A G E N D A

COUNCIL ON COURT PROCEDURES

Meeting

Date and Time: Thursday, September 30, 1982
9:30 a.m.

Place: Harris Hall (Main Meeting Room), Lane County Courthouse, Corner of 8th and Oak, Eugene, Oregon

1. Approval of minutes of meetings held July 31, 1982 and September 11, 1982

2. Public testimony relating to proposed amendments

3. Staff review of proposed amendments to Oregon Rules of Civil Procedure and Oregon Rules of Juvenile Court Procedure

4. Report of Subcommittee on ORCP 7

5. NEW BUSINESS

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held September 30, 1982

Harris Hall, Lane County Courthouse

Eugene, Oregon

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

(Also present were Douglas A. Haldane and Gilma J. Henthorne of Council staff)

The Council on Court Procedures convened at 9:45 a.m. on Thursday, September 30, 1982, in the Main Meeting Room of the Harris Hall, Lane County Courthouse, Eugene, Oregon. The minutes of the meetings of July 31, 1982, and September 11, 1982, were unanimously approved.

Copies of the following were distributed to Council members: 1) three-page letter from Frank T. Mussell, Assistant Attorney General, Family Law Section, Department of Justice, to Cheryl Mohr-Manhire, Staff Assistant with the Juvenile Services Commission in Salem; 2) two-page letter (written testimony) from the League of Women Voters of Central Lane County to Donald W.McEwen, Chairperson, and Members of the Council on Court Procedures; 3) Additional Proposed Amendments to ORCP dated September 30, 1982, a copy of each of which are attached to the original of these minutes as Appendices A, B and C, respectively.

Chairman McEwen inquired if anyone attending wished to present testimony on any matter before the Council on Court Procedures.

First to speak was Roz Slovic of the League of Women Voters of Lane County. Ms. Slovic testified that the League had recently completed a local juvenile court monitoring project and had become aware of widely differing procedures and terminology employed by juvenile courts in Oregon. She urged on behalf of the League that the Council accept for consideration the proposed Rules of Juvenile Court Procedure submitted by the Juvenile Services Commission. It was the view of the League that such a code of procedure was needed. She then read for the record from the written testimony which she had submitted, a copy of which is attached as Appendix B to the original of these minutes.

Chairman McEwen inquired of Ms. Slovic whether she or the League had considered the question of the Council becoming involved in substantive and evidentiary matters. Ms. Slovic responded that if the Council were so restricted, she would urge that it consider those portions of the code which are clearly procedural.

Terry L. Soeteber, Director of the Josephine County Juvenile Department, then offered testimony also directed toward the proposed Rules of Juvenile Court Procedure. Mr. Soeteber indicated a desire to address specific concerns he had regarding the proposed rules of procedure, but questioned whether it was appropriate in view of the fact that the Council was apparently still attempting to determine whether to consider the rules at all. Chairman McEwen responded that it might be more appropriate to see what action the Council took in considering the rules of procedure and suggested that should the Council consider the rules, Mr. Soeteber could submit written remarks to the Council staff.

Testimony was then offered by The Honorable David Frohnmayer, Attorney General of the State of Oregon. Mr. Frohnmayer's remarks were also addressed to the proposed Rules of Juvenile Court Procedure. Mr. Frohnmayer stated that he did not oppose the adoption of uniform rules of procedure for the juvenile courts in the state, nor did he dispute the need for reform in juvenile court procedure. He was addressing the Council, however, because of serious concerns regarding the scope of the authority of the Council on Court Procedures to deal with the proposed code. He stated that he entertained both legal and policy concerns. His concerns regarding the Council's authority were stated as follow:

1) While the Council has authority to adopt rules of procedure for civil proceedings in all courts of the state, no statute or appellate court decision in Oregon has identified juvenile procedures as "civil" in nature.

2) While ORS 1.735 clearly states that the Council on Court Procedures may not promulgate rules of evidence, the proposed juvenile code contains many matters which are evidentiary in nature.

3) While ORS 1.735 grants the Council the authority to adopt rules of procedure "which shall not abridge, enlarge, or modify the substantive rights of any litigant", the Proposed Rules of Juvenile Procedure contain much which is substantive in nature.

Mr. Frohnmayer's policy concerns were:

1) The Proposed Rules of Procedure do not distinguish between dependency and delinquency matters and questioned why the protections which would apply to delinquency proceedings, which are more criminal in nature, should apply to dependency matters;

2) While the Congress of the United States in the Indian Child Welfare Act has established procedural and substantive rights for Indian children, the proposed code contains no special articulation of the treatment to be afforded Indian children;

3) He questioned the wisdom of attempting to impose upon the juvenile courts of the state a uniform code of procedure during the time when court administration is being centralized. This time of transition will be difficult enough for the courts without having to cope with a new code of procedure at the same time;

4) Many matters contained in the proposed code, particularly those regarding fourth and fifth amendment rights of juveniles in delinquency hearings, are matters which have been proposed previously to the legislature, and the legislature has declined to endorse them each time.

