MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES:

Joe D. Bailey	John F. Hunnicutt	William F. Schroeder
John H. Buttler	William L. Jackson	J. Michael Starr
J. R. Campbell	Roy Kilpatrick	Wendell H. Tompkins
John M. Copenhaver	Sam Kyle	John J. Tyner
William M. Dale, Jr.	Douglas McKean	James W. Walton
Jeffrey P. Foote	Edward L. Perkins	William W. Wells
Robert H. Grant	James E. Redman	Bill L. Williamson
John J. Higgins	E. B. Sahlstrom	

FROM: DOUGLAS A. HALDANE
Executive Director

DATE: 9/16/83

The Council will hold its first meeting of this biennium on Saturday, October 15, 1983, at 9:30 a.m. in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

The terms of the following Council members have expired: Donald H. Londer, Austin W. Crowe, Jr., Wendell E. Gronso, Donald W. McEwen, Frank H. Pozzi, James C. Tait, and Lyle C. Velure. They have been replaced by: John J. Tyner, J. Michael Starr, William Schroeder, James Redman, Jeffrey P. Foote, Joe Bailey, and Sam Kyle.

Since Mr. McEwen's term has expired, it will be necessary for the Council to choose a Chairman to preside over its meetings during the 1983-85 biennium.

In addition, a number of matters have been brought to my attention by various members of the Bar regarding the need for additional amendments to the ORCP. The Council should be able to begin work on those suggestions at this meeting as well as plan the direction the Council wishes to take during the biennium.

Enclosed is a copy of the new Council membershp following the most recent appointments.

cc: Donald W. McEwen
Donald H. Londer
Austin W. Crowe, Jr.
Wendell E. Gronso
Frank H. Pozzi
James C. Tait
Lyle C. Velure

COUNCIL ON COURT PROCEDURES

Membership

Supreme Court Justice	Term End
J. R. Campbell	1985

Court of Appeals Judge

John H. Buttler	1985

District Court Judges

Edward L. Perkins	1985
John J. Tyner	1987

Circuit Court Judges	Term End
John M. Copenhaver	1987
William M. Dale, Jr	1985
John F. Hunnicutt	1985
William L. Jackson	1987
Wendell H. Tompkins	1987
William W. Wells	1985

Public Member

Douglas McKean	1985

Members of Oregon State Bar

Joe D. Bailey	1987	James E. Redman	1987
Jeffrey P. Foote	1987	E. B. Sahlstrom	1985
Robert H. Grant	1985	William F. Schroeder	1987
John J. Higgins	1985	J. Michael Starr	1987
Roy Kilpatrick	1985	James W. Walton	1985
Sam Kyle	1987	Bill L. Williamson	1985

(One Supreme Court justice chosen from Supreme Court)

(One Court of Appeals judge chosen from Court of Appeals)

(Six Circuit Court judges chosen by Executive Committee of Circuit Judges Association)

(Two District Court judges chosen by Executive Committee of District Judges Association)

(One public member chosen by Supreme Court)

(Twelve members of Oregon State Bar appointed by Board of Governors of Oregon State Bar)

9/83

A G E N D A

COUNCIL ON COURT PROCEDURES

Meeting

9:30 a.m., Saturday, Oct. 15, 1983

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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1. Report on Legislative Session

2. New Council members

3. Appointment of Chairman

4. Budget: 1983-85 Biennium

5. Council business: 1983-85

    a) Problems in ORCP
    b) New areas of concern
    c) Subcommittee structure

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held October 15, 1983

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

Present:	Joe D. Bailey	Edward L. Perkins
	J. R. Campbell	James E. Redman
	John M. Copenhaver	E. B. Sahlstrom
	William M. Dale, Jr.	William F. Schroeder
	Jeffrey P. Foote	Wendell H. Tompkins
	William L. Jackson	John J. Tyner
	Roy Kilpatrick	William W. Wells
	Douglas McKean	
Absent:	John H. Butler	Sam Kyle
	Robert H. Grant	J. Michael Starr
	John J. Higgins	James W. Walton
	John F. Hunnicutt	Bill L. Williamson

(Also present was Douglas Haldane, Executive Director of the Council.)

The meeting was called to order at 9:30 a.m. by Vice Chairman William M. Dale.

As the first item of business, Judge Dale asked for nominations for the position of Council Chairman as Don McEwen's term on the Council had expired. Judge Campbell nominated Roy Kilpatrick for the position; Elmer Sahlstrom seconded the nomination. Judge Jackson moved that nominations be closed; the motion was seconded by Mr. Sahlstrom. Nominations were closed, and Mr. Kilpatrick was elected Council Chairman unanimously.

Elmer Sahlstrom nominated Judge Dale to continue to serve in the position of Vice Chairman; the nomination was seconded by Judge Jackson. Judge Dale was elected Vice Chairman unanimously.

Mr. Haldane reported on the results of the 1983 Legislative Session by explaining the changes to each of the rules of civil procedure as contained in the packet of information previously submitted to the Council members, a copy of which is attached to the original of these minutes as Appendix "A."

Mr. Haldane then announced the names of the new members of the Council. They include: John J. Tyner, J. Michael Starr, William Schroeder, James Redman, Jeffrey P. Foote, Joe Bailey, and Sam Kyle.

The new Council members replace members whose terms had expired including: Donald H. Londer, Austin W. Crowe, Jr., Wendell E. Gronso, Donald W. McEwen, Frank H. Pozzi, James C. Tait, and Lyle C. Velure.

Mr. Haldane then gave a brief report of the Council's budget for the 1983-85 biennium. He explained, particularly for the benefit of new members, procedures for claiming reimbursement of expenses.

Mr. Haldane then outlined possible problems in the ORCP which have been submitted for the Council's consideration. Exhibit "B" to the original of these minutes lists the problems described. Mr. Haldane was asked by the Council to develop specific proposals to address these problems and to submit those suggestions to the Council in advance of the next meeting.

Chairman Kilpatrick suggested that the Council hold fewer meetings than it has in the past and that it attempt to meet at a number of different locations during the entire biennium. Mr. Haldane was directed to establish a tentative meeting schedule for the biennium.

The Council unanimously supported the Chairman's request that an appropriate resolution be drafted and sent to Don McEwen expressing the Council's thanks to Mr. McEwen for his service as Council Chairman since the formation of the Council.

The meeting adjourned at 11:15 a.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES:

Joe D. Bailey	John F. Hunnicutt	William F. Schroeder
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FROM: DOUGLAS A. HALDANE
Executive Director

DATE: 9/16/83

Attached are the amendments to the Oregon Rules of Civil Procedure promulgated by the Council on December 4, 1982, which survived the 1983 Legislature with only a few modifications [HB 2891].

The House of Representatives did pass a bill which would have reversed the Council action and restored Rule 22 C. to its original form, but this was rejected by the Senate. The Council's promulgated revision will become effective, along with the rest of the rule changes, on January 1, 1984.

A number of other bills were introduced during the legislative session relating to the ORCP, but only one was enacted into law (the offer of compromise procedure of ORCP 54 E.).

The time limit for the offer of compromise procedure was changed from three to 10 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 disbursemens and attorney 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 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 fees.

Encl.

cc: Donald W. McEwen (encl.)
Donald H. Londer (encl.)
Austin W. Crowe, Jr. (encl.)
Wendell E. Gronso (encl.)
Frank H. Pozzi (encl.)
James C. Tait (encl.)
Lyle C. Velure (encl.)

AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE PROMULGATED BY COUNCIL ON COURT PROCEDURES ON DECEMBER 4, 1982

AND

ADOPTED BY THE 1983 LEGISLATURE (THOSE RULES MODIFIED BY THE LEGISLATURE ARE MARKED WITH AN ASTERISK)

NOTE: The amendment to Rule 54 was presented to the legislature by the Oregon State Bar Procedure and Practice Committee, i.e., it was not included in the promulgated amendments of December 4, 1982, by the Council.

Exhibit "A"

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 upon the district attorney of the county in the same manner as required for service upon the county clerk.*]

NOTE: The Council deleted "clerk" and the legislature also deleted "secretary."

* * * *

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.

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 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.

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 by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defendant's insurance carrier or that the defendant's insurance carrier is unknown.

* * * *

F.(2)(a)(i) Certificate of service when summons not served by sheriff or deputy. If the summons is not served by a sheriff or a sheriff's deputy, the certificate of the server indicating: the time, place, and manner of service; that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise; and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the certificate when, where, and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the certificate may be made by the person completing the mailing or the attorney for any party and shall state the circumstances of mailing and the return receipt shall be attached.

NOTE: The legislature added the interlineated language.

COMMENT

7 D.(3)(d). The rule would be amended to specifically allow service on a public body by serving the attorney for the public body. Since "clerk" may be ambiguous, reference to service on a clerk is deleted. It would no longer be necessary to serve the district attorney when a county is a party to an action.

7 D.(4) This subsection would be amended to provide for service of a copy of the summons and complaint on a defendant's insurance carrier before a default judgment may be taken when the identity of the insurance carrier is

known to the plaintiff. The purpose of the amendment is to avoid the result of Harp v. Loux, 54 Or. App. 840 (1981).

7 F.(2)(a)(i) The rule would be amended to specifically allow certification of mailing by the attorney for any party.

NOTE: The 1983 Legislature added "or person completing the mailing or" to the last sentence of F.(2)(a)(i).

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 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.

COMMENT

To cure an ambiguity, the proposed amendment would make it clear that it applies to all parties, represented by an attorney or not. In addition, ORCP 9 would be amended to allow service on a party who has appeared by placing a copy of the document in the court file when that party has not provided an address for service.

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 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 granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25.

COMMENT

To cure any ambiguity in the ability of the court to allow leave to amend after a motion to dismiss has been granted, Rule 21 A. will be amended to specifically refer to leave to amend under ORCP 25. The amendment would also make it clear that judgment may be entered if leave to amend is not granted.

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 leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties.*] Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court. 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.

COMMENT

The time for filing and serving a third party complaint will be changed from not later than 10 days after service of the third party plaintiff's original answer to not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Within the 90 days, third parties may be pled in as a matter of right. After 90 days, third parties may only be pled in by agreement of the parties who have appeared and leave of court.

DEPOSITIONS UPON WRITTEN QUESTIONS

RULE 40

A. Serving questions; notice. Upon stipulation of the parties or leave of court for good cause shown, and [After] after commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 55. The deposition of a person confined in prison may be taken only as provided in Rule 39 B.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify such person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 39 C.(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with

cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

B. Officer to take responses and prepare record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 39 D., F., and G., to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

COMMENT

The amendment would require stipulation or leave of court before taking a deposition on written questions.

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.

COMMENT

The rule will be amended to allow access to hospital records to one against whom a "civil action" has been filed, rather than a "claim."

SUMMARY JUDGMENT

RULE 47

A. For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits, for a summary judgment in that party's favor upon all or any part thereof.

B. For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits, for a summary judgment in that party's favor as to all or any part thereof.

C. Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party, prior to the day of the hearing, may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the

issue of liability alone although there is a genuine issue as to the amount of damages.

D. Form of affidavits; defense required. [*Supporting*] Except as provided by section E. of this rule, supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

E. Affidavit of attorney when expert opinion required. Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions.

If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. The affidavit shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a sufficient basis for denying the motion for summary judgment.

[E] F. When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present by affidavit facts essential to justify the opposition of that party, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

[F] G. Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the

court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

[G] H. Multiple parties or claims; final judgment. In any action involving multiple parties or multiple claims, a summary judgment which is not entered in compliance with Rule 67 B. shall not constitute a final judgment.

COMMENT

When, in opposing a motion for summary judgment, it would be necessary to provide the opinion of an expert to raise a material issue of fact, an affidavit of counsel that a qualified expert is willing to testify to facts and opinions which raise a material issue of fact will be an adequate basis for the court to deny the motion.

DISMISSAL OF ACTIONS;
COMPROMISE

RULE 54

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to [three] 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after the date of the offer, but the

party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

COMMENT

The 1983 Legislature changed the time limit in section 54 E. from three days before trial to 10 days before trial. The legislature also added the words "otherwise" and "in addition" to the third sentence of section 54 E. 1983 Oregon Laws, ch. 531, § 1.

D. Service; service on law enforcement agency; service by mail; proof of service.

D.(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C.(6), shall be served in the same manner as provided for service of summons in Rule 7 D.(3)(b)(i), D.(3)(d), D.(3)(e), or D.(3)(f).

D.(2) Service on law enforcement agency.

D.(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law

enforcement agency.

D.(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D.(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D.(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

D.(3) Service 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 this section:

D.(3)(a) The attorney certifies in connection with or upon the return of service that the attorney, or [his/her] the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D.(3)(b) The attorney, or [his/her] the attorney's 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

NOTE: The legislature removed "and the attorney . . . thereto."

D.(3)(c) The subpoena was mailed to the witness more than [ten] 10 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.

D.[3](4) Proof of service. Proof of service of a subpoena is made in the same manner as proof of service of a summons.

COMMENT

Service of a subpoena by mail when certain conditions are met has been provided under new subsection D.(3). Proof of service, formerly subsection D.(3), is now subsection D.(4).

NOTE: The 1983 legislature modified paragraph 55 D.(3)(b) by removing the words "and the attorney has satisfied the agreement with respect thereto." The legislature also made the interlineated changes in D.(3)(a), D.(3)(b), and D.(3)(c).

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.

COMMENT

The amendment would allow the submission of jury instructions by electronic recording as well as in written form.

JUDGMENT NOTWITHSTANDING THE VERDICT

RULE 63

A. Grounds. When a motion for a directed verdict, made at the close of all the evidence, which should have been granted has been refused and a verdict is rendered against the applicant, the court may, on motion, render a judgment notwithstanding the verdict, or set aside any judgment which may have been entered and render another judgment, as the case may require.

COMMENT

The rule will be amended to make it clear that the motion for directed verdict referred to in ORCP 63 A. is a motion made at the close of all the evidence, not one made at the close of the plaintiff's case-in-chief.

