

A G E N D A

COUNCIL ON COURT PROCEDURES

Meeting

9:30 a.m., Saturday, July 31, 1982

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

-
1. Approval of minutes of June 19 meeting
 2. Election of treasurer
 3. Report of Juvenile Services Commission
 4. Report of Subcommittee on ORCP 7 D.(4)
 5. Third party practice
 6. Publication of rule changes
 7. Meeting locations
 8. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held July 31, 1982

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

Present: Austin W. Crowe, Jr. Frank H. Pozzi
William M. Dale, Jr. E. B. Sahlstrom
Robert H. Grant James C. Tait
Wendell E. Gronso Wendell H. Tompkins
John F. Hunnicutt Lyle C. Velure
Roy Kilpatrick James W. Walton
Donald W. McEwen William W. Wells
Edward L. Perkins

Absent: John H. Buttler
J. R. Campbell
John M. Copenhaver
John J. Higgins
William L. Jackson
Robert W. Redding
Bill L. Williamson

(Also in attendance were Douglas A. Haldane of Council staff, members of the Oregon State Bar, and representatives of the insurance industry.)

The minutes of the meeting of June 19, 1982 were approved and adopted as distributed. Mr. James W. Walton was suggested as treasurer for the Council and was elected without objection.

Judge Wells reported on the work of the Juvenile Services Commission regarding the revising of the Rules of Procedure for Juvenile Courts. A tentative draft of those rules had been distributed to Council members prior to the meeting. Judge Wells reported that the public hearings process was resulting in numerous significant changes to the tentative draft, and the Council's attention to the rules of procedure was probably premature at this time. The matter was set over until such time as the Juvenile Services Commission reports a final draft.

Following Judge Wells' report, a lengthy discussion of third party practice took place. The discussion indicated that third party practice has received a great deal of

Council time and attention in the past, but no issues had been resolved and third party practice remains as controversial as ever. Controversy exists between those that believe third party practice actually increases the costs and the amount of time necessary to see a lawsuit through to its completion and those that believe that third party practice actually reduces the time and costs. One particular problem that has been pointed out is that of late filings of third party complaints. While ORCP 22 requires that a third party complaint be filed not later than 10 days after service of the third party plaintiff's original answer or leave of court must be obtained, it is a common practice among lawyers to stipulate to a late filing of the original defendant's answer which then makes the filing of the third party complaint later than anticipated.

In an attempt to alleviate this problem, Mr. Crowe moved, with Judge Dale's second, that the time for filing a third party complaint begin to run from the service of the summons and complaint upon defendant and that the defendant have 60 days from the date of service to try to file a third party complaint as a matter of right. Thereafter, leave of court would have to be obtained for the filing of a third party complaint.

The discussion was interrupted at this point while Mr. Haldane distributed to Council members the results of the straw poll taken on third party practice. A copy of the results of that poll are attached to these minutes as Appendix A.

During discussion on the motion, it was pointed out that third party practice allows handling all parties to a particular occurrence in a single lawsuit without the necessity of a number of suits being filed. On the other hand, in many cases the plaintiff will lose on the principal claim and thus everything would have been taken care of in one lawsuit without the necessity of bringing in multiple parties. The practical matter of setting dockets where there are a number of lawyers involved in an individual case was pointed out, and the point was made that having additional defendants in a case aids settlement. Mr. Crowe's motion to amend ORCP 22 failed with a vote of 5 in favor and 10 opposed.

Mr. Kilpatrick then moved, with Mr. Gronso's second, that third party practice be abolished in tort claims only. Following a discussion surrounding the difficulty of determining whether a case sounded in tort or otherwise and the problem presented by multiple-count claims with only some sounding

in tort, Mr. Sahlstrom moved to amend the motion to abolish third party practice in personal injury cases. The amendment was accepted by Mr. Kilpatrick and Mr. Gronso, but the motion failed with a vote of 6 in favor and 9 opposed.