5) Whether it should ultimately be determined that the Council on Court Procedures does indeed have the authority to promulgate rules of juvenile court procedure, the task of establishing that authority through the courts will be one which will involve tremendous expense to litigants.

Judge Wells inquired of Mr. Frohnmayer why the legislature would tell the Juvenile Services Commission to recommend rules of procedure to the Council on Court Procedures if it didn't intend that the Council on Court Procedures do the job. Mr.

Frohnmayer responded that he had no good response or explanation for the legislature's action.

The Council then heard testimony from Paul Lenarduzzi, Director of the Lane County Juvenile Department, whose comments were also directed toward the proposed juvenile code. Mr. Lenarduzzi was prepared to address the substance of the code itself, but would follow the chair's suggestion and submit his specific comments to the Council staff should the Council decide to consider the proposed code. He did indicate that the Juvenile Directors of Coos, Curry, Josephine, Jackson, Douglas, Klamath, and Lane Counties had met to consider the code and had grave concerns regarding many of its provisions.

Following some discussion among Council members, Judge Dale moved, with Mr. Pozzi's second, that the Chairman of the Council inform the Governor, the President of the Senate, the Speaker of the House, and the Attorney General that despite the apparent direction of the Legislative Assembly, it is the considered judgment of the Council on Court Procecures that it does not have the statutory authority to promulgate rules of procedure for juvenile courts and, more particularly, that it does not have the authority to promulgate the rules of procedure proposed by the Juvenile Services Commission for the reason that, in addition to procedural matters, the rules contain much which is substantive or evidentiary. During the discussion on the motion, it was apparent that Council members believed that a uniform code of procedure for juvenile courts is needed, but there continued to be questionsabout the Council's expertise and authority. Although Judge Wells and Judge Hunnicutt continued to urge Council consideration of the proposed rules, the motion was adopted with a vote of nine in favor and Judges Wells and Hunnicutt voting no.

Mr. Pozzi then moved, with Judge Jackson's second, that the Chairman should include in the letter just approved by the Council a statement of the Council's willingness to consider a code of procedure for juvenile courts should the legislature, through appropriate legislation, empower the Council to take on that task. Speaking to his motion, Mr. Pozzi argued that a uniform code for juvenile procedure is needed, that the reform of juvenile procedures has been a "political football" for at least the last decade, and that because it has no direct interest in juvenile procedures, the Council is perhaps better equipped than any body to perform the task. Mr. Pozzi's motion passed unanimously.

The Council then began discussion of the Proposed Amendments to ORCP dated September 30, 1982, and attached to the original of these minutes as Appendix C.

The following action was taken:

ORCP 21 A. Judge Hunnicutt moved, with Mr. Sahlstrom's second, to adopt the proposed amendment as submitted, including the language change in parentheses in the last sentence. The motion was adopted unanimously, but Mr. Haldane was directed to consider the effect of the last sentence of ORCP 21.

ORCP 22 C. Judge Dale took exception to the requirement that the agreement of the parties be required before a third party complaint would be allowed after the running of the initial time period, and moved the deletion of that language. Mr. Kilpatrick seconded the motion, but it failed with only Judge Dale voting in favor. Mr. Pozzi moved, with Judge Buttler's second, to substitute the words "parties who have appeared" for "existing parties." The motion passed unanimously.

RULE 44 E. Mr. Sahlstrom moved, with Judge Tompkins' second, that the proposed amendments in the draft be adopted. Those amendments would delete the words "legally liable or" after "party" in the first line and the substitution of "civil action" for "claim" in the second line and substitution of "filed" for "asserted" in the second line. The motion passed unanimously.

RULE 7 D.(3)(d). Mr. Sahlstrom moved, with Mr. Pozzi's second, to delete from Rule 7 D.(3)(d) the entire last sentence. The motion passed, with Judges Hunnicutt and Tompkins in opposition. Mr. Pozzi moved, with Mr. Sahlstrom's second, that the words "or attorney" be added to the list of those upon whom service may be made when serving a public body. The motion was adopted unanimously.

RULE 9. Judge Hunnicutt moved, with Mr. Grant's second, to adopt the proposed addition to Rule 9 of language which would allow service of pleadings in the court file when a party's address was not ascertainable. Mr. Kilpatrick moved to amend the motion by deleting the words "and no addresss is reasonably ascertainable." Judge Hunnicutt and Mr. Grant accepted the amendment, and the motion passed with seven in favor and three opposed. Voting "no" were Mr. Sahlstrom and Judges Tompkins and Dale.