PROBLEMS FOR 1983-85 BIENNIUM

ORCP 7 C.(2)	Error in ORCP 7 C.(2). Reference in subparagraph 7 C.(2) should be to D.(6), not D.(5). (Letter from Edward Heid)
ORCP 7 C.(3)(c)	Attorney James M. Campbell has suggested a new form of summons.
ORCP 32 H.	Attorney Martha C. Evans requests that the Council consider modifying or eliminating ORCP 32 H., which requires notice of a class action suit to potential defendants. At a minimum, ORCP 32 H.(2) "ought to provide for notice to foreign corporations pursuant to ORCP 7 B.(3)(b)."
ORCP 47 C.	Attorney Bruce Hamlin believes that ORCP 47 C. "ought to be amended to require actual receipt of any opposing affidavits or memorandum prior to the day of hearing. The remedy of a continuance is unsatisfactory because the moving party has already prepared for the hearing, and possibly traveled some distance to argue the motion." Hamlin also feels that the problem of considering late-filed affidavits could be corrected by making the second sentence of ORCP 47 C. mandatory and not discretionary.
ORCP 57 C.	Modify to reduce time expended in selection of a jury and insure that voir dire examinations are limited to matters bearing upon qualifications of prospective jurors. (James Walton and Don McEwen)
ORCP 73	Problem regarding Judgments by Confession. (Barbara Heller, Trial Court Clerk, Columbia County Courthouse, St. Helens)
NEW AREA (?)	(See letter from Justice Lent regarding interpreters)
OTHER	See complaint from Robert Ringo and Don McEwen's response regarding "Request for Documents."
ORCP 22	Amendment which would prohibit a third party complaint a party's insurance company or the joinder of a party's insurance company in all cases except those where the plaintiff's complaint seeks a declaration of insurance coverage. (See letter from James Tait of 10/7/83.)
	Suggestion by William Stiles that the rules be amended to indicate that Arabic numbers rather than Roman numerals be used in pleadings to denote separate paragraphs

Exhibit "B"

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES:

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

FROM: Douglas A. Haldane
Executive Director

RE: AMENDMENTS TO ORCP 22 C.

DATE: April 5, 1983

Yesterday I was notified by Kirk Hall, counsel to the House Judiciary Committee, that a subcommittee of that committee has recommended to the full committee that the amendments to the ORCP promulgated by the Council be modified by deleting changes made to ORCP 22 C., the third party practice rule.

The subcommittee was apparently concerned with a situation where a succession of motions and amended complaints precede the filing of an answer. It was thought that defendants who, because of faulty pleadings might not be aware of a third party claim until more than 90 days after the service of the original complaint, would be precluded from bringing their third party action absent a stipulation of the parties and leave of court.

Mr. Hall will schedule me for an appearance before the full committee prior to final action. I would appreciate any thoughts which members of the Council might have regarding the committee's concerns. Additionally, I may be in touch with some of you to provide testimony on the changes to ORCP 22 C.

In the event any of you care to write to members of the committee on this subject, I am enclosing a list of the members.

DAH:gh
Encl.

MEMBERS OF FULL JUDICIARY COMMITTEE:

Hardy Myers - Portland (Chairman of Full Committee)
Randy Miller - Lake Oswego
Jim Hill - Salem
Bill Rutherford - McMinnville (Chairman of Subcommittee)
Kip Lombard - Ashland
Norm Smith - Tigard
Jim Scavera - North Bend
Dick Springer - Portland
Peter Courtney - Salem

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES:

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Edward L. Perkins
Frank H. Pozzi
E. B. Sahlstrom
James C. Tait
Wendell H. Tompkins
Lyle C. Velure
James W. Walton
William W. Wells
Bill L. Williamson

FROM: Douglas A. Haldane
Executive Director

RE: HEARING BEFORE HOUSE JUDICIARY COMMITTEE
APRIL 20, 1983
1:30 p.m.
ROOM 350, STATE CAPITOL

The next hearing before the House Judiciary Committee has been set for the above date, time, and place.

DAH:gh

4/7/83

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES:

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

FROM: Douglas A. Haldane
Executive Director

RE: Amendments to ORCP 22 C.

DATE: May 2, 1983

HB 2891, which is the vehicle for approval of the Council amendments to the ORCP, has passed the house with the only significant change being in Council amendments to ORCP 22. In its current form, HB 2891 would leave ORCP as it is now rather than accepting the Council's promulgated amendments.

We are working in the Senate to restore the Council amendments to ORCP 22. Members of the Senate Judiciary Committee are:

Jan Wyers, Chairman (Portland)
Walter Brown, Vice Chair (Oak Grove)
Joyce Cohen (Lake Oswego)
William Frye (Eugene)
Jim Gardner (Portland)
Jeanette Hamby (Hillsboro)
Margie Hendriksen (Eugene)

DAH:gh

TESTIMONY OF DOUGLAS A. HALDANE, EXECUTIVE DIRECTOR, OREGON COUNCIL ON COURT PROCEDURES - HB 2891 - 6/8/83

TO: SENATE JUDICIARY COMMITTEE

Mr. Chairman and Members of the Committee:

My name is Douglas A. Haldane. I am the Executive Director of the Oregon Council on Court Procedures. Prior to the beginning of today's hearing, I delivered to your staff for distribution to the Committee copies of the amendments to the Oregon Rules of Civil Prcoedure promulgated by the Council on Court Procedures on December 4, 1982. These amendments were reported to the Legislative Assembly shortly thereafter. These amendments will take effect 90 days after the close of this Legislative Assembly unless an earlier effective date is provided. In past biennia, the legislature has provided, through a Bill for an Act, that January 1 of the year following the legislative session will be the effective date of new or amended rules. That Bill for an Act has also been used as a vehicle for the legislature to exercise its powers to amend, repeal, or supplement any of the rules or amendments.

House Bill 2891 was introduced originally to establish an effective date of January 1, 1984 for the amendments promulgated during the last biennium. The Council does not oppose the extension of the effective date to January 1.

The House Committee on the Judiciary, however, has modified the Council's amendments by deleting amendments made

DOUGLAS A. HALDANE - TESTIMONY

to ORCP 22 C. The Council does oppose this modification.

The current ORCP 22 C. was borrowed from Federal Rule of Civil Procedure 14, and provides that third party actions must be served within 10 days of the filing of an answer. The Council's amendment would allow 90 days from the time of service of the original summons and complaint during which third party actions could be brought.

This change was deemed desirable because of the late filing of answers due to the common practice of plaintiffs' attorneys allowing defendants extensions of time in which to appear. Oftentimes answers will not be filed until after significant discovery has taken place. When a third party action is filed this late, the third party defendant is compelled to redo all of the discovery that has already been done. This causes delays to all involved, docket problems, and additional expense to the litigants.

The Council's amendment is not a perfect solution but represents a compromise struck between maintaining third party practice in its present form and abolishing it entirely.

The Council would urge that this Committee not adopt the House modification of the 1982 amendments.

STATEMENT OF DONALD W. McEWEN

I was admitted to practice law in 1949 and have practiced continuously in Portland, Oregon, since my admission. The major emphasis of my practice has always been litigation, and for the past 15 years or more 80% or more of my time is devoted to litigation.

I have served on the Council on Court Procedures since its creation by the Legislature, and have been the Chairman of the Council throughout the period of its existence. The amendments to the Oregon Rules of Civil Procedure promulgated by the Council on Court Procedures on December 4, 1982, with but two exceptions are simply amendments made for clarification or refinement, and need no comment. The amendments to Rule 22 C., Third Party Practice, and to Rule 47, Summary Judgment, deserve comment.

The Council was frequently advised that motions for summary judgment were being filed, not for the purpose of obtaining a summary adjudication, but as a means of discovery and for the precise purpose of obtaining the identity and opinions of an expert witness employed by opposing parties. The Council was advised that this tactic was employed primarily in product liability cases.

