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.

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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.

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