and the rule suggested in Item 11, page 7, of the May 5, 1980, staff memorandum. It recognizes that we are dealing with three separate rules. The first two deal with the result of an amended pleading:

(1) 22 D. says that when a motion is made and succeeds and parties plead over rather than standing on their pleadings, they do not waive their position that the judge erred in granting the motion.

(2) 22 E. says that any time an amended pleading is filed, whether voluntarily or as the result of a successful motion, the opposing party does not have to reassert defenses or objections made to matters in the original pleading which are also in the amended pleading.

The last rule (21 H.) has nothing to do with amendments but comes up only when a motion is unsuccessfully made. The pleading attacked stands, and there is no amended pleading. This waiver rule makes clear that by filing a responsive pleading, the party making the unsuccessful motion waives nothing. This waiver rule was added to ORCP 21 rather than to ORCP 23 because it relates to the effect of pleading over after a motion, and not to amendments.

* * *

55 F.(2)

F.(2) Place of exmamination. A resident of this state who is not a party to the action may be required by subpoena to attend an examination only in the county wherein such person resides, is employed, or transacts business in person, or at such other convenient place as is fixed by an order of court.

55 F.(2) CONTINUED

A nonresident of this state who is not a party to the action may be required by subpoena to attend only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

COMMENT

This should make clear that the reference to place of examination is only for non-party witnesses subpoenaed to attend. Under ORCP 46, a party receiving a notice of deposition would have to attend wherever the deposition is set unless a protective order was secured under ORCP 36.

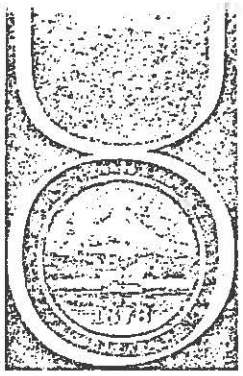
* * *

ORCP 62 A.

A. Necessity. Whenever any party appearing in a civil action tried by the court so demands prior to the commencement of the trial, the court shall make special findings of fact, and shall state separately its conclusions of law thereon. In the absence of such a demand for special findings, the court may make either general or special findings. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact or conclusions of law appear therein. No findings of fact shall be required in cases which are tried anew upon the record upon an appeal.

COMMENT TO ORCP 62 A.

The language in the last sentence was taken from ORS 19.125 (3).



School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

April 16, 1980

Mr. Austin W. Crowe, Jr.
COSGRAVE, KESTER, CROWE, GIDLEY & LAGESEN
Attorneys at Law
622 Pittock Block
921 S.W. Washington Street
Portland, Oregon 97205

Dear Austin:

I have looked at the material from Bill McAllister and sent copies of it all to members of your subcommittee. I will send copies of his analysis and the Oregon Retail Council statement to all Council members. SB 904 was substantially similar to the proposed changes in ORCP 32. The rest of the material refers to the Uniform Class Action Act, and I see no need to circulate it to all Council members.

I am enclosing a draft of a suggested notice to the Multnomah Lawyer and Bar Bulletin. Could you please call me as soon as possible with approval or changes you want. We are right at the Multnomah Lawyer deadline.

Very truly yours,

Fredric R. Merrill
Executive Director, Council on
Court Procedures

FRM:gh
Encl.
cc: Hon. Wm. M. Dale, Jr. (Encl.)
Laird Kirkpatrick (Encl.)
Frank H. Pozzi

LOMBARD, GARDNER, HONSOWETZ & BREWER
ATTORNEYS AT LAW

HERB LOMBARD
JACK A. GARDNER, P.C.
F. WILLIAM HONSOWETZ
DAVID BREWER
LARRY H. SCHONS
RONALD A. IRVINE
JEFFREY E. POTTER

915 OAK STREET, SUITE 200
EUGENE, OREGON 97401
(503) 687-9001
484-7402

OF COUNSEL
ALLEN L. JOHNSON

April 27, 1980

Robert Harris, Chairman
Real Estate Section Legislative Committee
910 SW Cumberland Road
Lake Oswego, Oregon 97034

Re: Appeals Problems

Dear Bob:

At its April meeting, the Executive Committee of the Real Estate and Land Use Section discussed the continuing problem of deciding where to obtain review of local government and administrative actions affecting land use.

The problem is highlighted in the attached pages from Judge Linde's opinion in Strawberry Hill 4-Wheelers v. Benton County, 287 Or 591(1979). I am also enclosing a copy of a recent letter which I sent to the Professional Liability Fund concerning the same general issue.

At present, annexations, septic tank approvals, systems development charges, energy plans, and a variety of other decisions are subject to confusing and sometimes conflicting rules governing times and forums for filing appeals. Whether a decision is reviewable by the Land Use Board of Appeals, by a circuit court or by the Court of Appeals may depend upon whether it involves statewide goal issues, whether it is quasi-judicial, whether proper notice was given, and similar questions.

As Justice Linde noted in the 4-Wheelers case, we have perfected the system described by Professor Davis as ideally designed to thwart justice and create unnecessary litigation:

> "For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist on a plurality of remedies, no remedy would lie when another is available, the lines between remedies would be complex and shifting, the principal concepts confusing. . ." Admin. Law Treatise § 24.01 (1958).

As Justice Linde suggests, the solution may lie in a "single, comprehensive form of judicial review of all such governmental actions regardless of characterization of the ultimate remedy." 287 Or 608n.

Another possibility is a statute allowing the transfer of appeals among circuit courts, the Court of Appeals, and administrative appellate boards such as LUBA. The statute could be patterned on the Supreme Court-Court of Appeals no-fault misfiling rule or the statute allowing transfers of cases from district to circuit

courts where claims exceed the district courts' jurisdictional limits.

The Executive Committee requests that the Legislative Committee develop a transfer statute for possible consideration by the Interim Land Use Committee, the Council on Court Procedure, and the next session of the legislature.

Yours very truly,

Allen L. Johnson

ALJ/me
cc: Hans Linde
Steve Schell
Jim Mattis
Fred Merrill
Pete McSwain
Joy Abele
Frank Josselson

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

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Mr. Allen L. Johnson
LOMBARD, GARDNER, HONSOWETZ & BREWER
Attorneys at Law
915 Oak Street, Suite 200
Eugene, OR 97401

Dear Al:

The Council on Court Procedures has a subcommittee, chaired by Justice Berkley Lent, considering the subject of writs of review. I have furnished the material which you sent on that subject to Justice Lent.

It is my understanding that the State Bar's Administrative Law Committee is engaged in a study of writs of review. I believe the Council subcommittee has decided to defer any action until the Bar committee completes its study.

Very truly yours,

Fredric R. Merrill
Executive Director, Council
on Court Procedures

FRM:gh

Encl.

cc: Hon. Berkeley Lent (Encl.)