SUMMARY OF CHANGES TO ORCP: 1983

On December 4, 1982, the Council on Court Procedures promulgated amendments to the Oregon Rules of Civil Procedure. The 1983 Legislature tinkered slightly with the Council amendments, and set a new effective date for rules promulgated by the Council (1983 Or. Laws, Ch. 751). A number of other bills were introduced during the legislative session relating to the ORCP but only one was enacted into law. The legislature changed the offer of compromise procedure of ORCP 54 E. (1983 Or. Laws, Ch. 531).

A. RULE 22; THIRD PARTY PRACTICE

One of the most important changes promulgated by the Council was a modification of the third party practice procedure in Rule 22. Rule 22 C. was originally taken from ORS 16.315(4)(Rep. 1979), which was enacted by the legislature in 1975. That rule was almost identical to Federal Rule of Civil Procedure 14(a).

Third party practice has generated a great deal of controversy in Oregon. When ORCP 22 was originally promulgated, there were a number of objections. At one point during the 1979-81 biennium, the majority of the Council on Court Procedures voted to abolish impleader entirely; this action was reversed to allow further study during the 1981-83 biennium. The 1981-82 State Bar Procedure and Practice Committee considered the matter in detail and recommended retention of the rule.

Although the Council considered abolishing the practice entirely or limiting it to cases not involving tort claims, they ultimately adopted a compromise, which retains third party practice but limits the time when impleader may be used. The Council felt that most of the problems presented by third party practice were due to delayed impleaders. Under the original rule, impleader was available as a matter of right up to ten days after the filing of the original answer, and after that, with leave of court. The parties could defer filing of the original answer by stipulation and late impleaders of right were possible. It also appeared that impleaders with leave of oourt were being allowed at a late date in some cases.

The Council amended ORCP 22 C. to relate the time limit for interpleader to service of summons and complaint, rather than to filing of the answer. A defendant wishing to interplead may do so as a matter of right within 90 days of service of the summons and complaint upon that defendant, but after 90 days no impleader is possible unless the party seeking to implead obtains "agreement from the parties who have appeared and leave of the court." There is, therefore, no longer any impleader by leave of the court. After 90 days, the court can veto the parties' agreement to allow a late impleader, but cannot authorize any late impleader without stipulation by all parties who have appeared.

The impleader practice controversy continued during the legislative session. The House of Representatives passed a bill

the affidavit. The Council records clearly indicate an intent that the attorney not be required to set forth the facts and opinions to which the expert would testify. The court never actually knows what the expert witness will say; it must rely on the attorney's assertion that the expert will present testimony sufficient to create a genuine issue of material fact.

C. SERVICE OF SUMMONS, SUBPOENA, AND OTHER PAPERS

The Council made several changes in ORCP 7. The most important was in ORCP 7 D., relating to service of summons upon the Motor Vehicle Division in motor vehicle accident cases. ORCP 7 D.(4)(a)(ii) was amended to provide that, in addition to mailing copies of the summons and complaint to various addresses for the defendant, the plaintiff is also required to mail a copy of the summons and complaint to the defendant's insurance carrier, if known. ORCP 4 D.(4)(c) was amended to provide that no default would be allowed, unless the plaintiff's affidavit either shows mailing of the summons and complaint to defendant's insurance carrier or that such carrier, if any, was unknown. This change was caused by the Oregon Court of Appeals case of Harp v. Loux, 54 Or App 840 (1981). In that case, after contact with the defendant's insurance carrier, the plaintiffs filed suit and mailed a summons and complaint to defendant's address. The plaintiff did not notify the insurance carrier of the action and proceeded to take a default judgment. The Court of Appeals affirmed the refusal to vacate the default judgment. Under the amended rule, the insurance carrier would receive direct notice of the filing from the plaintiff.

The Council also changed ORCP 7 D.(3)(d) relating to service of summons upon public bodies. The Council eliminated the possibility of serving a "clerk . . . thereof" but added the possibility of serving the "attorney thereof." The legislature further changed the provision by removing the possibility of serving a "secretary . . . thereof." The Council and legislature apparently were concerned that the words "clerk" or "secretary" could be interpreted to mean any clerical or secretarial personnel. Since the rule already provides for service upon the managing agent of the public body, a managing agent who is formally titled a "clerk" or "secretary" may still be served. The Council also deleted the requirement of additional service upon the district attorney in all cases when the county was a party to the action.