A discussion followed which seemed to express the Council's frustration at its inability to resolve what most members recognized as problems with ORCP 22. Mr. McKeown suggested that the Council should focus on the problem of the last-minute third party complaint, and see if the issue could be resolved. He inquired of Mr. Crowe as to whether Mr. Crowe would be willing to resubmit his proposed amendment deleting that language which would allow a late filing of a third party complaint with leave of court. Mr. Crowe stated that that would be acceptable so long as the right of the defendant to plead in a third party defendant would be absolute for a period of six months following the service of the summons and complaint. Mr. Gronso responded that the six-month period was too long and would not solve the problem of costs involved in discovery undertaken by the third party defendant which had already been completed by the initial parties. He suggested a period of 90 days rather than six months. After some further discussion, Mr. Crowe moved, with Mr. Pozzi's second, that ORCP 22 be amended to allow the filing of a third party complaint for a period of 90 days after the service of summons and complaint upon defendant and not thereafter. Mr. Tait suggested that there was nothing wrong with filing a late third-party complaint if all parties agreed and suggested that the filing of the third party complaint after 90 days from the date of service of the summons and complaint should be allowed if stipulated to by the parties. Judge Hunnicutt suggested that if the late filing of a third party complaint was to be allowed by stipulation, it should only be with leave of court. Mr. Tait originally opposed the leave of court language, but after Judge Tompkins pointed out the docketing problems of last-minute continuances which might be caused by late filings, Mr. Tait agreed, and Mr. Crowe and Mr. Pozzi agreed to an amendment to their motion, which would allow the late filing of third party complaints if stipulated to by the parties and with leave of court. The motion passed with 14 in favor and 1 abstention.

Mr. Haldane distributed a draft of a proposed amendment to ORCP 7 D.(4), but since the subcommittee had not had an opportunity to meet and make a recommendation, Mr. Gronso moved, with Mr. Sahlstrom's second, that the matter be re-referred to the subcommittee. The motion was adopted unanimously.

Mr. Velure moved, with Mr. Pozzi's second, to reconsider the action taken by the Council at the June 19 meeting adopting an amendment to ORCP 47 on summary judgment. He stated his concern that the amendment as adopted will be construed by the trial court to require stating the underlying facts and opinions of an expert

witness in an affidavit offered in opposition to a motion for summary judgment. He stated that he recognized that the Council's intention was clear on this point, that the underlying facts and opinions would not have to be stated, but was concerned that the language in the amendment would not necessarily effectuate the Council's intention. The motion to reconsider failed, with a vote of 6 in favor, 8 opposed, and 1 abstention.

Mr. Velure then moved to reconsider Council action on proposed amendments to ORCP 44 E. He stated he wished reconsideration on the action taken by the Council at the June 19, 1982 meeting in which the Council rejected proposed amendments which would restrict access to hospital records to records relating to the accident, occurrence, or incident which was the matter involved in the civil action and would require a showing of substantial need before unrelated records could be obtained. He also wished to consider the action of the Council in rejecting a proposed amendment which would require one gaining access to hospital records to provide copies for opposing counsel. The motion to reconsider failed, with a vote of 5 in favor, 8 opposed, and 2 abstaining.

A discussion followed relating to meeting locations and times for the Council's public meetings. It was pointed out that the Council had tentatively scheduled meetings in Eugene, Salem, Bend, and two meetings in Portland. It was suggested that it might be appropriate to move the meeting sites to areas which would allow greater access to the public hearings by members of the Bar and the public. It was pointed out that the Council was required to hold its public meetings in each of the congressional districts of the state and the congressional district boundaries were such that it might be difficult to follow the suggestion of spreading the meetings out further. Since Council members were unaware of the exact boundaries of the new congressional districts, Mr. Haldane was asked to use his discretion in the matter. Mr. Haldane was also asked to redistribute to the Council the schedule of the public meetings. A copy of that schedule is attached to these minutes as Appendix B.

