

Report of
Hearings Committee
Oregon Council on Court Procedures
Hearings of November 20, 1982

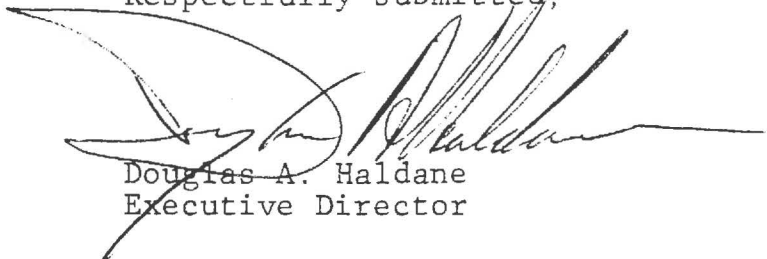
A hearings committee comprised of Mr. McEwen and Mr. Crowe met to hear public testimony on Council proposals at 9:30 a.m. at the Multnomah County Courthouse, Portland, on November 20, 1982. Also present was Douglas Haldane of the Council staff, Robert Newell of the Bar's Pleading and Practice Committee, and Richard Noble of the Oregon State Bar.

Mr. Newell urged Council promulgation of Committee recommendations adopted by the Bar on October 1, 1982. Copies of those proposals are attached as Appendices A and B to the Council minutes of October 23, 1982.

Mr. Noble expressed his support for the proposed amendment to ORCP 47 - Summary Judgment.

There being no other members of the public present to offer testimony, the hearings were adjourned at 10:55 a.m.

Respectfully submitted,



Douglas A. Haldane
Executive Director

DAH:gh

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.	E.B. Sahlstrom
William M. Dale, Jr.	James C. Tait
Robert H. Grant	Wendell H. Tompkins
Wendell E. Gronso	Lyle C. Velure
John J. Higgins	James W. Walton
John F. Hunnicutt	William W. Wells
William L. Jackson	Bill L. Williamson
Roy Kilpatrick	
Donald H. Londer	

FROM: DOUGLAS A. HALDANE, Executive Director

DATE: November 22, 1982

Enclosed is a copy of Don McEwen's letter to the Governor, Attorney General, and legislative leaders regarding the proposed juvenile code. Also enclosed are a letter and proposal from Dick Caswell of the Attorney General's Office regarding consolidation of cases in different counties.

The question of consolidation of cases filed in different counties, as well as a proposal to amend ORCP 40 (to require a stipulation or leave of court before proceeding with depositions or written questions), will be before the Council at its December 4th meeting.

It will be necessary to have a quorum present at the December 4th meeting in order that the Council can take final action.

DAH:gh



DEPARTMENT OF JUSTICE
BUSINESS/LABOR/CONSUMER AFFAIRS DIVISION
ANTITRUST SECTION
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4732
November 10, 1982

Frederick R. Merrill
Council on Court Procedures
c/o School of Law
University of Oregon
Eugene, Oregon 97403

Re: Proposed Oregon Rule of Civil Procedure

Dear Professor Merrill:

Attorney General Dave Frohnmayer and Deputy Attorney General Stan Long have asked me to forward to you the attached proposal for an addition to the Oregon Rules of Civil Procedure.

As you can see from the draft, the revision provides for pretrial coordination or consolidation of cases involving one or more common questions of fact.

The proposed rule is modeled on 28 USC Section 1407, which establishes procedures for the Judicial Panel on Multidistrict Litigation. However, rather than to seek creation of a panel to handle transfer of these cases, we believe that these powers should be vested in the Chief Justice.

It is our belief that addition of this rule to the Oregon Rules of Civil Procedure would be a valuable asset in dealing with some of the more complicated cases in which not only private parties, but also the Department of Justice, are involved.

Accordingly, we ask that you bring this matter to the attention of the Council and determine whether they are interested in our proposal.

Thank you for your cooperation in this matter.

Sincerely,

Richard L. Caswell
Attorney in Charge
Antitrust Section

ss
encl.

PROPOSED RULE OF CIVIL PROCEDURE

SECTION 1. (1) When civil actions involving one or more common questions of fact are pending in different counties, such actions may be transferred to any county for coordinated or consolidated pretrial proceedings. Such transfer shall be made by the Chief Justice of the Supreme Court of this state as authorized by this section upon his determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such action. Each action so transferred may be remanded by the Chief Justice at or before the conclusion of such pretrial proceedings to the county from which it was transferred, unless it shall have been previously terminated.