RULE 59. Mr. Kilpatrick moved, with Judge Wells' second, that the proposed changes to Rule 59 allowing for submission of jury instructions by audio recording be adopted. The discussion centered on the failure of the proposal to provide for trial court discretion in the manner in which the instructions would be submitted. The motion failed, with a vote of five in favor and five opposed. Mr. Haldane was directed to take another look at the proposal for consideration at the Council's next meeting.

NEW BUSINESS. Chairman McEwen stated that the Council should consider the possibility of providing a rule allowing a motion to strike a pleading because of failure to comply with the rules.

The meeting adjourned at 11:40 a.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

M E M O R A N D U M

TO: SUBCOMMITTEE ON ORCP 7:

John J. Higgins
Robert H. Grant
Lyle C. Velure

FROM: DOUGLAS A. HALDANE

DATE: September 16, 1982

RE: Amendments to ORCP 7, Harp v. Loux

Enclosed is a draft of a proposal to amend ORCP 7 to avoid the result reached in Harp v. Loux. I recognize that this proposal does not go as far or do as many things as we discussed at the last subcommittee meeting, however, it is my view that this is about as far as we can go constitutionally.

I would suggst that each of you, after reviewing this proposal, respond to me with whatever further suggestions you have. With those responses in hand, I can probably arrange a subcommittee meeting by conference call in order that we can bang out a definite proposal to present to the Council at its September 30 meeting.

DAH:gh

Encl.

D.(4) Particular actions involving motor vehicles.

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 a registered agent within this state, may be served with summons by personal service upon the Motor Vehicles Division and mailing a copy of the summons and complaint to the defendant

→ and the defendant's insurance carrier if known to the plaintiff.

D.(4)(a)(ii) Summons may be served by leaving one copy of the summons and complaint with a fee of $12.50 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, as soon as reasonably possible, shall 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 as shown by the Motor Vehicles Division's driver records, 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 by these rules, service under this paragraph shall be complete upon such mailing.

→ and the defendant's insurance carrier if known to the plaintiff.

D.(4)(a)(iii) The fee of $12.50 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.

D.(4)(b) Notification of change of address. Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D.(4)(c) Default. No default shall be entered against any defendant served by mail under this subsection who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail.

9-16-82

Harp v. Loux

636 P.2d 976 (1981)

Mikal D. HARP, Respondent, v. Philip W. LOUX, Appellant.

No. 37770; CA 19862.

Court of Appeals of Oregon.

Argued and Submitted August 26, 1981.

Decided November 23, 1981.

*977 Edward J. Harri, Salem, argued the cause for appellant. With him on the briefs was Rodney W. Miller, Salem.

J. Michael Alexander, Salem, argued the cause for respondent. With him on the brief was Brown, Burt, Swanson, Lathen & Alexander, Salem.

Before RICHARDSON, P.J., and THORNTON and VAN HOOMISSEN, JJ.

RICHARDSON, Presiding Judge.

Defendant[1] appeals from the denial of his motion to set aside a default judgment in this action arising out of a motor vehicle accident. He contends that (1) the default judgment was improper because there was no showing that plaintiff used "due diligence" to locate him before attempting to serve him by mail; (2) the trial court abused its discretion by not setting aside the judgment on grounds of surprise, when neither defendant nor his insurer was actually serviced or notified of the action by plaintiff; (3) if ORCP 7 D(4)(a) and (c) permit a judgment to be taken without the defendant or his insurer receiving notice of the action, the rule denies them due process under the circumstances of this case; and (4) the adoption of the rule was invalid. We affirm.

The accident occurred in May, 1978. Defendant was insured by Forest Industries Insurance Exchange (Forest). He settled his claim for damage to his own car with Forest the month after the accident; Forest has not communicated with him since and has not been informed of defendant's address changes since the accident. Plaintiff was a minor at the time of the accident. Members of his family and his own insurer were aware that defendant was insured by Forest and communicated with Forest concerning the accident between the time of its occurrence and the time plaintiff brought this action in April, 1980.

The default judgment was granted pursuant to plaintiff's motion, which was supported by the following affidavit of his attorney:

