N O T I C E

TO: NEWS MEDIA

FROM: COUNCIL ON COURT PROCEDURES
University of Oregon Law Center
Eugene, OR 97403

The next meeting of the COUNCIL ON COURT PROCEDURES will be held Saturday, December 4, 1982, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

At that time, the Council will hear and discuss suggestions regarding proposed amendments to the Oregon Rules of Civil Procedure.

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11-22-82

A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, December 4, 1982

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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1. Approval of minutes of October 23, 1982

2. Final action on proposed amendments to ORCP (Draft dated December 4, 1982)

3. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held December 4, 1982

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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

(Also present were Douglas Haldane of the Council staff, Michael Marcus of the Oregon State Bar, and Robert Newell of the Procedure and Practice Committee of the Oregon State Bar.)

The meeting was called to order at 9:45 a.m. in the Courtroom of Judge William Dale, Multnomah County Courthouse, Portland, Oregon.

The minutes of the meeting of October 23, 1982, were read and approved.

Chairman McEwen, recognizing that members of the public were present, invited public testimony on matters before the Council.

Mr. Michael Marcus distributed Comments to Proposed Amendments to ORCP, a copy of which is attached to these minutes as Appendix A.

Regarding Rule 7, Mr. Crowe moved the adoption of the language proposed by Mr. Marcus. The motion was seconded by

Judge Buttler. The proposed amendment failed on a voice vote.

Regarding service by mail on a defendant's insurance carrier, if known, under Rule 7, Judge Dale moved, with Judge Londer's second, that the service by mail be required to be registered or certified. The motion passed unanimously.

Mr. Marcus then discussed his proposal on ORCP 22. It was the consensus of members of the Council that no further action would be taken on ORCP 22. The Council also adopted Rule 9 as proposed in the draft for final consideration of December 4, 1982.

Mr. Newell then explained the proposals of the Bar's Procedure and Practice Committee which had been adopted by the Bar on September 30, 1982.

Mr. Sahlstrom moved that the current ORCP 21 be amended by having the last sentence included in the draft for final consideration. Judge Londer seconded the motion. The motion passed with only Judge Hunnicutt voting in opposition.

Regarding Rule 22, it was suggested that the language requiring "agreement of all parties who have appeared and leave on motion" be changed to "agreement of parties who have appeared and leave of court." This suggestion was incorporated in Judge Londer's motion that the language proposed in the draft for final consideration be adopted. Mr. Sahlstrom seconded the motion, which passed unanimously.

Mr. Walton moved, with Mr. Crowe's second, to adopt the amendments to Rule 40 as proposed. The motion passed unanimously.

The Bar's proposal regarding amendments to Rule 43 was the subject of a motion by Mr. Velure to reject the proposed amendment. Mr. Sahlstrom seconded the motion. The motion to reject was carried unanimously.

Mr. Walton moved, with Judge Buttler's second, to approve as proposed the amendments to Rule 44. The motion was adopted unanimously.

Judge Dale moved, with Judge Buttler's second, that the amendments to Rule 47 be adopted as proposed. The motion passed on a voice vote.

Judge Jackson moved, with Mr. Grant's second, to adopt the amendments to Rule 55 proposed by the Bar. The motion carried by voice vote.

Mr. Walton moved the adoption of the proposed amendments to Rule 59, with Mr. Kilpatrick's second. Mr. Sahlstrom moved that the proposal be amended to read that a request for jury instructions in writing or by taped submission must be made in writing at least fifteen days prior to trial, and that the requesting party must provide the court with the written instructions that he requests be given to the jury. Judge Wells seconded the motion to amend, which was defeated by voice vote. The main motion to accept the proposed amendments contained in the draft for final consideration was adopted.

Mr. Crowe moved, with Judge Dale's second, that the proposed amendments to Rule 63 be adopted. The motion passed on a voice vote.

Judge Buttler brought to the attention of the Council problems experienced by the Court of Appeals with Rule 54 B.(2). The question was one of whether Rule 54 contemplated special finding by a trial court when dismissing with prejudice. There being no proposal before the Council, the matter was set over for consideration during the next biennium.

The meeting adjourned at 11:45 a.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

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COMMENTS TO PROPOSED AMENDMENTS TO ORCP

December 4, 1982

Michael H. Marcus

RULE 7: Avoiding the Result in Harp v. Loux

Requiring service on a known insurance carrier is only a partial response to the problem created by Harp. Harp read the deletion of "due diligence" as permitting a trial court to refuse to set aside a default where the plaintiff complies with all express requirements of ORCP 7D(4), even though the plaintiff has actual knowledge of a method of accomplishing actual notice which is not specified by ORCP 7D(4). In this respect, Harp misreads Mullane v. Central Hanover Bank as approving a generic rather than a particularized assessment of whether the means of service were "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . ."

In my view, when Mullane decreed that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt," the Court contemplated a case-by-case analysis. In any event, fundamental fairness is offended by upholding a default obtained by a plaintiff who exploits ORCP's present exclusivity to avoid using a means of notice which is both known to the plaintiff and likely to accomplish actual notice to the defendant.

To avoid imposing any further burden on good faith defendants, I suggest the problem of Harp would be more completely addressed by concluding ORCP 7(4)(c) as follows:

> . . . 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 that the plaintiff knows of no other reasonable means by which to accomplish actual notice.

RULE 9: The party who has appeared without an address:

For similar reasons, if you know of an appearing pro per's mailing address even though it has not been "provided" by that party, you should not be able to serve motions merely by lodging a copy in the court file. I agree you shouldn't have to hire an investigator, but suggest that the new language in Rule 9B read as follows:

> A party who has appeared without providing an appropriate address for service and for whom no effective mailing address is actually known may be served by placing a copy of the pleading or other papers in the court file.

