

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES:

John H. Buttler	Donald W. McEwen
J.R. Campbell	Edward L. Perkins
John M. Copenhaver	Frank H. Pozzi
Austin W. Crowe, Jr.	Robert W. Redding
William M. Dale, Jr.	E.B. Sahlstrom
Robert H. Grant	James C. Tait
Wendell E. Gronso	Wendell H. Tompkins
John H. Higgins	Lyle C. Velure
William L. Jackson	James W. Walton
Roy Kilpatrick	William W. Wells
Harriet R. Krauss	Bill L. Williamson
Jon B. Lund	

FROM: Douglas A. Haldane, Executive Director

DATE: April 30, 1982

PLEASE NOTICE

There will NOT be a full Council meeting on Saturday, May 8th. Instead, there will be a meeting for members of the subcommittees as shown on the schedule attached to their copies of this memorandum.

There WILL BE a meeting of the full Council, as previously scheduled, on Saturday, June 12, in Judge Dale's Courtroom, Multnomah County Courthouse, Portland.

DAH:gh

M E M O R A N D U M

TO: MEMBERS OF SUBCOMMITTEES  
FROM: Douglas A. Haldane  
DATE: April 28, 1982

SCHEDULE FOR MEETINGS OF SUBCOMMITTEES

Saturday, May 8, 1982  
Judge Dale's Courtroom  
Multnomah County Courthouse  
Portland, Oregon

SUMMARY JUDGMENT

9:30 a.m.

Don McEwen  
Austin Crowe  
John Higgins

THIRD PARTY PRACTICE

10:15 a.m.

Judge Dale  
Austin Crowe  
Wendell Gronso  
Don McEwen  
Frank Pozzi

ORCP 44 E.

11:00 a.m.

E.B. Sahlstrom  
Austin Crowe  
Jim Tait  
Lyle Velure  
Jim Walton

NOTE: Attached for consideration by the third party practice subcommittee is the Bar's Procedure and Practice Committee's memorandum containing an adopted amendment to ORCP 22 C.

DAH:gh

TO: All Members of the Oregon State Bar and  
All Members of the Judiciary

RE: Third Party Practice

At the time the Council on Court Procedures was created in 1977, third party practice existed in Oregon. In promulgating the Rules of Civil Procedure, the Council provided for third party practice in substantially the same form as that provided by the legislature.

Third party practice has been the subject of a great deal of discussion and consideration by the Council since its creation. It continues to be a subject of constant discussion and consideration. At its meeting on January 23, 1982, the Council adopted a motion to "re-evaluate the desirability of third party practice, including cross-claims under ORCP 22."

The Council will again review in depth third party practice. At the conclusion of its re-examination the Council will either:

1. Eliminate third party practice altogether;
2. Leave third party practice in its existing form; or
3. Make specific changes in third party practice.

The Council and its staff are in need of all the factual information they can obtain concerning third party practice in our state courts. It welcomes expression from all members of the Bar and the Judiciary who have had any experience with third party practice.

Please communicate your views to:

Douglas A. Haldane  
Executive Director  
Council on Court Procedures  
School of Law  
University of Oregon  
Eugene, Oregon 97403

You may appear at any Council meeting and in that manner provide the Council with information regarding third party practice. The dates and places of future meetings may be obtained from Professor Haldane.

(published in Oregon State Bar Bulletin, Lane County Bar Bulletin, and  
The Multnomah Lawyer -- March-April 1982 issues)

COUNCIL ON COURT PROCEDURES

Summary Judgment Subcommittee

Minutes of Meeting Held May 8, 1982

Judge Dale's Courtroom

Multnomah County Courthouse

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The Summary Judgment Subcommittee of the Council on Court Procedures convened at 9:30 a.m. on Saturday, May 8, 1982, in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon. Present at the meeting were subcommittee members Don McEwen, Austin Crowe, and John Higgins. Also present was Douglas Haldane of the Council staff.

Mr. Crowe distributed a proposed amendment to Rule 47, SUMMARY JUDGMENT, dated May 7, 1982, a copy of which is attached to these minutes as Exhibit A.

Mr. Crowe explained his reasoning in submitting the amendment in this proposed form as a response to a specific abuse. If the problem is the use of motions for summary judgment for the discovery of expert witnesses, then the ability of the opposing party to establish an issue regarding a material fact by affidavit of the attorney should keep motions which are not filed in good faith from being filed in the first place. The proposed amendment was discussed at length, adopted, and referred to the Council by consensus.

