

A G E N D A

COUNCIL ON COURT PROCEDURES

Meeting

Date and Time: Saturday, October 23, 1982  
9:30 a.m.

Place: Willamette University College  
of Law, Classroom E (off lobby),  
250 Winter Street S.E. (one  
block from Capitol), Salem,  
Oregon

1. Approval of minutes of meeting held September 30, 1982
2. Public testimony relating to proposed amendments
3. Staff review of proposed amendments to Oregon Rules  
of Civil Procedure
4. Report of Subcommittee on ORCP 7
5. NEW BUSINESS

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held October 23, 1982

Willamette University College of Law

Salem, Oregon

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

(Also attending were Douglas Haldane of the Council staff and Diana Godwin of the Oregon State Bar.)

Judge Dale called the meeting to order at 9:40 a.m.

Mr. Haldane distributed copies of Council proposals. Lacking a quorum, no action was taken.

Ms. Godwin presented to those present an explanation of the recommendations of the Bar Committee on Pleading and Practice. She urged Council promulgation. The proposals had been adopted by the Bar at the business session on Friday, October 1, 1982. Copies of the recommendations are attached as Appendices A and B to these minutes.

There being no other members of the public present to offer testimony, the hearing was adjourned at 10:15 a.m.

Respectfully submitted,

Douglas A. Haldane  
Executive Director

DAH:gh

Proposed Amendment to Rule 43A

Rule 43 - Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

A. Scope. Any party may serve on any other party a request: (1) to produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, and translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36B and which are in the possession, custody, or control of the party upon whom the request is served; [or] (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36B; and (3) to produce a written list of the names and addresses of all persons known by the opposing party to have knowledge of relevant facts or observations concerning the subject matter of the litigation. Such written list shall not include contents or any statements from such persons absent the showing required under ORCP 36B(3).

Proposed Amendment to Rule 55

Rule 55 - Subpoena

I. Service of Subpoenas by Mail. Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by ORCP 55D: (1) the attorney certifies in connection with or upon the return of service that the attorney, or his/her agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed; (2) that the attorney, or his/her agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness and the attorney has satisfied the agreement with respect thereto; and (3) that the subpoena was mailed to the witness more than ten days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

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, Executive Director

DATE: October 14, 1982

RE: Conference Call of October 13, 1982

The enclosed draft is an attempt to incorporate the amendment proposed in the October 13 conference call among the members of the subcommittee.

If this does not do the job, or if you have further suggestions, please let me know.

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

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.

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, and that a copy of the summons and complaint was mailed to the defendant's insurance carrier or that the defendant's insurance carrier is unknown.

and the defendant's insurance carrier if known.

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ADDITIONAL PROPOSED AMENDMENTS TO ORCP

October 23, 1982

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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 <sup>shall</sup> ~~[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~~<sup>25</sup> D.

COUNTERCLAIMS,  
CROSS-CLAIMS, AND THIRD  
PARTY CLAIMS

RULE 22

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 *parties who have appeared* 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.

SUMMONS

RULE 7

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.

SUMMONS

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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, and the defendant's insurance carrier if known. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon such mailing.

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