RULE 22: Third party practice

Why not make stipulation and leave of court for a late third party complaint disjunctive rather than conjunctive? It seems to me that the court ought to be able to consider the diseconomy of a separate action plus a motion to consolidate when weighing the plaintiff's objections to bringing in a third party defendant.

LAW OFFICES
WOLF, GRIFFITH, BITTNER, ABBOTT & ROBERTS
800 BENJ. FRANKLIN PLAZA
ONE SOUTHWEST COLUMBIA
PORTLAND, OREGON 97258
(503) 222-4422
TWX 910-464-5152

THOMAS E. WOLF
C. ANDERSON GRIFFITH
J. TERRENCE BITTNER
GARY V. ABBOTT
ROBERT M. KEATING
JOHN R. BARKER
JOHN F. FOLLIARD, JR.
R. KENNEY ROBERTS
STEPHEN F. ENGLISH
IRVING W. POTTER
FRANK JOSSELSON
WILLIAM R. MILLER, JR.
WILLIAM A. DAVIS
STEVEN R. REINISCH
RICHARD E. TALBOTT
JOHN L. KLOR
STEVEN P. JONES
JAMES M. BARRON

OF COUNSEL
DARYLL E. KLEIN

LAURA J. WALKER
GEORGE W. GOODMAN
LEX FLOYD PAGE
LESLIE J. MACKENZIE
DANIEL F. McNEIL
R. MICHAEL HEALEY
SCOTT H. TERRALL
ALLAN M. GARTEN
PEGGY S. FORAKER
ANDREW D. HAHS
JEFFREY V. HILL
THOMAS S. HILLIER
TERRENCE A. LEAHY
JERALD P. KEENE
JOHN M. BURNS
EMIL R. BERG

November 23, 1982

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

Dear Mr. Haldane:

I have just finished reading your article in the November issue of the Oregon Litigation Journal. My practice consists mainly of insurance defense in the area of medical malpractice and sports/athletic injury cases. I am writing to register my opposition to the proposed change in ORCP 44, which apparently denies access to hospital records if there is a personal injury "claim" but no action filed. I don't believe it is necessary for me to go into a long discussion as to why this change seems to be a step backwards, as I am sure the Council either has or will discuss the ramifications quite thoroughly. However, I would like an opportunity to be heard and would ask that you let me know if there are going to be any hearings, meetings, conferences, etc., where either I could present my views in person or in writing.

As a general rule, it has been my experience that the advantages of liberal discovery outweigh the disadvantages and, in reality, lead to earlier resolution of claims. Frankly, I cannot quite understand the Oregon Bar's insistence on keeping the door closed on discovery, particularly in the area of medical information, when the claim involves bodily injury! Perhaps we always are in the "plaintiffs versus defendants" debate, and, of course, the plaintiffs' bar outnumbers the defense side. Nevertheless, the vast majority of jurisdictions are much more wide open than Oregon is or in the foreseeable future will be.

I also have problems with the proposed change in ORCP 47, allowing an attorney to sign an affidavit that he has a "qualified expert." I recognize the inherent problem in your medical malpractice case example where the defendant himself provides the basis for summary judgment. Perhaps that situation can be carved out as an exception to the present summary judgment statute. However, as I am sure you can understand, whether or not an attorney does have an expert who will testify in favor of his client sometimes falls into the realm of that attorney's perception. If such a rule is to be adopted, then I strongly urge there be some checks and balances to insure that in fact such an expert does exist and in fact holds an opinion sufficient to defeat summary judgment. I am not sure of the vehicle by which this can be confirmed, but it is something that ought to be included. Again, my suspicion is that this proposed change is simply for the benefit of those attorneys who wish to avoid having to "show their hand" before trial.

I am looking forward to your response.

Yours very truly,

Jack Folliard

JFF/dt

HUGH B. COLLINS
ATTORNEY AT LAW
837~~825~~ EAST MAIN STREET
POST OFFICE BOX 4490
MEDFORD, OR 97501 0176

~~HUGH B. COLLINS~~
~~MICHAEL W. BURNETT~~

(503) 770-5900

OUR FILE NO.

December 2, 1982

Fredric Merrill
School of Law
University of Oregon
Eugene, OR 97403

RE: Proposed Amendment to ORCP 43

Dear Mr. Merrill:

The proposed amendment (furnish a witness list on demand) would bring us closer to the "interrogatories" system of discovery, which system the Bar deplored and which system the original commission promised would never be adopted.

Rather than expand ORCP 43, I suggest it be made more realistic. A basic philosophy should require everyone to do his own work rather than encourage freeloaders to expand their reflex efforts to drive on empty and ride for free.

ORCP 43 would much better serve the purpose if it contained a specific provision that documents, etc., which may be obtained from any third source, or documents, etc., which are not relevant to the controversy, are outside the scope of the rule.

Examples of the current week's abuse of present ORCP 43 include:

(1) A demand by the attorney for a subrogating fire insurer for a copy of the fire marshal's report - which I filled by getting him a copy from the adjuster who had worked the loss on behalf of his client;

(2) A demand by the owner's attorney for a copy of the construction contract (telephone book size) which I filled by asking his client's architect (who had prepared and printed the contract) to send the attorney a copy.

In each such instance, the rule was being used or abused because the attorney doing the demanding wasn't capable of thinking, or didn't want to think, or otherwise was just too lazy to conduct his own investigation. Responses were made because it's easier to make two phone calls than it is to move for protective order. But I think you will agree with me that such "discovery" practices have the gamey aroma of welfare fraud.

Sincerely,

HUGH B. COLLINS/dtc