The meeting of the subcommittee was adjourned at 10:15 a.m.

Respectfully submitted,

Douglas A. Haldane

May 7, 1982

PROPOSED AMENDMENT TO RULE 47 SUMMARY JUDGMENT

(1) Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions.

(2) If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion.

(3) The affidavit shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a sufficient basis for denying the motion for summary judgment.

AWC:jmc

Exhibit "A"

to Minutes of Meeting of  
Summary Judgment Subcom-  
mittee Held 5/8/82

COUNCIL ON COURT PROCEDURES

Third Party Practice Subcommittee

Minutes of Meeting Held May 8, 1982

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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The third party practice subcommittee of the Council on Court Procedures met at 10:15 a.m. on Saturday, May 8, 1982, in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon. Judge Dale was out of town and could not attend. Present were subcommittee members Austin Crowe, Wendell Gronso, Don McEwen, and Frank Pozzi. Also present was Douglas Haldane of the Council staff.

The subcommittee reviewed proposed amendments to Rule 22 which had been forwarded from the Pleading and Practice Committee of the Oregon State Bar. A copy of the Bar Committee's discussion and proposal is attached as Exhibit A to these minutes.

Mr. Gronso and Mr. Pozzi appeared firm in their resolve to move the abolition of third party practice in Oregon, while Mr. McEwen and Mr. Crowe were equally adamant in their belief that third party practice should be retained.

The subcommittee was deadlocked and decided to refer the matter to the Council as a whole.

The meeting adjourned at 11:05 a.m.

Respectfully submitted,

Douglas A. Haldane  
Executive Director

DAH:gh

PROCEDURE AND PRACTICE COMMITTEE

THIRD-PARTY PRACTICE

During its 1981-1982 term, the Committee has undertaken to study and consider the area of third-party practice in Oregon, specifically ORCP 22C. The examination has focused on the desirability of retaining the rule in its present form, modifying/amending its provisions or abandoning third-party practice altogether. In the past few months, the Committee members have attempted to solicit the comments from practicing trial attorneys, both from the plaintiff and defense bars, concerning the merits of and their experience with third-party practice. In addition, we have sought the written comments, opinions and recommendations from the state's circuit court judges.

ORCP 21C. and its predecessor, ORS 16.315, were modeled after FRCP 14(a) and have been in effect in Oregon since 1975. Especially in the last couple of years, there has been a considerable undercurrent of ferment with respect to the propriety of continued utilization of third-party practice in Oregon. In fact, in 1981, the Council on Court Procedures voted to abolish third-party practice---a decision later rescinded. Currently, the Council is again undertaking to review the area. At the commencement of its current term, the Committee on Procedure and Practice thought it desirable to undertake an empirical examination of this area and make its specific recommendations to the Board of Bar Governors.

In short, the lawyers whom the Committee interviewed and consulted generally felt that although the third-party

practice statute was occasionally abused, in the overall prospective it had been an effective procedural device and should be retained. The feeling was echoed amongst the members of the Bar that third-party practice in many instances contributed to the settlement of cases which would otherwise have to be tried---for example, by forcing the ultimate indemnitor(s) into the primary litigation. The lawyers also felt that generally third-party practice was a timesaving device, cutting down on discovery costs and often avoiding the necessity for multiple trials. Those attorneys who had actually been through a third-party trial recognized the added complexity of the proceeding, but felt that it was not that much more cumbersome or difficult than any case involving multiple defendants with opposing interests or positions.

On the other hand, the judges who responded to the Committee's questionnaire were overwhelmingly in favor of abolishing third-party practice. Of the approximately 25 written responses received from the circuit court judges, only three indicated that their experience with third-party practice had been favorable. Amongst the reasons cited by the judges for their position were:

1. Delays in getting a third-party practice case at issue---usually because of procrastination and delay between the third-party plaintiff and the third-party defendant.
2. Third-party practice seems inherently to foster increased and costly motion practice.
3. Delays in instituting the third-party action,



often forcing the otherwise deserving plaintiff to wait months and even years to have his/her claim litigated (though, as mentioned, this sympathetic position for the deserving plaintiff seems more a concern of the judiciary than of the plaintiff's bar).