The Council promulgated a relatively simple amendment to deal with this improper use of Rule 47. The amendment provides that, when necessary to oppose a motion for summary

judgment, the opinion of an expert is needed to establish a genuine issue of material fact, an affidavit of the party's attorney stating that a qualified expert has been employed and he is willing and available to testify to admissible facts or opinions which controvert the allegations of the documents supporting the summary judgment motion, and thus create a genuine issue of fact, shall be sufficient. The amendment requires that the affidavit of the attorney be made in good faith, and based upon admissible facts or opinions from an expert actually employed.

The amendment to third party practice was promulgated after exhaustive consideration of problems which result from third party practice. Prior to the amendment a defendant could as a matter of right file a third party complaint and implead a third party defendant simply by filing a third party complaint within ten days of the date upon which the answer was filed. By the use of extensions of time granted by opposing counsel, motions addressed to the pleadings, etc., defendants frequently do not file answers until months after the action has been commenced. Even when answers have been filed, defendants frequently in the course of discovery claim facts were discovered which formed a basis for assertion of a third party complaint, and courts frequently granted applications made after the ten day period had expired. Bringing additional parties into the action long after it was commenced, and frequently just prior to trial, resulted

in resetting of cases for trial, not because the plaintiff was not prepared to go forward, but solely because of claims existing between defendants and third parties. The Council determined that the period of time within which a defendant could file a third party complaint as a matter of right should begin to run from the time plaintiff's summons and complaint is served upon the defendant. The amendment provides that a defendant may at any time, not later than 90 days after that service, file a third party complaint. If the third party complaint is not filed within that 90 day period of time, the defendant must obtain the agreement of all parties who have appeared in the action and leave of court before that defendant can file a third party complaint.

In my opinion, and in the opinion of the Council, the amendment is a reasonable compromise and an appropriate balancing of the interests of all parties. A defendant who does not discover the existence of a third party claim until after the expiration of the 90-day period is not deprived of a remedy; he simply has to proceed by a separate action rather than by proceeding by third party complaint in the pending action.

Third party practice is permitted in almost every jurisdiction. It has been and continues to be controversial in Oregon. Generally speaking, attorneys who primarily specialize in the representation of plaintiffs are opposed to third party practice because it has frequently delayed

the trial of the plaintiff's case. Conversely, those whose emphasis is on the representation of defendants feel that third party practice provides an opportunity to join additional parties who may be liable to the defendant for all or part of the plaintiff's claim in the pending action, and by that means litigate all of those issues in a single case. The amendment eliminates any delay in the trial of the action, and at the same time reserves an adequate period of time within which third party claims may be asserted in at least most actions.

House Bill 2891

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as **introduced.**

Makes January 1, 1984, the effective date of certain amended rules of civil procedure adopted by Council on Court Procedures and submitted to 1983 Legislative Assembly.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to procedure in civil court proceedings; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Notwithstanding ORS 1.735, the Oregon Rules of Civil Procedure amended by promulgation on December 4, 1982, and submitted to the Legislative Assembly at its 1983 Regular Session by the Council on Court Procedures pursuant to ORS 1.735 shall become effective January 1, 1984.

SECTION 2. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

partment or agency] **of the taxpayer's complaint** shall be accomplished by the clerk of the tax court by filing [*the*] a certified copy of the complaint with the administrative head of the department or agency **and a certified copy with the political subdivision. Service of the political subdivision's complaint shall be accomplished by the clerk of the tax court by filing a certified copy of the complaint with the administrative head of the department or agency and mailing a certified copy of the complaint to the taxpayer.** The complaint of a taxpayer shall be entitled in the name of the person filing as plaintiff and the department or agency as defendant. **The complaint of a political subdivision shall be entitled in the name of the political subdivision as plaintiff and the taxpayer and the department or agency as defendants.** A copy of the order of the department or agency shall be attached to the original complaint. All procedures shall be in accordance with ORS 305.415 to 305.447, 305.475 and 305.490 to 305.500.

[*(7) The provisions of subsections (5) and (6) of this section shall apply to all appeals filed after January 1, 1974.*]

SECTION 5. The amendments to ORS 305.570 and 305.620 made by sections 3 and 4 of this Act relating to appeals to the Oregon Tax Court shall apply to orders of the Department of Revenue issued after the effective date of this Act.

Approved by the Governor August 4, 1983
Filed in the office of Secretary of State August 5, 1983

CHAPTER 750

AN ACT [HB 2840]

Relating to railroads; creating new provisions; amending ORS 763.035; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 763.035 is amended to read:

763.035. (1) The power to fix and regulate the speed of railway trains **and to regulate the sounding of railway train warning devices** at public railroad-highway crossings is vested exclusively in the state.

(2) Upon petition of any public authority in interest or of any railroad or upon [*his*] **the commissioner's** own motion, the commissioner shall, after due investigation and hearing, unless a hearing is not required under ORS 763.080 enter an order fixing and regulating the speed of railway trains **or regulating the sounding of railway train warning devices.**

(3) The speed limits fixed by the commissioner shall be maximum speed limits and shall be commensurate with the hazards presented and the practical operation of the trains.

SECTION 2. Notwithstanding the amendments to ORS 763.035 by section 1 of this Act, any ordinance of a political subdivision of this state that regulates the sounding of railway train warning devices and that is in effect on the effective date of this Act shall remain in effect and shall not be preempted by ORS 763.035 as amended by section 1 of this Act until the Public Utility Commissioner, after the effective date of this Act, first enters an order establishing regulation of railway train warning devices under the authority granted by the amendments to ORS 763.035 by section 1 of this Act.

SECTION 3. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

Approved by the Governor August 4, 1983
Filed in the office of Secretary of State August 5, 1983

CHAPTER 751

AN ACT [HB 2891]

Relating to procedure in civil court proceedings; creating new provisions; amending ORS 1.735 and ORCP 7D., 7F. and 55D.; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Notwithstanding ORS 1.735, the Oregon Rules of Civil Procedure amended by promulgation on December 4, 1982, and submitted to the Legislative Assembly at its 1983 Regular Session by the Council on Court Procedures pursuant to ORS 1.735 shall become effective January 1, 1984.

SECTION 2. Sections 3 to 6 of this Act first become operative on January 1, 1984.

SECTION 3. ORCP 7 D., as amended by promulgation on December 4, 1982, by the Council on Court Procedures, is amended to read:

D. Manner of service.

D.(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication.

D.(2) Service methods.

D.(2)(a) Personal service. Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

D.(2)(b) Substituted service. Substituted service may be made by delivering a true copy of the sum-

mons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules, substituted service shall be complete upon such mailing.

D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a true copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, 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 defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules, office service shall be complete upon such mailing.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a true copy of the summons and a true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed or allowed by these rules, service by mail shall be complete three days after such mailing if the address to which it was mailed is within this state and seven days after mailing if the address to which it is mailed is outside this state.

D.(3) Particular defendants. Service may be made upon specified defendants as follows:

D.(3)(a) Individuals.

D.(3)(a)(i) Generally. Upon an individual defendant, by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons.

