N O T I C E

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

July 28, 1981

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

The next meeting of the COUNCIL ON COURT PROCEDURES will be held on Saturday, August 8, 1981, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon. At that time, the Council will review actions taken during the legislative session and discuss personnel matters.

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A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, August 8, 1981

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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1. Report on legislative session

2. Appointment of Executive Director (executive session)

3. Projects for next biennium

4. NEW BUSINESS

MINUTES OF MEETING

COUNCIL ON COURT PROCEDURES

AUGUST 8, 1981

The Council on Court Procedures convened at 9:30 a.m. on Saturday, August 8, 1981, in Judge Dale's Courtroom in the Multnomah County Courthouse, Portland, Oregon.

The Chairman announced that Judge Buttler has been reappointed to the Council by the Court of Appeals; that Justice Campbell has been appointed to the Council by the Supreme Court, and that Robert H. Grant, Roy Kilpatrick, E. B. Sahlstrom, and James W. Walton have been appointed to the Council by the State Bar.

The Executive Director reported on the legislative session, indicating that the Council budget had finally passed; that HB 3261, which made a few changes in the material submitted by the Council as recommended by the Joint House and Senate Judiciary Committee, also passed; and, HB 3122, which made substantial changes in Rule 32, also passed.

The Council Executive Committee reported that they had reviewed 32 applications submitted for the post of Executive Director and recommended that personal interviews be conducted of two of the candidates. Judge Dale moved, seconded by Wendell Gronso, that a subcommittee be appointed to conduct the two interviews and select the Executive Director. The motion passed and the Chairman appointed Austin Crowe, Jim Tait, and Don McEwen to the subcommittee.

The Council discussed possible areas of action for the next biennium but decided to defer action until all new members have been appointed.

The minutes of the meeting held December 3, 1980, were unanimously approved.

The next meeting is scheduled for Saturday, September 19, 1981, at 9:30 a.m., in Judge Dale's Courtroom in the Multnomah County Courthouse.

Respectfully submitted,

Fredric R. Merrill
Executive Director

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COUNCIL MEMBERS PRESENT AT 8/8/81 MEETING:

Darst B. Atherly

J. R. Campbell

William W. Wells

Donald W. McEwen

Carl Burnham

William M. Dale

Garr M. King

Wendell E. Gronso

James C. Tait

Robert W. Redding

Frank H. Pozzi

Austin W. Crowe, Jr.

PROBLEMS FOR 1981-83 BIENNIUM

Rule 7 D.(1)

I am not sure our drafting on this rule is as artful as it could be. The question is the relationship between the general standard for service in 7 D.(1) and the specific methods of service. If someone does not follow the specific service methods (i.e., mails to an individual defendant) and does not get a prior court order under 7 D.(6) authorizing service, is the service defective even though the defendant actually receives the summons? If a defendant attempts to follow one of the service methods but does not strictly comply (e.g., makes substituted service at the wrong house), is this defective service if the defendant actually gets the summons and complaint? I am sure the Council intended to avoid technical quashing of summons when a defendant got good notice. I said so in the commentary to the original rules. There is nothing in Rule 7 that exactly says this. 7 F.(4) and 7 G. say that defects in (a) return, (b) form of summons, (c) issuance, and (d) person serving do not affect validity of service if there was actual notice. They do not say that for manner or method of service. One ends up arguing that if defendant received the summons and it clearly apprised him of the existence and pendency of the action, then the manner of service was "reasonably calculated, under all the circumstances" to do that and 7 D.(1) has been satisfied. For a type of service that is not totally unreliable and works, this does not seem too difficult (i.e., mail service). However, for a totally unreliable service (i.e., leaving at wrong person's home) the argument using 7 D.(1) gets somewhat unreal. The problem is that the standard is process oriented and not result oriented. We should consider adding manner of service to 7 G. This should be thought through very carefully as we do not want to eliminate the service requirement or stop forcing parties to make adequate service.

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Rule 7 F.(2)(a)(1)

One of the things which is not clear in the rule is who is the server and who makes the affidavit for service by mail. Mail service is provided by 7 D.(3)(b)(ii) (corporations and 7 D.(4) (motor vehicles), and could be ordered under 7 D.(6). Under the rule, the attorney is not authorized to serve (7 E.), so who makes the certificate? Note the last sentence of 7 F.(2)(a)(i) refers to the certificate upon mailing.