4. Discovery is complicated and delayed---often the third-party defendant desires to engage in discovery that has already been covered in the principal case, before the third-party complaint was filed.

5. The trial of a third-party case becomes unwieldy, cumbersome and complicated. It is difficult to frame issues, it is even more difficult to instruct, and the jury seems often confused.

The Committee has given careful attention to the input received, and we are particularly concerned with the judiciary's negative reaction to third-party practice. It is our feeling, however, that ORCP 22C. should not at this time be abandoned and that the tools presently exist within the statute to control most of the complaints raised by the judges.

The primary indictment of third-party practice from the judges' point of view consists of the delay involved in first filing the third-party complaint and then in getting the case to trial. ORCP 22C., however, undisputedly gives the court a wide latitude in granting or denying leave to file the third-party complaint when more than 10 days have passed after the defendant has filed his original answer. It may be reflective of the

relative embryonic stage of third-party practice in Oregon, yet the Committee wonders why the courts, concerned with delays and docketing problems, would permit a defendant to file a third-party complaint when it quite clearly would result in a significant delay of the proceeding or if it would prejudice the rights of the original plaintiff. Denying such leave would certainly not be reversible error absent a clear abuse of discretion by the trial court.

Moreover, ORCP 22C. specifically gives any party, presumably at any time in the proceeding, the right to strike the third-party claim or to segregate or sever the third-party issue. If a plaintiff has been frustrated or stymied in its efforts to obtain an early "day in court," such a motion should be made and the court should be sensitive to the plaintiff's position.

Finally, ORCP 22E. specifically gives the court the right, even on its own motion, to segregate or sever the third-party claim. Arguably, this device can and should be used in any instance where the court in its judgment feels the third-party specter will unduly complicate the trial or where the parties cannot agree on a reasonable procedural format for the conduct of the trial itself.

With due consideration, though, to the concerns of the judges, the Committee undertook to examine the provisions of ORCP 22C. in an effort to perhaps strengthen the trial court's control over third-party practice litigation and to eliminate the potential prejudice to the original claimant. Accordingly,

the Committee had recommended that ORCP 22C. be amended to read as follows: (The underlined portions reflect the proposed changes.)

C. Third-Party Practice.

C.(1) At any time after commencement of the action, a defending party, as 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 a 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 and upon showing that the third-party plaintiff has acted with due diligence in filing the third-party complaint. Such leave shall not be given if it would substantially prejudice the rights of existing parties or would unreasonably delay or unduly complicate the trial of the matter. \* In granting leave to file a third-party complaint, the court may do so under such terms and conditions as it deems appropriate. . . . At any time prior to commencement of trial, any party may move to strike the third-party claim or for its severance or separate trial. . . .

These changes, though perhaps subtle, would hopefully accomplish the following:

1. The burden would now be placed upon the third-party plaintiff (the original defendant) to establish that it has acted with due diligence in initiating the third-party complaint. Hopefully, this would discourage third-party filings on the eve of trial and would make the original defendants aware that third-party filings would have to be done with reasonable dispatch.

\*Note: Proposed changes adopted by Bar's Procedure & Practice committee with deletion of the words "or unduly complicate".

2. The proposed amendment would make it clear that the court can refuse leave to file the third-party complaint, not only if it would prejudice the rights of existing parties, but also if it would unreasonably or unduly complicate the trial.

3. The Committee's amendment further would give the court the authority, as a condition precedent to allowing the filing of the third-party complaint, to impose such terms and conditions as it deems reasonable and consistent with an effective and timely disposition of the matter. These stipulations could include such items as discovery deadlines and limitations, participation in a pretrial conference to refine or define the issues, an agreement to adhere to the original trial date, etc. Failure to agree to such terms or inability to comply could result either in denial of the motion to file a third-party complaint or the severance of the third-party case from the main proceeding. (The Committee recognizes that the third-party defendant, who usually will not even be aware of such leave of such motion to file a third-party complaint, conceivably could be prejudiced by deadlines or other conditions imposed by the court---often perhaps done with the collusive blessing of the original plaintiff and the third-party plaintiff. However, again, if a third-party defendant finds itself prejudiced, the court should not hesitate in severing or segregating the third-party action.)