(2) Such coordinated or consolidated pretrial proceedings shall be conducted by the transferee court. For that purpose, upon request of the Chief Justice, a circuit judge or a retired judge may be designated and assigned temporarily for service in the transferee court by the Chief Justice of the Supreme Court. At the discretion of the Chief Justice, such actions may be assigned by the Chief Justice to a judge or judges of the transferee court. The judge or judges to whom such actions are assigned, the Chief Justice, and other judges designated when needed by the Chief Justice may exercise the powers necessary in any court for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(3) Proceedings for the transfer of an action under this statute may be initiated by:

(a) The Chief Justice on his own initiative or,

(b) Motion filed with the Chief Justice by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the court in which the moving party's action is pending.

The Chief Justice shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify a briefing schedule for the purpose of determining whether such transfer shall be made. Orders of the Chief Justice issued prior to the order either directing or denying transfer shall be filed in the Office of the Clerk of the Court in any transferor district. The Chief Justice's order of transfer shall be based upon the materials filed by the parties, and shall be supported by findings of fact and conclusions of law based upon such record. If no record is made by the parties, the Chief Justice may issue such transfer order as he deems appropriate. Orders of the transfer and such other orders as the Chief Justice may make thereafter shall be filed in the Office of the Clerk of the Court of the transferee court and shall be effective when filed. The clerk of the transferee court shall forthwith transmit a certified copy of the Chief Justice's order to transfer to the clerk of the court from which the action is being transferred. An order denying transfer shall be filed in each district wherein

there is a case pending in which the motion for transfer has been made.

(4) There shall be no proceedings for review of any order of the Chief Justice either permitting or denying transfer of a case.

(5) The Chief Justice may prescribe rules for the conduct of these proceedings which are not otherwise inconsistent with the Oregon Rules of Civil Procedure.

am

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.	E.B. Sahlstrom
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John F. Hunnicutt	William W. Wells
William L. Jackson	Bill L. Williamson
Roy Kilpatrick	
Donald H. Londer	

FROM: DOUGLAS A. HALDANE, Executive Director

DATE: November 15, 1982

RE: Proposed Amendments to ORCP

Enclosed are copies of letters from the following:

Chairman Donald W. McEwen, November 8, 1982 (new amendment to Rule 40)

D. Olcott Thompson, of the firm of Ferder, Ogdahl & Souther, Salem, November 9, 1982 (comments regarding amendments to Rule 22 and suggestion relating to Rule 9)

Jonathan M. Hoffman, of the firm of Martin, Bischoff, Templeton, Biggs & Ericsson, Portland, November 5, 1982 (objection to proposed modification of ORCP 47)

DAH:gh

MCEWEN, NEWMAN, HANNA & GISVOLD

(FOUNDED AS CAKE & CAKE-1886)

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DON G. CARTER
WARREN R. SPENCER
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MICHAEL A. HOLSTUN
TIMOTHY R. STRADER

RALPH H. CAKE
(1891-1973)
NICHOLAS JAUREGUY
(1896-1974)

HERBERT C. HARDY
OF COUNSEL

November 8, 1982

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

Dear Doug:

On November 4 the presiding judge of Multnomah County, the Honorable Charles S. Crookham, called regarding the necessity of amendments to Rule 40. He advised that there are several cases recently filed wherein the plaintiffs are representing themselves. I have been advised that one of these cases includes over 600 defendants. These individuals have submitted lengthy sets of interrogatories to banks, brokerage houses, other business entities, etc.

Judge Crookham suggested that the rule should be amended to provide that depositions on written questions may only be taken upon stipulation of the parties, or upon leave of court with good cause shown.

Certainly the pendency of these proceedings initiated by these individuals pro per in and of itself sustains the necessity of the amendment Judge Crookham suggested. At the present time the only solution for these parties which comes to mind, without research, is a motion for a protective order pursuant to ORCP 36 C. In my personal opinion, one should not have to affirmatively act to prevent this type of abuse; the rule should be amended to prevent it.

Please place this matter on the agenda as soon as possible. We should make every effort to include an appropriate amendment to Rule 40 in our next submission to the legislature. Best personal wishes.

Yours very truly,

MCEWEN, NEWMAN, HANNA & GISVOLD


Donald W. McEwen

DWM:lam

cc: The Honorable Charles S. Crookham

FERDER, OGDahl & SOUTHER

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W. WALLACE OGDahl

MERRI L. SOUTHER

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D. OLCOTT THOMPSON

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November 9, 1982

Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Re: Amendments to Oregon Rules of Civil Procedure

Dear Ms./Sir:

In reference to the changes in Rule 22, there appears to be one problem. If a plaintiff files an amended complaint after the 90 days allowed in the adopted rule that for the first time would permit a third party action, the defendant-third party plaintiff under your adopted rule must obtain agreement of the original plaintiff to file the third party complaint. Because of the procedural problems a third party presents to a plaintiff, a plaintiff may well not consent to the filing of a third party complaint, defeating the purpose of third party practice. In such a situation, the defendant-third party plaintiff should just need leave of the court to file the third party complaint.