7/15/81

Rule 7 D.(3)(d)

The most usual type of service here would be upon the county clerk. Some courts no longer have clerks. In a number of later rules we refer to clerk or person performing the duties of that office. See Rules 9 and 69 D. We should do that here.

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Rule 9 B.

The first sentence of this section is a bit ambiguous. It has been suggested that it should read: "Wherever under these rules service is required or permitted to be made on a party, and that party is represented by an attorney . . ."

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Rule 21 A.

There has been some confusion over the correct form of order when a successful Rule 21 A. motion is made. For some of the motions, an order dismissing a pleading would be appropriate. For others, a stay would be required for 21 A.(3) and (4); a summons would have to be quashed for 21 A.(2) and (5); an order directing that a party be served would be required for 21 A.(6). For a 21 A.(1) motion, the court probably should probably direct entry of a judgment of dismissal. In any case, an order under Rule 21 and a judgment of dismissal are not the same. Part of the confusion may be referring to the Rule 21 A. motion as a motion to dismiss at the beginning. The federal rule just refers to a "motion."

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Rule 44 A.

The physical and mental examination rule only gives the court authority to order examination by "a physician." What if a party wants to use a chiropractor or an osteopath? A party should be able to use a psychologist rather than a psychiatrist. The rule should be clarified.

Rule 44 C.

The Council gave a lot of thought to access to hospital records not directly related to the claim, but which might show pre-existing injury. What about medical reports? Can a defendant demand older written reports on the grounds they "relate" to the injury by showing pre-existing injury?

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Rule 44 E.

The 1979 Legislature tried to clarify the application of this to include out-patient services at a hospital, but it must be a hospital. I assume this would mean a hospital as defined in ORS chapter 441. Shouldn't we have included care facilities, nursing home, and clinics like Kaiser?

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Rule 54 B.(2)

The existing rule in Oregon on a motion attacking the sufficiency of the evidence in a non-jury case, made at the close of the plaintiff's case, is that the judge cannot weigh the evidence. See Karabolis v. Leabert. That case suggests the federal rule is different. We have now enacted the federal rule. I am not sure the Council intended any change and 54 B.(2) is ambiguous. See 51 Or. App. 707 (1981), where the problem is discussed.

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Rule 54 E. and Rule 68 B.

If a losing party ends up being awarded costs (possible because of an offer or settlement or court discretion), it is not clear how this is done. It is not an order but a judgment. But must the cost bill procedure be followed? I would assume this would be necessary to provide an adversary hearing. Is it part of the judgment for the other side, or is there a separate cost judgment entered for the losing party?

Rule 63 A.

It is not clear from this rule whether a motion for directed verdict at the close of all evidence is required, as a prerequisite to a defendant's N.O.V. motion, or just a directed verdict motion at the close of the plaintiff's case. Under the old law, there was only a directed verdict motion at the close of all evidence, and the federal rules make clear that a motion at the close of all evidence is required. We should clarify our rule.

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Rule 67

When we transferred ORS chapter 18 to the rules, we did not include anything equivalent to ORS 18.090. ORS 18.090 was the statute providing authority to enter a judgment if no leave to plead over was given after a successful motion. Rule 15 B.(2) recognizes that leave to replead will not always be given. If leave to replead is given, and no pleading is filed, the dismissal is for failure to prosecute under Rule 54. There is, however, nothing explicitly covering entry of judgment when a motion is sustained and leave to replead is not given. I am not sure we need it, but we might check the cases under ORS 18.090.

need to check cases

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Rule 84 D.(2)(c)

There is an erroneous reference in this paragraph. It should say: "For purposes of this section, not "paragraph."

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VENUE OVER CORPORATIONS

When we redid the summons statutes, we repealed ORS 15.080. It was no longer necessary for summons. There is a whole line of old cases that used the statute as authority to allow venue over corporations where the cause of action arose. With the repeal, you can argue that the only venue for corporations is where their home office is located. The Council does not have rulemaking power over venue statutes, but the legislature repealed ORS 15.080.