4. Finally, ORCP 22C. would be amended to make it clear that at any time prior to trial, any party may move to strike, sever or segregate the third-party claim. The language in the

present statute may implicitly suggest that such motion is appropriate only in the early stages of the third-party practice.



School of Law  
UNIVERSITY OF OREGON  
Eugene, Oregon 97403

503/686-3837

April 13, 1982

Donald W. McEwen  
Chairman, Council on Court Procedures  
1408 Standard Plaza  
1100 S.W. 6th Avenue  
Portland, Oregon 97204

Dear Don:

Enclosed is a copy of my letter to Judge Dale explaining where we are with third party practice. Fred is seeing that anything the Bar's Pleading and Practice Committee does comes to me, so the Council will have an opportunity to address it. The Pleading and Practice Committee has not specifically requested commentary by the Bar, and we'll just have to wait and see if our notice in the Oregon State Bar Bulletin generates any response.

On the question of small claims, I have collected forms and commentary from court administrators for 13 counties. So far, the problems listed seem to be relatively minor and are the same that have been previously mentioned by Judge Hodges and Mr. Van Landingham.

Beginning April 15, I have gone on half time at the Law School and will be able to devote a little more time to putting things together for the Council.

I should probably also mention, since he is a member of the Council, that I have agreed to work on an "on call" basis for Lyle Velure during the summer. Mr. Velure has some very definite ideas about matters before the Council, and while I don't believe my employment by him would cause any conflict, a full disclosure to you and perhaps other members of the Council is appropriate. If you think this will cause any difficulty, please let me know.

Sincerely,

Douglas A. Haldane  
Executive Director, Council on  
Court Procedures

DAH:gh  
Encl.

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CIRCUIT COURT OF OREGON  
FOURTH JUDICIAL DISTRICT  
MULTNOMAH COUNTY COURTHOUSE  
1021 S.W. 4TH AVENUE  
PORTLAND, OREGON 97204

WILLIAM M. DALE  
JUDGE

April 2, 1982

Mr. Douglas A. Haldane  
Executive Director  
Council on Court Procedures  
School of Law  
University of Oregon  
Eugene, Oregon 97403

Dear Doug:

You will recall that Chairman McEwen appointed me to head the Subcommittee on Third-Party Practice. I suppose I should get moving on the matter fairly soon. I am going to be gone for substantially the month of May on vacation.

My reason in writing to you is to get your ideas as to whether we should hold any public meetings and, if so, where. Also whether we should perhaps just rely on the investigation which is being made by the Practice & Procedure Committee of the Oregon State Bar on the same subject.

Frankly, what I am probably doing is shifting the burden over to you to get me started. Why don't you think it over and then we can confer.

Yours very truly,

WILLIAM M. DALE  
Circuit Judge

WMD/fl



School of Law  
UNIVERSITY OF OREGON  
Eugene, Oregon 97403

503/686-3837

April 13, 1982

Honorable William M. Dale  
Circuit Judge  
Circuit Court of Oregon  
Fourth Judicial District  
Multnomah County Courthouse  
1021 S.W. 4th Avenue  
Portland, Oregon 97204

RE: Third Party Practice

Dear Judge Dale:

Chairman McEwen asked me to advertise to the Bar the fact that the Council on Court Procedures was taking up the question of third party practice and to solicit comments from members of the Bar concerning their experiences under the rule. Due to the long lead time necessary to have an item published in the Oregon State Bar Bulletin, that announcement did not appear until the current issue came out the beginning of this month. I think in order to get any meaningful commentary from the Bar, it would be inappropriate to begin reviewing the rule at this point.

We have scheduled public meetings in each of the congressional districts in the state, as required by statute, for September 11 and 30, October 23, and November 6 and 20. In addition, regular working meetings of the Council are scheduled for May 8, June 12, and July 10. I am hopeful that by the June 8th meeting we will have available the material developed by the Bar's Pleading and Practice Committee and a start on commentary from members of the Bar. I would imagine that we could use the public meetings as an opportunity to receive further commentary from the Bar on third party practice.

This would put us in the position of developing the Council's stand on third party practice during the summer and early fall in time for promulgation of any rule changes in December.

Since he works right down the hall, I'm staying in touch with Fred Merrill on the Pleading and Practice Committee's approach to the



Honorable William M. Dale  
April 13, 1982  
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question. He has promised a report from that Committee following their April 17th meeting, and I will let you know what develops after that meeting.