D.(3)(a)(ii) Minors. Upon a minor under the age of 14 years, by service in the manner specified in subparagraph (i) of this paragraph upon such minor, and also upon such minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any person having the care or control of the minor or with whom such minor resides, or in whose service such minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

D.(3)(a)(iii) Incapacitated persons. Upon an incapacitated person, by service in the manner specified in subparagraph (i) of this paragraph upon such person, and also upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

D.(3)(b) Corporations and limited partnerships. Upon a domestic or foreign corporation or limited partnership:

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation or limited partnership, or by personal service upon any clerk on duty in the office of a registered agent.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found in the county where the action is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation or limited partnership who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to the office of the registered agent or to the last registered office of the corporation or limited partnership, if any, as shown by the records on file in the office of the Corporation Commissioner or, if the corporation or limited partnership is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation or limited partnership, and in any case to any address the use of which the plaintiff knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

D.(3)(c) State. Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant, or clerk.

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, [*secretary,*] or attorney thereof.

D.(3)(e) General Partnerships. Upon any general partnership by personal service upon a partner or any agent authorized by appointment or law to receive service of summons for the partnership.

D.(3)(f) Other unincorporated association subject to suit under a common name. Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

D.(3)(g) Vessel owners and charterers. Upon any foreign steamship owner or steamship charterer by personal service upon a vessel master in such owner's or charterer's employment or any agent authorized by such owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a

port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.

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.

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, 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.

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 by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defendant's insurance carrier or that the defendant's insurance carrier is unknown.

D.(5) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases such service shall be reasonably calculated to give actual notice.

D.(6) Court order for service; service by publication.

D.(6)(a) Court order for service by other method. On motion upon a showing by affidavit that service cannot be made by any method otherwise specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

D.(6)(b) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C.(3) shall state: "The 'motion' or 'answer' (or 'reply') must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D.(6)(c) Where published. In order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D.(6)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

D.(6)(e) Unknown heirs or persons. If service cannot be made by another method described in this

section because defendants are unknown heirs or persons as described in sections I. and J. of Rule 20, the action shall proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy, at the time of the commencement of the action, and served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D.(6)(f) Defending before or after judgment. A defendant against whom publication is ordered or such defendant's representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

SECTION 4. ORCP 7 F., as amended by promulgation on December 4, 1982, by the Council on Court Procedures, is amended to read:

F. Return; proof of service.

F.(1) Return of summons. The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by mail.

F.(2) Proof of service. Proof of service of summons or mailing may be made as follows:

F.(2)(a) Service other than publication. Service other than publication shall be proved by:

F.(2)(a)(i) Certificate of service when summons not served by sheriff or deputy. If the summons is not served by a sheriff or a sheriff's deputy, the certificate of the server indicating: the time, place, and manner of service; that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise; and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the certificate when, where, and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the certificate may be made by **the person completing the mailing** or the attorney for any party and shall state the circumstances of mailing and the return receipt shall be attached.

F.(2)(a)(ii) Certificate of service by sheriff or deputy. If the summons is served by a sheriff or a sheriff's deputy, the sheriff's or deputy's certificate of service indicating the time, place, and manner of service, and if defendant is not personally served, when, where, and with whom the copy of the summons and complaint was left or describing in detail the manner and circumstances of service. If the summons and complaint were mailed, the certificate shall state the circumstances of mailing and the return receipt shall be attached.

F.(2)(b) Publication. Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon)
: ss.
County of)

I, _____, being first duly sworn, depose and say that I am the _____ (here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____ day of _____, 19_____.

_____
Notary Public for Oregon
My commission expires
_____ day of _____, 19_____.

F.(2)(c) Making and certifying affidavit. The affidavit of service may be made and certified before a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such affidavit.

F.(2)(d) Form of certificate or affidavit. A certificate or affidavit containing proof of service may be made upon the summons or as a separate document attached to the summons.

F.(3) Written admission. In any case proof may be made by written admission of the defendant.

F.(4) Failure to make proof; validity of service. If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

SECTION 5. ORCP 55 D., as amended by promulgation on December 4, 1982, by the Council on Court Procedures, is amended to read:

D. Service; service on law enforcement agency; service by mail; proof of service.

D.(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the

party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C.(6), shall be served in the same manner as provided for service of summons in Rule 7D.(3)(b)(i), D.(3)(d), D.(3)(e), or D.(3)(f).

D.(2) Service on law enforcement agency.

D.(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D.(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D.(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D.(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

D.(3)Service 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 this section:

D.(3)(a) The attorney certifies in connection with or upon the return of service that the attorney, or *[his/her]* **the attorney's** agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D.(3)(b) The attorney, or *[his/her]* **the attorney's** 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

D.(3)(c) The subpoena was mailed to the witness more than *[ten]* **10** 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.

D.(4) Proof of service. Proof of service of a subpoena is made in the same manner as proof of service of a summons.

SECTION 6. ORS 1.735 is amended to read:

1.735. 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]* **on January 1 following** 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.

SECTION 7. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

Approved by the Governor August 4, 1983
Filed in the office of Secretary of State August 5, 1983

CHAPTER 752

AN ACT [HB 2958]

Relating to alcoholic beverages; creating new provisions; amending ORS 430.359; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 430.359 is amended to read:

430.359. (1) Upon approval of an application, the division shall enter into a matching fund relationship with the applicant. In all cases the amount granted by the division under the matching formula shall not exceed 50 percent of the total estimated costs, as approved by the division, of the alcoholism treatment and rehabilitation program.

(2) The amount of state funds shall be apportioned among the applicants according to the community need of the applicant for alcoholism treatment and rehabilitation services as compared with the community needs of all applicants. In evaluating the community needs of the applicant, the division, in consultation with the Committee on Alcohol Problems created by ORS 430.100 (4), shall give priority consideration to those applications that identify and include treatment and rehabilitation programs aimed at providing alcoholism treatment and rehabilitation services to minorities with a significant population of affected persons. The funds granted shall be distributed monthly.

(3) Federal funds at the disposal of an applicant or treatment and rehabilitation program for use in alco-

June 7, 1983

TO: Fred Merrill

FROM: Gilma

RE: Call from: Barbara Heller
Trial Court Clerk
Columbia County Courthouse
St. Helens, OR 97051

Telephone: 397-2327

SUBJECT: ORCP 73 - JUDGMENTS BY CONFESSION

Betty Belshaw told her to call the Council about the problems she is encountering with JUDGMENTS BY CONFESSION. She said "Confession of Judgments" are being stamped in and put in the file but they are not entered as effective judgments. She wonders whether she has the latitude to enter a judgment, or whether she must ask the judge to order it. She said some attorneys are sending a separate ORDER for the court to enter the confession.

She is worried about the language in 73 C.: "Judgment by confession may be ordered by the court upon the filing of the statement required by section B. of this rule." She is wondering about the meaning of "may" -- does it mean "might", "shall", "must", etc.

She would like someone to call her soon (perhaps Friday of this week).

cc: Doug Haldane

JUDGMENTS BY CONFESSION
RULE 73

A. Judgments which may be confessed.

A(1) **For money due; where allowed.** Judgment by confession may be entered without action for money due in the manner prescribed by this rule. Such judgment may be entered in any court having jurisdiction over the subject matter. The application to confess judgment shall be made in the county in which the defendants, or one of them, reside or may be found at the time of the application. A judgment entered by any court in any other county has no force or validity, notwithstanding anything in the defendant's statement to the contrary.

A(2) **Consumer transactions.** No judgment by confession may be entered without action upon a contract, obligation, or liability which arises out of the sale of goods or furnishing of services for personal, family, or household use, or out of a loan or other extension of credit for personal, family, or household purposes, or upon a promissory note which is based upon such sale or extension of credit.