"I am the attorney for Plaintiff in the above-entitled action. A Complaint for Personal Injury was filed on April 16, 1980. On the same date a certified, true copy of the Summons and a certified, true copy of the Complaint were delivered to the Yamhill County Sheriff for service upon the Defendant at the address given by the Defendant at the scene of the accident. This address is also the same one on record with the Oregon Motor Vehicle Department. Subsequently the Yamhill County Sheriff's office returned the Summons to me with an undated notation that the Defendant had moved to 1724 1/2 Santa Ynez, Sacramento, California. On April 24, 1980 a certified letter was sent to the Sacramento County Sheriff requesting service upon the Defendant at the Santa Ynez address. On *978 May 15, 1980 the Civil Division of the Sacramento County Sheriff's office sent to us a non est return. By telephone the Sacramento County Sheriff's office informed us that the Defendant had moved to Coalmont, British Columbia, Canada. On or about May 16, 1980 we made various telephone calls to the area of Coalmont, British Columbia, but were unable to find the Defendant. "On May 20, 1980 certified, true copies of the Summons and certified, true copies of the Complaint were mailed to the Defendant to the following addresses: "Rt. 1, Box 402 Amity, Oregon "1724 1/2 Santa Ynez Sacramento, California "Coalmont, British Columbia. "All three envelopes were returned to us by the Post Office marked unclaimed. A copy of the face of each envelope is attached hereto, marked Exhibit `A', and hereby made a part hereof."

Forest first became aware of the judgment against defendant in August, 1980, when plaintiff's lawyer demanded satisfaction from Forest. Defendant's motion to set the judgment aside was filed by Forest's attorney the next month and, after a hearing, was denied by the trial judge in December, 1980.

Defendant argues that the default judgment was improperly granted because he was served by mail, neither he nor his insurer received service or actual notice of the action, and the affidavit of plaintiff's attorney does not disclose that due diligence was exercised to ascertain defendant's current address. The service by mail was made pursuant to ORCP 7 D(4)(a), and the default was taken pursuant to ORCP 7 D(4)(c), which provide respectively:

"(a) 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, may be served with summons by mail, except a defendant which is a foreign corporation maintaining an attorney in fact within this state. Service by mail shall be made by mailing to: (i) the address given by the defendant at the time of the accident or collision that is the subject of the action, and (ii) the most recent address furnished by the defendant to the Administrator of the Motor Vehicles Division, and (iii) any other address of the defendant known to the plaintiff, which might result in actual notice. "(c) No default shall be entered against any defendant served by mail under this subsection who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address furnished by the defendant to the Administrator of the Motor Vehicles Division, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail."

The affidavit of plaintiff's attorney in support of the motion for default clearly satisfied the literal terms of ORCP 7 D(4)(c). However, defendant argues that Rule 7 D(4)(c) requires more than its language overtly communicates and that the "due diligence" requirement of former ORS 15.190(3), as construed by the Supreme Court in Ter Har v. Backus, 259 Or. 478, 487 P.2d 660 (1971), is implicitly embodied in the rule. The issue in Backus was whether the plaintiff had met the conditions for making substituted service upon the Motor Vehicles Division (Division) in lieu of personal service upon the defendant under former ORS 15.190(3). That statute provided at the relevant time that substituted service could be made "[w]hen service of the summons or process cannot be made as prescribed *979 in ORS 15.080, and the defendant after due diligence cannot

be found within the state, and that fact appears by affidavit to the satisfaction of the court * * *." (Emphasis added.) The court held that, to satisfy the "due diligence" requirement, the affidavit had to show "`that all reasonable means have been exhausted in an effort to so find defendant,'" 259 Or. at 481, 487 P.2d 660 (emphasis in original), and that

"[a]mong possible sources of information which should be contacted in order to make a showing that `all reasonable means' have been exhausted, depending upon the circumstances of the particular case, are the following: (1) inquiry at the post office of defendant's last known residence * * *; (2) inquiry of defendant's employer, if any, particularly if he is a co-defendant * * *; (3) inquiry of public utility companies, such as light and water companies in the area of defendant's last known residence * * *; and (4) inquiry of neighbors, relatives and friends, if any, in the area of defendant's last known residence * * *." (Citations omitted; footnotes omitted.) 259 Or. at 482, 487 P.2d 660.

By Oregon Laws 1969, chapter 389, section 1, the legislature added the following language to ORS 15.190(3):

"* * * Due diligence is satisfied when it appears from the affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident, or residing at the most recent address furnished by the defendant to the Director of the Department of Motor Vehicles, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the filing of the affidavit. * * *"

Although enacted prior to the decision in Backus, that amendment was not relevant to the decision, because the events in Backus predated it.

In 1973, the legislature adopted Oregon Laws 1973, chapter 60, section 1, which eliminated any showing as a prerequisite to making substituted service, but which required a showing by affidavit to be made before a default could be entered upon a defendant's nonappearance following substituted service. ORS 15.190(7), as adopted by the 1973 Act, provided:

"No default shall be entered against any defendant who has not either received or rejected the registered or certified letter containing the notice of such service and a copy of the summons or process, unless the plaintiff can show that the defendant after due diligence cannot be found within or without the state and that fact appears by affidavit

to the satisfaction of the court or judge thereof or the judge described in subsection (3) of ORS 15.120. Due diligence is satisfied when it appears from such affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident, or residing at the most recent address furnished by the defendant to the Administrator of the Motor Vehicles Division, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons or process upon the Administrator of the Motor Vehicles Division. Where due diligence is proven to the court by such affidavit, the service upon the Administrator of the Motor Vehicles Division shall be sufficient valid personal service upon said resident, nonresident or foreign corporation, notwithstanding that he or it did not actually receive a notice of such service because of defendant's failure to notify the Administrator of the Motor Vehicles Division of a change of his or its address as required by subsection (2) of this section." (Emphasis added.)