In other words, a plaintiff could file a complaint and not require an answer from the defendant for over 90 days and then file an amended complaint giving rise to a possible third party claim and through the initial delay and then the filing of the amended complaint prevent any third party action to the prejudice of the defendant. This problem would be overcome by permitting the third party complaint to be filed after the 90 days only upon leave of the court and not upon agreement of all existing parties.

One matter that I believe should be spelled out in the rules is a problem that occurs under Rule 9 in relation to appeals. Under ORS 19.023 (2), the trial court reporter is required to be served with the notice of appeal. Nowhere in the statutes or in the Rules of Civil Procedure does it state how the trial court reporter is to be served. As a "new party" to the action, service in the manner of a summons and complaint under Rule 7 may be required. It is suggested under Oregon Rules of Appellate Procedure, Appendix A, that only mailing is required.

To clear up this ambiguity, I believe that Rule 9 should set out the manner of service on the trial court reporter and the court clerk. I would suggest certified mail return receipt requested to ensure that the notices did get to the respective parties.

Council on Court Procedures
November 9, 1982
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Thank you very much for reviewing my suggestions. I look forward to the amendments that are eventually promulgated and submitted to the 1983 Oregon Legislature.

Very truly yours,

FERDER, OGDahl & SOUTHER


D. OLCOTT THOMPSON

DOT/js

MARTIN, BISCHOFF, TEMPLETON, BIGGS & ERICSSON

(DUSENBERY, MARTIN, BISCHOFF & TEMPLETON)

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BARBARA J. GAZELEY
JOAN LISENSKY VOLPERT
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DANIEL H. ROSENHOUSE

November 5, 1982

Council on Court Procedures
University of Oregon School of Law
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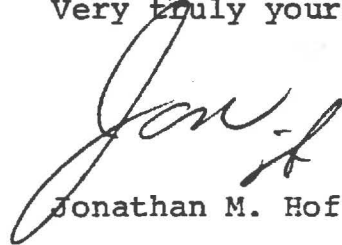
Attention: Laird Kirkpatrick

Dear Laird:

I wanted to attend the public hearing on the proposed amendments to the Oregon Rules of Civil Procedure, but my schedule requires that I will be out of town when the Council holds its hearing in Portland. However, I wish to voice my strong objection to the proposed modification of ORCP 47. I believe this proposed change takes us completely in the wrong direction, and back to the dark ages. The effect of this rule would be to emasculate the summary judgment procedure altogether.

It is time we recognize that there is no God-given right to trial by ambush and require a disclosure of expert opinion. This is not necessarily a costly or a time-consuming measure. There is no reason why we could not provide that all experts submit a report, as is already required by doctors. If such expert reports are available as a matter of course, it would be unnecessary to destroy our Rule 47 as the proposed rule appears to do.

Very truly yours,



Jonathan M. Hoffman

JMH:Amr

MC EWEN, NEWMAN, HANNA & GISVOLD

FOUNDED AS CAKE & CAKE 1886

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TIMOTHY R. STRADER

RALPH H. CAKE
1886-1970
NICHOLAS LAUREGUY
1886-1974

HERBERT S. HARRIS
OF CO. LINE

November 17, 1982

TO: The Honorable Victor Atiyeh
The Honorable Fred Heard
The Honorable Hardy Myers
The Honorable David Frohnmayer

RE: Proposed Juvenile Code

Dear Governor, Mr. President,
Mr. Speaker, and Mr. Attorney
General:

ORS 1.735 empowers and directs the Council on Court Procedures to "promulgate rules governing pleading, practice and procedure, ... in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant." That section also states "The rules authorized by this section do not include rules of evidence" ORS 417.490(h) empowers and directs the Juvenile Services Commission to recommend proposed rules of juvenile court procedure to the Council on Court Procedures.

The Juvenile Services Commission has fulfilled its statutory mandate by submitting to the Council on Court Procedures, on August 30, 1982, proposed Oregon Rules of Juvenile Court Procedure. The Commission apparently assumed that the Council on Court Procedures would review the proposed juvenile code and promulgate a juvenile code. It is the considered judgment of the Council on Court Procedures that it is without the authority to promulgate such rules, and of necessity it must decline to act upon the submission of the Juvenile Services Commission.

The Council has taken this action for a number of reasons. First, no statute or appellate court decision in Oregon has identified juvenile procedures as "civil" in

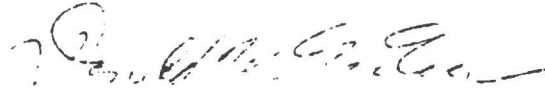
MCEWEN, NEWMAN, HANNA & GISVOLD

The Honorable Victor Atiyeh
The Honorable Fred Heard
The Honorable Hardy Myers
The Honorable David Frohnmayer
November 17, 1982
Page Two

nature. Second, the code as proposed by the Juvenile Services Commission contains many matters which are evidentiary and thus clearly outside the scope of the Council's authority. Third, the code proposed by the Juvenile Services Commission contains much which is substantive in nature and thus completely outside the Council's authority.