B. Statement by defendant. A statement in writing must be made, signed by any party against whom judgment is to be entered or a person authorized to bind such party, and verified by oath, as follows:

B(1) It must authorize the entry of judgment for a specified sum;

B(2) It must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly and presently due;

B(3) It must contain a statement that the person or persons signing the judgment understands that it authorizes entry of judgment without further proceeding which would authorize execution to enforce payment of the judgment; and

B(4) It must have been executed after the date or dates when the sums described in the statement were due.

C. Application by plaintiff. Judgment by confession may be ordered by the court upon the filing of the statement required by section B of this rule. The judgment may be entered and enforced in the same manner and with the same effect as a judgment in an action.

D. Confession by joint debtors. One or more joint debtors may confess a judgment for a joint debt due. Where all the joint debtors do not unite in the confession, the judgment shall be entered and enforced against only those who confessed it and it is not a bar to an action against the other joint debtors upon the same demand. [OCP 121380]

RULES 74 through 77 (Reserved for Expansion)

ORDER OR JUDGMENT FOR SPECIFIC ACTS
RULE 78

A. Judgment requiring performance considered equivalent thereto. A judgment requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party does not comply with the judgment, be deemed to be equivalent thereto.

B. Enforcement; contempt. The court or judge thereof may enforce an order or judgment directing a party to perform a specific act by punishing the party refusing or neglecting to comply therewith, as for a contempt as provided in ORS 33.010 through 33.150.

C. Application. Section B. of this rule does not apply to a judgment for the payment of money, except orders and judgments for the payment of suit money, alimony and money for support, maintenance, nurture, education, or attorney fees, in:

C(1) Actions for dissolutions of marriages.

C(2) Actions for separation from bed and board.

C(3) Proceedings under ORS 108.110 and 108.120.

D. Contempt proceeding. As an alternative to the independent proceeding contemplated by ORS 33.010 through 33.150, when a contempt consists of disobedience of an injunction or other judgment or order of court in a civil action, citation for contempt may be by motion in the action in which such order was made and the determination respecting punishment made after a show cause hearing. Provided however:

D(1) Notice of the show cause hearing shall be served personally upon the party required to show cause.

HOUSE COMMITTEE ON JUDICIARY
Room 351, State Capitol
SALEM, OREGON 97310
378-5962
Toll Free 1-800-452-7813

February 11, 1983

Fred Merrill
Executive Director
Council on Court Procedures
University of Oregon
Law School
Eugene, OR 97401

Dear Professor Merrill:

RE: HB 2417

The Committee is presently considering HB 2417, which would amend ORCP 7 G to add a provision that service of summons upon the wrong person is of no effect and the person served has no duty to appear or defend. See the enclosed copy of the bill.

At hearing yesterday the Committee heard testimony from Mr. Marshall Duncan of Corbett, Oregon, concerning a recent incident. Mr. Duncan was served with a summons intended for his son, who has the same name but lives at a different address. Although Mr. Duncan advised the process server of this mistake, the summons was left with Mr. Duncan. He was thereafter required to incur the legal expense and face the anxiety of quashing the service of summons.

This bill was drafted at the request of Representative Otto to remedy the situation. It is intended to relieve a person wrongly served with a summons from any responsibility for appearing or defending against the improper summons. However, at hearing it appeared to the Committee that even with this amendment to ORCP 7 G, a wrongly served person would still have to appear and moved to quash the subpena or face entry of a default judgment against him which would later require an appearance and motion to vacate the judgment. The Committee also questioned whether the proposed amendment to ORCP 7 G adds to or modifies existing Oregon law.

We enclose a copy of the tape recording of the Committee meeting (discussion of HB 2417 is the first item on the tape). We would appreciate

any comments you may have on the proposed bill and any suggestions for amendments which would insure that a wrongly served person would not be required to respond to an improper summons.

If you have any questions, please do not hesitate to call me or committee counsel Kirk Hall. Thank you for your cooperation.

Very truly yours,

Bill Rutherford
Chair, Subcommittee 2

att.
cc: The Honorable Glenn Otto

KH:pb

House Bill 2417

Sponsored by Representative OTTO

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Describes effect of service of summons on wrong person in civil action.

A BILL FOR AN ACT

Relating to civil court proceedings; amending ORCP 7 G.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 7 G. is amended to read:

G. Disregard of error; actual notice; **wrong person served.**

G.(1) Failure to comply with provisions of this rule relating to the form of summons, issuance of summons, and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, or affidavit or certificate of service of summons, and shall disregard any error in the content of or service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

G.(2) If it appears on the face of a summons or complaint served upon a person, disregarding any presumption arising from identity of names, that the person served is not the defendant named in the summons and complaint, and if the person served is in fact not the defendant, the service upon the person served is void, the person served has no duty to appear and defend in response to the summons, and the court shall not have jurisdiction over or enter any judgment affecting the person served on the basis of the service. This subsection does not preclude any other determination of insufficiency of summons or service thereof.

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

March 25, 1983

Representative Bill Rutherford
House Committee on Judiciary
Room 351, State Capitol
Salem, OR 97310

Dear Representative Rutherford:

I have noted a possibly troublesome anomaly in ORS 487.560. That statute defines the crime of driving while suspended and establishes as an affirmative defense the fact that the defendant had not received notice of suspension as required by ORS 482.570.

Normally, one would assume that since lack of notice is an affirmative defense, a defendant would have the burden of proving lack of notice by a preponderance of the evidence on the basis of ORS 161.055. On looking at ORS 161.055, however, it appears that the burden of proof set out there applies only "when a defense is declared to be an affirmative defense by Chapter 743, Oregon Laws, 1971", the revised criminal code. So far as I know, ORS 487.560 was not a part of Chapter 743, Oregon Laws, 1971, and thus the definition of a burden of proof for an affirmative defense contained in ORS 161.055 would not apply to the crime of driving while suspended. I argued, unsuccessfully, in the District Court for Lane County that in the absence of a statutory determination of who had the burden of proof, more general principles should apply and the state should be required to prove notice beyond a reasonable doubt. The court denied my motion, citing State v. McCollum, 48 Or App 35 (1980), State v. Lawrence, 36 Or App 733 (1978), and State v. Taylor, 28 Or App 815 (1977). The cited cases all state that lack of notice is an affirmative defense, but none of those cases address the question of the allocation of the burden of proof.

It doesn't strike me as a particularly significant problem; however, it might be simpler to amend ORS 161.055 by striking the language which refers to Chapter 743, Oregon Laws, 1971, than take up appellate court time dealing with an issue of this nature.

I have not researched the question any further and do not know if an amendment such as I suggest would have broader implications, but it would seem

that a single statement regarding the burden of proof should be applicable to all affirmative defenses.

Sincerely,

Douglas A. Haldane
Director, Oregon Council on Court Procedures

DAH:gh

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

March 25, 1983

Representative Bill Rutherford
Room 351, State Capitol
Salem, OR 97310

Re: HB 2417

Dear Representative Rutherford:

You directed a letter to Professor Fred Merrill, formerly of the Council on Court Procedures, inquiring about his reaction to HB 2417 which would obviate the necessity of a party who had been wrongly served with a summons and complaint taking steps to have those quashed.

Professor Merrill passed your letter on to me for reply.