ORS 15.190 was repealed by Oregon Laws 1979, chapter 284, section 199, and was replaced by ORCP 7 D, the relevant portions of which were quoted above. The rule differs from the statute in that it permits service on motorists to be made by mail instead of by substituted service on the Division. The rule also deletes the statute's use of the term "due diligence" in describing *980 the attempts to locate the defendant which must be shown to support entry of default. However, the rule establishes a new requirement that the plaintiff's affidavit must show, in addition to his inability to locate the defendant at the address given at the accident or at the most recent address furnished the Division, that the defendant cannot be found "residing at any other address actually known by the plaintiff to be defendant's residence address * * *."[2]

Plaintiff argues that the acts necessary to constitute "due diligence" under Backus ceased to be required when that term was statutorily defined by the 1969 Act. Plaintiff contends further that the language and requirements of the applicable provisions have remained unchanged in substance from that time through the adoption of Rule 7 D(4)(c) in 1979.[3] We agree that the "due diligence" requirements of Backus do not apply in the motor vehicle cases to which Rule 7 D(4)(c) pertains and that literal compliance with the requirements of that rule is sufficient to support the entry of a default judgment. The acts which were legislatively designated in the 1969 Act as being adequate to constitute "due diligence" were redesignated as such in the 1973 Act and, with one addition, were again specified in ORCP 7 D(4)(c). Both were adopted after the decision in Backus. We conclude from that history that the legislature meant exactly what it said in 1969 and did not mean what Backus said.

ORCP 7 D(4)(c) does not retain the language of the 1969 and 1973 amendments that "due diligence is satisfied" by the specified acts aimed at locating the defendant; the term "due diligence" itself is not retained in the rule. That fact and the fact that the rule specifies exactly what actions a plaintiff must demonstrate were taken to locate the defendant persuade us that the rule does not contemplate location efforts other than those it does specify and that it does not implicitly adopt the Backus "due diligence" requirements.

Defendant argues that the requirement which ORCP 7 D(4)(c) added to those of ORS 15.190, that a plaintiff attempt service by mail at any other address of the defendant "actually known by the plaintiff to be defendant's residence address," is relevant here. As we understand defendant, he reads that language as implying that a plaintiff has the duty to use all reasonable efforts to ascertain the defendant's residence address. However, the words "actually known by the plaintiff" are contrary to defendant's understanding. (Emphasis added.)

The point defendant urges most strongly is that plaintiff was aware that Forest was defendant's carrier, and plaintiff's failure to inform Forest of the action amounted to a deliberate non-exercise of diligence on plaintiff's part to notify defendant and Forest of the action. The point does not assist defendant in connection with his argument that the granting of default under ORCP 7 D was improper. For reasons previously stated, the rule does not require that a plaintiff attempt to locate a defendant by searching for his address in the records of his insurer, and the rule does not require service on or notice to a known insurer.[4]

Defendant's argument of greater interest is that the trial court abused its discretion by not setting the judgment aside *981 on the ground that it was taken by surprise, because neither defendant nor the insurer was informed by plaintiff that the action had been brought.[5] This argument warrants the most fleeting if any discussion insofar as it pertains to the defendant himself. We decline to hold that this non-appearing defendant, upon whom service was made in the manner prescribed by statute, was surprised by the taking of a judgment against him. As far as anything in this record shows, there is no more to defendant's argument that the judgment against him was taken by surprise than the bald proposition that any defendant who has avoided receipt of service or actual notice, wilfully or otherwise, is necessarily surprised by a resulting default.

Defendant's argument presents a more perplexing, if not a closer, question in connection with an insurer who is known by a plaintiff to be on the risk and whom the plaintiff fails to notify of a pending action against an insured. The difficulty with defendant's argument is that the insurer's legal interest in the action is wholly derivative of the defendant's and from the insurer's contractual duty or prerogative to defend. See ORCP 26. It may be true that, in fact, the insurer's money and not the defendant's is on the table; however, the judgment runs against the defendant and not the insurer. It follows that a trial court has no discretion under ORS 18.160 to relieve a surprised insurer from a judgment which does not run against it in an action to which it is not a party. See n. 5, supra.