In considering this matter, the Council has been made aware of the urgent need for the adoption of uniform rules of procedure for the juvenile courts of the state. It also recognizes that procedures in juvenile courts are a matter of some controversy and that a body such as the Council on Court Procedures, which is somewhat removed from direct interest in the matters addressed in juvenile courts, may be an appropriate body to address these issues. I have been authorized by the Council to state its willingness, with the appropriate enabling legislation, to consider the promulgation of rules of procedure for juvenile courts.

Yours very truly,



Donald W. McEwen, Chairman
Council on Court Procedures

DWM:lam

cc: Douglas A. Haldane, Executive Director
Council on Court Procedures

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LISA C. BROWN
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November 18, 1982

SUBJECT:

Oregon State Bar
Procedure and Practice Committee
Our File No. 72-001-021

STUART A. HALL
OF COUNSEL

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

Dear Mr. Haldane:

I met with Don McEwen of the Council on Court Procedures and Don Atchison of the Board of Bar Governors on November 17 to discuss ways that the Procedure and Practice Committee could work more effectively with the Council on Court Procedures to avoid duplication of effort.

Although no specific formal procedures evolved from our discussion, it became clear that improved communication would aid both bodies. Don McEwen suggested that I correspond directly with you to advise you of the projects that we are working on, and to ask that we be kept advised of the Council's work in areas where we have previously made recommendations for change. In addition, one of our number, Roger Stroup, has been appointed to act as liason between the Committee and the Council. Through these informal means, we hope to improve communication and avoid duplication.

I have previously sent to Mr. McEwen and copied you our proposed amendments to ORCP 43A and 55. During the Committee's 1980-81 work year, two other proposals were made which apparently never came to the Council's attention. Those were amendments to ORCP 44E and 54E, and I enclose copies of those for your reference. The current Procedure and Practice Committee has asked to review these once more before they are submitted to the Council for further action. I expect our Committee to act on both of those at its December 11 meeting.

During the current year, the Committee will also be working on the following matters:

Mr. Douglas A. Haldane
November 18, 1982
Page Two

1. A mechanism for the discovery of expert witness opinions and related work product problems;
2. Uniform Circuit Court rules;
3. Peremptory jury challenges in multi-party trials;
4. Waivability of subject matter jurisdiction;
5. Statewide mandatory arbitration in civil disputes;
6. Affirmation without opinion of cases by the Oregon Court of Appeals; and
7. Automatic stay of execution of judgment.

If the Council desires participation by members of our Committee in any of its work or wishes to hear from the Committee on Committee projects, please let me know and we will be happy to assist. I trust that through better coordination and communication, we can make the efforts of both the Council and the Committee more effective for all.

Very truly yours,

BLACK, KENDALL, TREMAINE, BOOTHE & HIGGINS



Robert D. Newell

RDN/tau

Enclosures

cc: Mr. Donald N. Atchison
Mr. Donald W. McEwen

PROPOSED RULE OF CIVIL PROCEDURE

SECTION 1. (1) When civil actions involving one or more common questions of fact are pending in different counties, such actions may be transferred to any county for coordinated or consolidated pretrial proceedings. Such transfer shall be made by the Chief Justice of the Supreme Court of this state as authorized by this section upon his determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such action. Each action so transferred may be remanded by the Chief Justice at or before the conclusion of such pretrial proceedings to the county from which it was transferred, unless it shall have been previously terminated.

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(3) Proceedings for the transfer of an action under this statute may be initiated by:

(a) The Chief Justice on his own initiative or,

(b) Motion filed with the Chief Justice by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the court in which the moving party's action is pending.

The Chief Justice shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify a briefing schedule for the purpose of determining whether such transfer shall be made. Orders of the Chief Justice issued prior to the order either directing or denying transfer shall be filed in the Office of the Clerk of the Court in any transferor district. The Chief Justice's order of transfer shall be based upon the materials filed by the parties, and shall be supported by findings of fact and conclusions of law based upon such record. If no record is made by the parties, the Chief Justice may issue such transfer order as he deems appropriate. Orders of the transfer and such other orders as the Chief Justice may make thereafter shall be filed in the Office of the Clerk of the Court of the transferee court and shall be effective when filed. The clerk of the transferee court shall forthwith transmit a certified copy of the Chief Justice's order to transfer to the clerk of the court from which the action is being transferred. An order denying transfer shall be filed in each district wherein

there is a case pending in which the motion for transfer has been made.

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