Reviewing the bill, it would appear to me that it would cause more problems than it would solve. If the person who was actually served did nothing, chances are the plaintiff, not knowing that the wrong person had been served, would take a default and judgment would be entered. In that situation, because of the confusion of names, it is entirely possible that the plaintiff could attempt to execute on the judgment on property held by the wrong person. It simply seems that the further we get from the original service the more complicated it would become to right the original wrong. Requiring the person actually served to appear and quash service is probably the earliest and best opportunity to straighten such a situation out.

I recognize this places a burden on one who is wrongfully served; however, many inconvenient consequences flow from the fact that one has the same name as another.

Sincerely,

Douglas A. Baldane
Director, Oregon Council on Court Procedures

DAH:gh

cc: Kirk Hall (on 4/8/83)

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STUART A. HALL, OF COUNSEL
JOHN W. KENDALL (RET. 1982)

SUBJECT: HB 2891
Our File No. 72-001-021

May 16, 1983

Rep. Hardy Myers
Chairman, Senate Judiciary Committee
State Capitol
Salem, Oregon 97310

Dear Rep. Myers:

The Procedure & Practice Committee, at its regular meeting on May 14, 1983 considered the amendment to HB 2891 which would override the proposal of the Council on Court Procedures to amend ORCP 22C on third-party practice.

The Committee unanimously opposes this amendment. The proposal put forth by the Council on Court Procedures was a product of long hours of investigation, research and discussion aimed at correcting problems which bench and bar have confronted in third-party practice. The Committee opposes the rather abrupt dismissal of that work by returning the rule to its former status without substantial discussion in the legislature.

It was the unanimous opinion of the Committee that the Council on Court Procedures' proposal should be adopted and that this amendment should not be passed.

We would like to be advised of any hearings or work sessions on the amendment in order that the Committee's position might be set forth more fully.

Very truly yours,

BLACK, TREMAINE, HIGGINS, LANKTON & KRIEGER

Robert D. Newell

RDN/tau
cc: Mr. Douglas A. Haldane
Ms. Diana E. Godwin

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

May 18, 1983

Senator Jan Wyers
Chairman, Senate Judiciary Committee
State Capitol
Salem, OR 97310

Re: HB 2891

Dear Senator Wyers:

Enclosed is a copy of a letter to Representative Hardy Myers from Robert D. Newell of the Oregon State Bar Procedure & Practice Committee. I wanted to be certain that you had the benefit of Mr. Newell's thoughts on HB 2891.

The Council on Court Procedures spent a great deal of time in developing the proposed amendment regarding third party practice. It was a difficult process which attempted to reconcile seemingly irreconciliable views. As with most compromises, it is not a perfect solution but one which satisfied the parties in contention.

The Council continues to oppose the House amendments to HB 2891.

Very truly yours,

Douglas A. Haldane
Executive Director, Council on
Court Procedures

DAH:gh

Enclosure

cc: Donald W. McEwen

McEWEN, HANNA, GISVOLD, RANKIN & VANKOTEN
(FOUNDED AS CAKE & CAKE-1886)
ATTORNEYS AT LAW
SUITE 1408
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1100 S. W. SIXTH
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DON G. CARTER
WARREN R. SPENCER
JAMES RAY STREINZ
MICHAEL A. HOLSTUN
TIMOTHY R. STRADER

RALPH H. CAKE
1889-1973
NICHOLAS LAUREGUY
1896-1974

HERBERT C. HARDY
OF COUNSEL

May 26, 1983

The Honorable Jan Wyers
Chairman, Senate Judiciary Committee
Senate Chamber
Salem, Oregon 97310

The Honorable Hardy Myers
Chairman, House Judiciary Committee
House Chamber
Salem, Oregon 97310

Dear Jan and Hardy:

The Council on Court Procedures, in the first years of its existence, and in promulgating the initial set of rules which became ORCP, promulgated a number of rules governing discovery. In the course of its promulgation of the rules, the Council considered interrogatories to parties as provided by Rule 33 of the Federal Rules of Civil Procedure at great length. The question as to whether or not they should be provided was argued and debated extensively. After full and thorough consideration, the Council concluded that the discovery rules should not include a rule authorizing the use of interrogatories to parties. The consideration was very thorough and complete.

I have served as the Chairman of the Council since its creation. At no time since the determination that the use of interrogatories would not be included in the rules has the Council been of the opinion that the matter should be reconsidered.

Notwithstanding the absence of any rule permitting interrogatories, attorneys in Multnomah County began requesting the names and addresses of witnesses in requests for production of documents. The Honorable Charles S. Crookham, who has been Presiding Judge for the past several years, routinely granted such requests and required the other party to supply the information requested. I am sure that you are both aware that the Supreme Court in an opinion rendered in a mandamus proceeding on May 24, 1983, commanded Judge Crookham to rescind and vacate

an order granting such a request, State ex rel. Union Pacific Railroad Co. v. Crookham.

House Bill 2309 has been introduced for the purpose of allowing discovery of the names of witnesses. The discovery of the names of occurrence witnesses is not privileged and can be obtained by other discovery. I personally do not have any strong feeling one way or the other regarding discovery of the names of witnesses. I have throughout my career as an attorney had a substantial practice in the federal court where for years disclosure has been required of not only the names and addresses of witnesses, but also the substance of their testimony or a narrative statement thereof.

It is my understanding that the Bill referred to has been introduced at the request of the Oregon State Bar. In my opinion it is inappropriate for the Bar to make such a request directly to the Legislature. The Legislature created the Council for the purpose of promulgating rules of civil procedure. The Legislature has since the creation of the Council left to the Council promulgation of such rules.

I believe the Council has served the purpose for which it was created in a manner of benefit to the courts, the legal profession, and to the litigants. It has accomplished the foregoing because the entire task has been entrusted to it subject to legislative review of its product. I submit that it should so continue.

Yours very truly,

McEWEN, HANNA, GISVOLD,
RANKIN & VanKOTEN

Donald W. McEwen

DWM:lam

cc: Professor Douglas A. Haldane

GOLDSTEIN & CAMPBELL
ATTORNEYS AT LAW
474 Willamette, Suite 303
Eugene, Oregon 97401
(503) 484-4435

James M. Campbell
Michael B. Goldstein

July 27, 1983

Douglas Haldane
Attorney at Law
899 Pearl St.
Eugene, OR 97401

Re: ORCP 7C.(3)(c)

Dear Mr. Haldane:

Enclosed for your delectation is a form of summons which though doubtless susceptible of improvement does make more sense than the form dictated by present ORCP 7C.(3)(c).

Sincerely,

James M. Campbell

cn

enc: as noted

IN THE COURT OF THE STATE OF OREGON FOR THE COUNTY OF

)
)
)
)
)
)
) Case No.
)
)
)
) SUMMONS
)
)
)
)

TO:

IN THE NAME OF THE STATE OF OREGON: You are hereby required to appear and defend against the complaint filed against you in this matter within 30 days from the date this summons is served upon you. If you fail to do so the plaintiff will apply to the court for the relief demanded in the complaint. (If appropriate, the term "plaintiff" includes multiple plaintiffs, petitioners and defendants as third party plaintiffs; "defendant" likewise includes multiple defendants, respondents and third party defendants.)

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

YOU MUST "APPEAR" TO PROTECT YOUR RIGHTS IN THIS MATTER OR THE OTHER SIDE WILL WIN AUTOMATICALLY. To "appear" you must file with the court a legal paper called a "motion," "answer" or "reply." This paper must be given to the court clerk or administrator within 30 days along with the required filing fee. This paper must be in proper form and have proof of service on the party or attorney whose name and address appears below.