The July 31, 1982 meeting of the Council on Court Procedures was adjourned at 11:30 a.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

RESULTS OF BALLOT

THIRD PARTY PRACTICE

| | Retain | Retain for non- jury cases | Abolish | Modify |
|------------------------------------|----------|----------------------------------|----------|----------|
| John H. Buttler | | | | X |
| J.R. Campbell | | | | X |
| John M. Copenhaver | | | X | |
| Austin W. Crowe, Jr. | | | | X |
| William M. Dale, Jr. | X | | | |
| Robert H. Grant | | | | X |
| Wendell E. Gronso | | X | | |
| John J. Higgins | X | | | |
| John F. Hunnicutt | | | | |
| William L. Jackson | | | | X |
| Roy Kilpatrick | | | | |
| Donald W. McEwen | | | | X |
| Edward L. Perkins | | | | X |
| Frank H. Pozzi | | | X | |
| Robert W. Redding | X | | | |
| E.B. Sahlstrom | | | X | |
| James C. Tait | | | | X |
| Wendell H. Tompkins | | | X | |
| Lyle C. Velure | | | X | |
| James W. Walton | | | X | |
| William W. Wells | | | X | |
| Bill L. Williams | | | | |
| Public Member (to be appointed) | | | | |
| TOTALS | 3 | 1 | 7 | 8 |

N O T I C E

PROPOSED AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE

August 9, 1982

The Council on Court Procedures is considering proposed amendments to the Oregon Rules of Civil Procedure. The Council plans to submit these amendments to the 1983 Legislative Assembly. As provided in ORS 1.735, these amendments would go into effect unless rejected or changed by the Legislature.

The Council will be releasing a tentative draft of the amendments to secure comment and suggestions. Written comments and suggestions may be submitted to the Executive Director of the Council. In addition, any interested person is encouraged to present testimony relating to the tentative amendments at the Council's public hearings. The Council will conduct those public hearings according to the following schedule:

| <u>DATE</u> | <u>TIME</u> | <u>PLACE</u> |
|------------------------------|-------------|---|
| Sept. 11, 1982 | 9:30 a.m. | Cascade Natural Gas Community Service Room, 334 N.E. Hawthorne Street, Bend, Oregon |
| Sept. 30, 1982 (Thursday) | 9:30 a.m. | Harris Hall (Main Meeting Room), Lane County Courthouse, Corner of 8th & Oak, Eugene, Oregon |
| Oct. 23, 1982 | 9:30 a.m. | Willamette University College of Law, Classroom E (off lobby), 250 Winter Street S.E. (one block from Capitol), Salem, Oregon |
| Nov. 6, 1982 | 9:30 a.m. | Thunderbird Coliseum (Oregon Room), 1225 North Thunderbird Way, Portland, Oregon |
| Nov. 20, 1982 | 9:30 a.m. | County Commissioners' Meeting Room (Rm. 602), Multnomah County Courthouse, Portland, Oregon |

The Council will take final action on proposed amendments to the rules of procedure in December 1982.

The following is a summary of amendments which have been adopted or proposed for adoption so far:

AMENDMENTS

Adopted

ORCP 21 A. - DEFENSES AND OBJECTIONS; HOW PRESENTED. To cure any ambiguity in the ability of the court to allow leave to amend after a motion to dismiss has been granted, Rule 21 A. will be amended to specifically refer to leave to amend under ORCP 23 D. The amendment would also make it clear that judgment may be entered if leave to amend is not granted.

ORCP 22 C. - THIRD PARTY PRACTICE. The time for filing and serving a third party complaint will be changed from not later than 10 days after service of the third party plaintiff's original answer to not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Within the 90 days,

third parties may be pled in as a matter of right. After 90 days, third parties may only be pled in by stipulation of the existing parties and leave of court.

ORCP 44 E. - ACCESS TO HOSPITAL RECORDS. The rule will be amended to allow access to hospital records to one against whom a "civil action" has been filed, rather than a "claim."

ORCP 47 - SUMMARY JUDGMENT. When, in opposing a motion for summary judgment, it would be necessary to provide the opinion of an expert to raise a material issue of fact, an affidavit of counsel that a qualified expert is willing to testify to facts and opinions which raise a material issue of fact will be an adequate basis for the court to deny the motion.

ORCP 63 - JUDGMENT NOTWITHSTANDING THE VERDICT. The rule will be amended to make it clear that the motion for directed verdict referred to in ORCP 63 A. is a motion made at the close of all the evidence, not one made at the close of the plaintiff's case-in-chief.