Sincerely,

Douglas A. Haldane  
Executive Director, Council on  
Court Procedures

DAH:gh

cc: Donald W. McEwen

COUNCIL ON COURT PROCEDURES

Subcommittee on ORCP 44 E.  
Minutes of Meeting Held May 8, 1982  
Judge Dale's Courtroom  
Multnomah County Courthouse  
Portland, Oregon

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The subcommittee on ORCP 44 E. of the Council on Court Procedures met at 11:05 a.m. on Saturday, May 8, 1982 in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon. Present were subcommittee members E.B. Sahlstrom, Austin Crowe, Lyle Velure, and Jim Walton. Also present was Douglas Haldane of the Council staff.

Chairman Sahlstrom reported to the subcommittee a proposal of the Procedure and Practice Committee of the Oregon State Bar which would broaden access to medical records under Rule 44 E. After discussion and on motion of Mr. Velure, seconded by Mr. Walton, the subcommittee unanimously rejected the proposal.

The use of the word "claim" in ORCP 44 E. was apparently causing some confusion for hospital administrators. In order to make it clear that the rule contemplates an action having been filed, Mr. Velure moved, with Mr. Walton's seconding, to substitute the term "civil action" for the term "claim". The motion was approved, with Messrs. Sahlstrom, Velure, and Walton voting in favor, and Mr. Crowe opposed.

Following a discussion in which Mr. Velure and Mr. Walton complained that access to hospital records under ORCP 44 E. was too broad and in which Mr. Crowe urged retention of the present rule, Mr. Velure moved, with Mr. Walton seconding, to amend ORCP 44 E. to limit access to hospital records to those records arising out of the accident, incident, or occurrence for which the civil action had been brought. Further, he would require the party or attorney obtaining copies of hospital records to supply the other side with copies of those records. Further, for access to records not involving the accident, incident, or occurrence for which the civil action was brought, a procedure should be devised similar to that provided in Rule 36 B.(3), covering the discovery of trial preparation materials. Mr. Crowe opposed the motion, but it carried by a vote of 3 in favor, and 1 opposed.

Minutes of Subcommittee Meeting - 5/8/82  
Page 2

Mr. Haldane was instructed to draft appropriate language to amend Rule 44 E. as proposed by Mr. Velure's motion and to present that proposed language to a meeting of the subcommittee to be held immediately prior to the full Council meeting on Saturday, June 19, 1982.

The meeting adjourned at 11:50 a.m.

Respectfully submitted,

Douglas A. Haldane  
Executive Director, Council on  
Court Procedures

DAH:gh

LAW OFFICES

BLACK, KENDALL, TREMAINE, BOOTHE & HIGGINS

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FERRIS F. BOOTHE, P. C.  
JOHN J. HIGGINS, P. C.  
MILTON C. LANKTON, P. C.  
DAVID J. KRIEGER, P. C.  
MICHAEL H. SCHMEER, P. C.  
ROBERT J. MILLER, P. C.  
ALFRED H. STOLOFF, P. C.  
TERRY DESYLVIA  
DOUGLAS G. BECKMAN  
TIMOTHY W. HELTZEL, P. C.  
DONALD J. FRIEDMAN

JOAN O'NEILL  
TIMOTHY E. BROPHY  
ROBERT D. NEWELL  
DANIEL L. MEYERS  
EDWARD SEAN DONAHUE  
DALE L. SMITH  
MARY T. DANFORD  
MYRON SCHRECK  
DONALD J. LUKES

January 22, 1982

SUBJECT: Our File No. 72-001-021

STUART A. HALL  
OF COUNSEL

Mr. E.B. Sahlstrom  
Attorney at Law  
P.O. Box 10427  
Eugene, Oregon 97440

Dear Elmer:

Enclosed please find the amendment to ORCP 44E which the Procedure and Practice Committee drafted and passed. It was sent on to the Council on Court Procedure through normal channels, but apparently did not arrive.

If you wish to have the benefit of our efforts on this matter, I would be happy to provide them or to meet with you or members of your subcommittee at your convenience.

Very truly yours,

BLACK, KENDALL, TREMAINE, BOOTHE & HIGGINS

  
Robert D. Newell

RDN/tau  
Enclosures

Composite Exhibit A  
to Minutes of Subcommittee  
on ORCP 44 E. Meeting  
Held May 8, 1982