Aside from its legal difficulties, there are policy problems with defendant's argument. Insurers can, and generally do, include provisions in their contracts to require insureds to comply with all requirements of law (e.g., informing the Division of address changes), to notify the insurer of any claims and, in other ways, to take actions aimed at preventing exactly what happened here. As defendant points out, the insurer's remedies for breaches of such policy provisions will often be hollow, especially when, as here, the insurer does not know where the defendant is. Nevertheless, it is not readily apparent why a plaintiff injured by an insured should be required to protect the insurer from the consequences of the insured's failure to comply with the policy or with laws aimed at making him amenable to process, as opposed to the insurer anticipating the need for and taking necessary safeguards. We reject defendant's arguments that the default was taken in contravention of ORCP 7 D(4)(c) and that the trial judge abused his discretion by not setting the judgment aside.

Defendant argues next that ORCP 7 D violates his and his insurer's due process rights insofar as it permits "plaintiff to take a default judgment without taking every reasonable measure to ensure adequate notice." Defendant relies on Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), and on similar propositions in later United States and Oregon Supreme Court cases. The Court stated in Mullane:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. * * * "* * * The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself

reasonably certain to inform those affected * * * or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." (Citations omitted.) 339 U.S. at 314-15, 70 S. Ct. at 657-58.

Plaintiff responds:

*982 "Rules 7(D)(4)(a) and (c) demand attempts to locate the defendant at the address given at the accident, and at that supplied to the Motor Vehicles Division, as well as other locales actually known to the Plaintiff. Such attempts should certainly be reasonable methods to give notice, since ORS 483.602 requires a person involved in an injury accident to give the other driver his name and address, and ORS 482.290(3) and Rule 7(D)(4)(b) impose an affirmative duty on a motorist to keep the Motor Vehicles Division informed of his whereabouts. These corresponding duties on the part of potential plaintiffs and defendants clearly establish a statutory scheme reasonably and fairly calculated to provide actual notice." (Footnotes omitted.)

We agree with plaintiff. The service by mail provisions of ORCP 7 D are "not substantially less likely to bring home notice than other of the feasible and customary substitutes" for achieving notice to persons who cannot be located at the address or addresses they are required by law to provide.

We therefore hold that, under these facts, the rule does not violate defendant's constitutional rights. We also hold that no right of Forest's was violated. Forest is not a party to this action. Defendant calls our attention to no case holding that an insurer that is not a party has a due process right to service or notice of an action in which its insured is a defendant. As noted previously, insurers have the ability to assure, through their policy provisions, that insureds will be amenable to process and will inform insurers of claims. While the legislature may do so, we do not consider that it is constitutionally required to place on plaintiffs the burden of providing insurers with the notice they can demand from their insureds by contract.

Defendant's final argument is that the adoption of ORCP 7 D(4)(c) violated ORS 1.735, [6] because the default procedures of the rule differ substantively from those of former ORS 15.190. Defendant explains:

"* * * Under [the rule] a defendant in an Oregon court, if the rule is constitutional, must trust his fate to the irregularities of the mail service. ORCP 7(D)(4)(c) creates new

obligations and imposes additional duties with respect to past transactions and changes existing rights since it permits service by certified mail only. * * * The changes in the method of service available under ORCP 7(D)(4)(c) as contrasted with earlier methods requiring service on the Department of Motor Vehicles Division (former ORS 15.190) and personal service of the defendant, mark a substantive change. Thus, ORCP 7(D)(4)(c) goes beyond the scope of the rule permitted by ORS 1.735 and thus cannot be sustained."[7]

We do not agree that the change is "substantive" within the meaning of ORS 1.735, or that it could have any possible negative bearing on defendant's rights.

Affirmed.

NOTES

[1] The parties appear to agree that the real moving entity in this case is defendant's insurer and that defendant's whereabouts are unknown to plaintiff and to the insurer. Plaintiff contends that the insurer is not the real party in interest, ORCP 26, and lacks standing. Plaintiff does not seem to contest that the insurer has a duty or right to defend under the insurance policy. We therefore reject the standing argument. See Peterson v. Day, 283 Or. 353, 356, 584 P.2d 253 (1978).

[2] For a description of this statutory history see Chisum v. Bingamon, 46 Or. App. 1, 610 P.2d 297 (1980).

[3] Rule 7 D was amended by Oregon Laws 1981, chapter 898, section 4. The amendment does not apply to this case.

[4] In the present case, the insurer was unaware of defendant's current address. Obviously, in some situations an insurer will know a motorist's current address and the Motor Vehicles Division will not. We hold in this case, however, that ORCP 7 D(4)(c) does not require a showing that plaintiff has attempted to find a defendant motorist's address in any manner the rule does not specify. It might be wholly logical for the legislature to require, as a condition precedent to default, that an attempt be made to locate the defendant through an insurer known to the plaintiff. However, such a requirement is for the legislature, not for us, to adopt.