Proposed

ORCP 7. The rule would be amended to:

- (1) Specifically allow service on a county by serving the county clerk or person performing the duties of that office;
- (2) Specifically allow certification of mailing by the attorney for any party;
- (3) Require mailing a copy of the summons and complaint to the defendant's insurance carrier when making substituted service on the Department of Motor Vehicles before a default may be taken, when the identity of the insurance carrier is known to the plaintiff.

ORCP 9 B. - SERVICE; HOW MADE. To cure an ambiguity, the proposed amendment would make it clear that it applies to all parties, represented by an attorney or not.

* * *

Additional matters may be brought to the Council's attention during the hearings process.

COUNCIL ON COURT PROCEDURES:

| | |
|--|------------------------------------|
| Donald W. McEwen, Portland (Chairman) | Hon. William L. Jackson, Baker |
| Hon. William M. Dale, Jr., Portland (Vice Chairman) | Roy Kilpatrick, Mount Vernon |
| James W. Walton, Corvallis (Treasurer) | Hon. Edward L. Perkins, Bend |
| Hon. John H. Buttler, Salem | Frank H. Pozzi, Portland |
| Hon. J. R. Campbell, Salem | Hon. Robert W. Redding, Portland |
| Hon. John M. Copenhaver, Bend | E. B. Sahlstrom, Eugene |
| Austin W. Crowe, Jr., Portland | James C. Tait, Oregon City |
| Robert H. Grant, Medford | Hon. Wendell H. Tompkins, Albany |
| Wendell E. Gronso, Burns | Lyle C. Velure, Eugene |
| John J. Higgins, Portland | Hon. William W. Wells, Pendleton |
| Hon. John F. Hunnicutt, St. Helens | Prof. Bill L. Williamson, Portland |

COUNCIL ON COURT PROCEDURES
University of Oregon School of Law
Eugene, Oregon 97403

(503) 686-3990



School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

June 28, 1982

Mr. Robert H. Grant
Attorney at Law
201 W. Main Street, No. 5B
Medford, OR 97501

Mr. John J. Higgins
Attorney at Law
3100 First Interstate Tower
1300 S.W. 5th Avenue
Portland, OR 97201

Mr. Lyle C. Velure
Attorney at Law
P.O. Box 7788
Eugene, OR 97401

RE: SUBCOMMITTEE ON ORCP 7 D.(4)(a) AND ORCP 7 D.(4)(c)

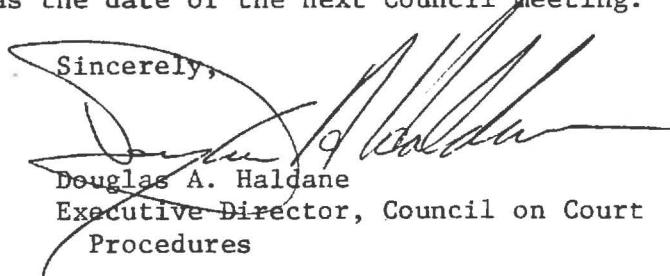
Gentlemen:

At the June 19, 1982 meeting of the Oregon Council on Court Procedures, Mr. Grant raised a concern expressed by Mr. Richard Lang over the Court of Appeals decision in Harp v. Loux, 54 Or App 840 (1981). The Council suggested that the matter be referred to a subcommittee. Chairman McEwen has appointed the three of you to serve on that subcommittee.

I am enclosing with this letter copies of correspondence which I have received to date on this subject. I will also forward to you as soon as possible a first draft of a proposed amendment along the lines suggested by Mr. Velure at the Council meeting, that of providing service directly on an insurance carrier in this kind of situation.

After you have had an opportunity to review these materials, I will be in touch with each of you to attempt to arrange a meeting of the subcommittee in order that we might have a proposal to submit to the Council on July 31, which Don McEwen has designated as the date of the next Council meeting.

Sincerely,


Douglas A. Haldane
Executive Director, Council on Court
Procedures

DAH:gh
Enclosures