The Council added a new section, which allows service of subpoenas by mail, to ORCP 55. This change was suggested by the Oregon State Bar Procedure and Practice Committee. Service of subpoenas by mail is allowed if (a) the attorney has personally talked to the witness, (b) the witness has agreed to appear if subpoenaed, (c) satisfactory arrangements for payment of fees and mileage have been made, (d) the subpoena was mailed with a return receipt form 10 days prior to trial, and (e) the witness signed the return receipt more than three days prior to trial. The legislature changed the rule, as promulgated by the Council, to eliminate a requirement that the arrangements for payment of fees and mileage have been satisfied. Witnesses subpoenaed by mail probably

cannot be held in contempt if they do not appear. Under ORCP 9 B., no one can be held in contempt unless they are personally served with the paper causing them to be held in contempt. The effect of the amendment is to give protection to the attorney making the mail service, by providing a basis for a continuance if the mail-subpoenaed witness does not appear. This should encourage use of the procedure and result in some saving of service costs.

The Council also amended ORCP 9 B. to provide that, if a party who has appeared neglects to provide an address for service of papers, no service of subsequent litigation papers is required. The ORCP do not specifically require the endorsement of the name and address of the party or attorney on any paper filed. This is frequently required by local court rules. ORCP 9 D. does say that the clerk is not required to receive any paper for filing unless the name of the party or attorney is endorsed thereon, but says nothing about the address. Under amended Rule 9 B., however, any party who does not at least endorse their name and address on the initial appearance risks losing the right to receive copies of subsequent papers filed by the other parties.

D. DISCOVERY

The most important change to the discovery rules was an amendment to ORCP 44 E., relating to access to hospital records. As originally promulgated, the rule allowed access to hospital records by any party against whom a claim was

asserted or who was legally liable.

There was some confusion among the hospitals possessing such records whether records should be furnished prior to the filing of an action. The Council amended the rule to allow access to hospital records only by a party "against whom a civil action is filed."

The Council also amended ORCP 40 A. to require a court order when depositions are to be taken on written questions. This apparently was caused by a concern that the depositions on written questions could in some way be used as a substitute for interrogatories.

E. OTHER PRETRIAL PRACTICES

The Council amended ORCP 21 A. to specifically provide that, if a motion to dismiss is granted, judgment shall be entered unless leave to file an amended complaint is given by the court. The Council was concerned that the option of the court to allow leave to amend, after granting a motion to dismiss, did not clearly appear in the rules. The amendment ~~actually seems more~~ also is important because it provides a basis for entry of a judgment when no leave to amend is given. Authority for entry of jugment in that situation was formerly provided by ORS 18.090 (Rep. 1979). The ORCP originally did not specifically cover the matter.

The legislature also amended ORCP 54 E., relating to offers of compromise. The time limit for the offer of compromise procedure was changed from three to ten days before trial. The section was also changed to clearly provide that, unless agreed otherwise by the parties, costs and disbursements and

attorney's fees would be entered in addition to the amount offered in compromise. This makes it possible to offer to compromise the principal claim, leaving the costs and disbursements and attorney's fees to be decided by the court through the normal cost bill procedure under Rule 68. It also, however, makes it incumbent upon the party making the offer to clearly specify that the amount offered is a complete and entire settlement of the claim, including costs and disbursements and attorney's fees. An offer of compromise in a lump sum, without specific reference to these items, if accepted, will leave the offering party open to a further assessment for costs and disbursements and attorney's fees. This modification was suggested by the Oregon State Bar Procedure and Practice Committtee. After the Council on Court Procedures rejected the recommendation, the Bar presented the matter to the legislature anyway, and the legislature overruled the Council.

F. TRIAL

The Council made two minor changes in the rules relating to trial procedure. ORCP 63 A. was amended to clearly provide that the motion for directed verdict, which is a prerequisite to a motion for judgment notwithstanding the verdict, must be one made at the close of all of the evidence, not just at the close of a party's case. This is consistent with the Federal Rules of Civil Procedure. The Council also amended ORCP 59 to allow a judge to preserve the instructions given either by electronic recording or by having the instructions reduced to writing. The form to be used is at the option of the judge.