[5] ORS 18.160 provides:

"The court may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, decree, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

[6] ORS 1.735 provides:

"The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The rules thus adopted and any amendments which may be adopted from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each regular session and shall go into effect 90 days after the close of that session unless the Legislative Assembly shall provide an earlier effective date. The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules."

[7] We do not agree with defendant's suggestion that former ORS 15.190, as it read at the time of its repeal, required personal notice by the Division or the plaintiff to a nonresident defendant or a defendant who could not be found within the state.

DAVE FROHNMAYER
ATTORNEY GENERAL

STANTON F. LONG
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

GENERAL COUNSEL DIVISION
Justice Building
Salem, Oregon 97310
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July 15, 1982

Cheryl Mohr-Manhire
Staff Assistant
Juvenile Services Commission
Farwest Plaza #215
630 Center Street NE
Salem, OR 97310

Re: Draft Oregon Rules of Juvenile Court Procedures

Dear Ms. Mohr-Manhire:

After consultation with, and at the direction of, Attorney General Dave Frohnmayer, I am writing to express our grave concern regarding the draft Oregon Rules of Juvenile Court Procedures under consideration by the Court Procedures Committee of the Juvenile Services Commission. Our concern relates to the following matters:

1. Although ORS 417.490(1)(h) requires the Juvenile Services Commission to "[r]ecommend rules of procedure for juvenile courts to the Council on Court Procedures," it is doubtful whether the Council on Court Procedures has the authority to promulgate rules pertaining to juvenile proceedings since the council is expressly directed pursuant to ORS 1.735 to promulgate rules "in all civil proceedings" (emphasis added). Juvenile Court proceedings have never been determined to be civil proceedings, either by statute or by appellate court decision.

2. Assuming, arguendo, that the Council on Court Procedures has the authority to promulgate juvenile court rules of procedure, the draft rules, in a number of instances, propose substantive changes in the law which exceed the council's authority under ORS 1.735 to "promulgate rules governing pleading, practice and procedure . . . which shall not abridge, enlarge, or modify the substantive rights of any litigant." Promulgation by the council of a rule which, in fact, is substantive and beyond the authority granted to the council may result in the enactment of an invalid rule, with the result that juveniles and their parents will be faced with the uncertainty and added expense of litigating the validity of the rule, if applied to them, and with substantial delays in the determination of the merits of their cases. For a

more thorough discussion of this issue, see 41 Op Atty Gen 527 (1981). Draft rule 338 is one example among many which, if adopted, would abridge, enlarge or modify the substantive rights of a litigant, since it purports to confer on a status offender the privilege against self-incrimination. Such a right has not heretofore been conferred on status offenders either by statute or by case law.

3. Although ORS 1.735 provides that "[t]he rules authorized by this section do not include rules of evidence. . . ," draft rule 344(A) purports to incorporate the "exclusionary rule" into all juvenile court proceedings. While the exclusionary rule is an evidentiary rule with constitutional underpinnings, in the form here presented it is purely an evidentiary rule because no court has held that it applies to cases involving status offenders, dependent children or termination of parental rights. Further, the Legislature has repeatedly declined to enact legislation applying the exclusionary rule to juvenile proceedings.

4. Several of the proposed rules should not be adopted by the committee or the council for strong policy reasons. For example, draft rule 357(C) provides for hearings in termination of parental rights cases within 180 days. Given the importance of the decision before the court, these matters should be brought to trial within no more than 90 days from the day of filing. A second example is draft rule 357(E), which purports to bifurcate the proceeding concerning termination of parental rights into adjudication and disposition phases. Such a bifurcation is inconsistent with the statutory criteria upon which termination of parental rights is grounded, and this inconsistency will further confuse an already complex area of the law.

For the foregoing reasons, I would urge the commission to carefully reconsider the draft rules in light of these issues before forwarding them to the Council on Court Procedures. Because of the serious issues presented in the draft rules, the Attorney General has indicated he intends to make a presentation to the Council on Court Procedures when it considers them.

I would be happy to meet with you and the commission to discuss these matters further at your convenience.

Sincerely,

FRANK T. MUSSELL
Assistant Attorney General
Family Law Section

FTM:vp
cc: Dave Frohnmayer

THE LEAGUE OF WOMEN VOTERS OF CENTRAL LANE COUNTY

Affiliated with the League of Women Voters
of Oregon and of the United States

September 27, 1982

Mr. Donald W. McEwan, Chairperson,
and members of the Council on Court Procedures
c/o University of Oregon School of Law
Eugene, Oregon 97403

Dear Chairperson McEwan and Members:

We, as legal and child-care professionals and interested citizens, urge the Council to accept for consideration the Proposed Rules of Juvenile Court Procedure which have been transmitted to you by the Juvenile Services Commission.

The League of Women Voters of Central Lane County has recently completed a local juvenile court monitoring project. In conducting backround research for this project, League members became aware of the widely differing procedures and terminology employed by the juvenile courts in Oregon. The monitors' report recommends that the Lane County Circuit Court adopt rules of procedure for the juvenile court--but only as a stopgap measure until statewide rules are promulgated.

The most recent comprehensive revision of Oregon's Juvenile Code occurred in 1959. Although there have been numerous amendments since then, many of the procedural requirements of the court lie scattered in case law and Attorney General's opinions. The degree of adherence to these requirements appears to differ from county to county.

While a certain amount of flexibility to meet local situations may be desireable, the variations in juvenile court procedures in Oregon may be reaching the level of unequal protection under the law for the children and parents of this state.

The League monitors in the course of their project discovered what many juvenile justice professionals have known for a long time--the juvenile courts touch the lives of thousands of citizens each year in ways which are critical to the continuity and integrity of family life and the futures of our children. Citizens of this state deserve some reasonable degree of uniformity in the procedures leading to decision-making in these courts.

The existing lack of uniformity is going to result in fiscal consequences for some counties in the next few months. The State Court Administrator's Office, in preparing for the change-over to a unified court system, found the differences in juvenile court procedures and practices to be so great that integration of all juvenile courts into the new system cannot be accomplished by January 1983. Thus, some counties will continue to bear the costs of the referees and other juvenile department personnel doing court work during the 1983-85 biennium while the Court Administrator's Office makes further efforts to regularize the system. This task would be greatly helped by uniform statewide rules of procedure.

APPENDIX "B"
TO MINUTES OF COUNCIL MEETING
HELD 9-30-82

Judges, lawyers and informed laypersons have devoted a great deal of time and effort to drawing up the proposed rules that are now before you. The Juvenile Services Commission has complied with its statutory mandate to approve the rules and transmit them to the Council.

Since no other group in the state has your statutory authority to transmit proposed rules of procedure to the Legislature, we urge you to complete the task so ably begun by the Juvenile Services Commission.

Sincerely,

President

Vice-President

Juvenile Justice, Chairer

Juvenile Court Monitors, Coordinator

ADDITIONAL PROPOSED AMENDMENTS TO ORCP

APPENDIX "C"
TO MINUTES OF COUNCIL
MEETING HELD 9-30-82

September 30, 1982

CONTENTS

Additional proposed amendments to:

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

RULE 21

A. How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion [to dismiss]: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion [to dismiss] making any of these defenses [shall] may be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated

defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion [to dismiss] asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. When a motion to dismiss has been allowed (granted), judgment shall be entered in favor of the moving party unless the court has allowed (given) leave to file an amended pleading under Rule 23 D.

C. Third party practice.

C.(1) [At any time after] After commencement of the action, a defending party, as a 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 part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. [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 agreement of all existing (named) parties and leave on motion (order of the court)[upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties]. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and counterclaims against the third

party plaintiff and cross-claims against other third party defendants as provided in sections A. and B. of this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

C.(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C.(1) of this section.

PHYSICAL AND MENTAL
EXAMINATION OF PERSONS;
REPORTS OF EXAMINATIONS

RULE 44

E. Access to hospital records.

Any party [legally liable or] against whom a [claim] civil action is [asserted] filed for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B. Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person.

D.(3)(d) Public bodies. Upon any county, incorporated city, school district, or other public corporation, commission, board or agency, by personal service or office service upon an officer, director, managing agent, [clerk, or] secretary, or attorney thereof. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served in the same manner upon the [District Attorney of] attorney for the county [in the same manner as required for service upon the county clerk].

SERVICE AND FILING OF
PLEADINGS AND OTHER
PAPERS

RULE 9

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party or by mailing it to such attorney's or party's last known address. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. A party who has appeared without providing an appropriate address for service, and no address is reasonably ascertainable, may be served by placing a copy of the pleading or other papers in the court file. Service by mail is complete

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

INSTRUCTIONS TO JURY AND
DELIBERATION

RULE 59

B. Charging the jury. In charging the jury, the court shall state to them all matters of law necessary for their information in giving their verdict. Whenever the knowledge of the court is by statute made evidence of a fact, the court shall declare such knowledge to the jury, who are bound to accept it as conclusive. If either party requires it, and at commencement of the trial gave notice of that party's intention so to do, or if in the opinion of the court it is desirable, the charge shall either be reduced to writing, and then read to the jury by the court or recorded electronically during the charging of the jury. The jury shall take such written instructions or recording with it while deliberating upon the verdict, and then return [them] the written instructions or recording to the clerk immediately upon conclusion of its deliberations. The clerk shall file the written instructions or recording in the court file of the case.