YOU MAY ALSO BE LIABLE FOR ATTORNEY FEES IN THIS MATTER. If the complaint claims you are liable for attorney fees and plaintiff prevails, a judgment for reasonable attorney fees may be entered against you.

IF YOU HAVE QUESTIONS YOU SHOULD SEE AN ATTORNEY IMMEDIATELY.

GOLDSTEIN & CAMPBELL
Attorneys at Law
474 Willamette, Suite 303
Eugene, Oregon 97401
Telephone (503) 484-4435
Attorneys for Plaintiff

Of Attorneys for Plaintiff

This summons and the attached complaint are hereby certified to be true and complete copies of the originals thereof.

Of Attorneys for Plaintiff

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BLEDSOE, ANDERSON & YOUNG
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MILO PETRANOVICH
FRANK M. PARISI
TIMOTHY R. HARMON
BRUCE C. HAMLIN
RICHARD S. POPE
RICHARD N. VAN CLEAVE
MARY-ANNE SAARINEN
JOHN W. WEIL
SCOTT P. MONFILS
PAULA B. WEISS
HELEN RIVES-HENDRICKS
MICHAEL R. SANDOVAL
ANGELA M. NOLAN
GRIFFITH C. STEINKE
P. ANNE KLASSNER

CORBETT GORDON
CARRIE G. OTEY
MARIANNE E. SCHIMELFENIG
RALPH F. RAYBURN
R. SCOTT McGREW
ROBERT P. STAFFORD
TRISH M. BROWN
SUSAN E. PIPER
VIVIAN I. RAITS
RANDALL W. ROSÁ
JOHN KENT PEARSON, JR.
MARK B. BLOCK
BRENDA MARIE FITZGERALD

July 29, 1983

12685-2
OUR FILE NO.

Douglas A. Haldane, Esq.
Executive Director
Council on Court Procedures
899 Pearl Street
Eugene, Oregon 97440

Re: ORCP 47C

Dear Doug:

I want to call your attention to the recent Court of Appeals case of Bowers Mechanical, Inc. v. Kent Associates, 63 Or App 414 (1983). The case holds that service of a memorandum or affidavit opposing a motion for summary judgment is complete upon mailing, even if mailing occurs on the day before the hearing and receipt occurs after the hearing. Although that reading of the law is obviously correct, the Court of Appeals admitted that the result is unfair:

> "* * * It is apparent that the permissible timing is close and, as here, may not be sufficient to permit the moving party to file counter-affidavits, thereby necessitating a continuance of the hearing for that purpose. * * *" 63 Or App at 417.

I believe that ORCP 47C ought to be amended to require actual receipt of any opposing affidavits or memorandum prior to the day of hearing. The remedy of a

continuance is unsatisfactory because the moving party has already prepared for the hearing, and possibly traveled some distance to argue the motion. Of course, this situation comes up any time a motion (not simply a summary judgment motion) is set for expedited hearing. In Multnomah County Circuit Court, it is possible to set a motion on as little as three days' notice.

A related problem is the practice of circuit courts of considering late filed affidavits. In most circuit courts, a party opposing a motion for summary judgment can appear on the day of the hearing and hand an affidavit to opposing counsel, without any effort to serve or deliver on the day before. As a matter of practice, I move to strike any such affidavit for non-compliance with ORCP 47C. Although Judge Neufeld apparently granted such a motion in Bowers Mechanical, they are routinely denied. I believe that the problem could be corrected by making the second sentence of ORCP 47C mandatory and not discretionary.

Very truly yours,

Bruce C. Hamlin

Enclosure

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

BOWERS MECHANICAL, INC.,
Plaintiff,
v.
KENT ASSOCIATES et al,
Defendants,

THE DOUGLAS CO.,
Appellant,
v.
CRUME et al,
Respondents.

(80-209-E; CA A24139)

Appeal from Circuit Court, Josephine County.

Argued and submitted January 24, 1983.

Gerald C. Neufeld, Judge.

Thomas J. Murphy, Eugene, argued the cause for appellant. With him on the brief was Cass, Scott, Woods & Smith, Eugene.

Richard A. Stark, Medford, argued the cause for respondents. With him on the brief was Haviland and Stark, Medford.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Reversed and remanded.

BUTTLER, P. J.

Defendant Douglas Company (Douglas) appeals from a summary judgment for defendants Crume (Crume) on Crume's cross-claim to foreclose a construction lien against Douglas. The question is whether the trial court erred in refusing to consider an affidavit opposing Crume's motion which Douglas mailed to Crume's attorney prior to a hearing on the motion, but which was not received until after the hearing.

On January 9, 1981, Crume filed its motion for summary judgment. A hearing was set for Monday, March 23, and notice of the hearing was sent to the parties on February 5. Douglas' attorney, a Eugene lawyer, mailed a certified copy of a memorandum and affidavit in opposition to the motion to Crume's attorney, a Medford lawyer, on Friday, March 20, but Crume's attorney did not receive the mailed material until March 25. The affidavit raised a factual question as to the amount of the lien. Douglas' attorney presented the memorandum and affidavit to the trial court the day of the hearing, and presented copies to Crume's attorney 20 minutes before the hearing. The trial court ruled that the affidavit had not been served prior to the day of the hearing as required by ORCP 47C and, therefore, refused to consider it. Because there were no other grounds upon which to challenge the motion, it was granted.

Douglas contends that service on Crume was accomplished on March 20 with the mailing of the affidavit and that ORCP 47C was, therefore, satisfied. We agree. ORCP 47C provides, in relevant part:

> "The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party, prior to the day of hearing, may serve opposing affidavits. * * *"

ORCP 9A requires opposing affidavits to be served on the opposing party, and ORCP 9B provides, in relevant part:

> "Whenever under these rules service is required or permitted to be made upon a party 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. * * * Service by mail is complete upon mailing. * * *"

ORCP 9C provides, in relevant part:

> "All papers required to be served upon a party by section A. of this rule shall be filed with the court within a reasonable time after service. * * *"

The language of those rules is clear: so long as the party opposing summary judgment serves the attorney for the moving party with the affidavit in opposition to the motion prior to the day of the hearing, ORCP 47C is satisfied, and the attorney for the moving party is deemed to have been served when the affidavit is placed in the mail. It is apparent that the permissible timing is close and, as here, may not be sufficient to permit the moving party to file counter-affidavits, thereby necessitating a continuance of the hearing for that purpose. However, ORCP 9 and 47 are clear and unambiguous, and the trial court erred in holding that the opposing affidavit was not served timely.

Although the trial court did not reach the question whether the affidavit, filed on the the day of the hearing, was timely, we hold that it was. ORCP 9C requires only that the affidavit be filed within a reasonable time *after* service. Here, service was made on Friday, and the affidavit was filed on the following Monday. Filing was within a reasonable time.

Because Douglas' opposing affidavit was served and filed within the times required by the rules, the trial court erred in refusing to consider it. When considered, the opposing affidavit raised a material issue of fact. Therefore, the trial court erred in granting Crume's motion for summary judgment.

Reversed and remanded.

FREDERIC D. CANNING
JAMES C. TAIT
A. GREGORY McKENZIE

CANNING, TAIT & McKENZIE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1693 MOLALLA AVENUE
OREGON CITY, OREGON 97045

AREA CODE 503
657-8144

October 7, 1983

Douglas A. Haldane, Esq.
P. O. Box 11544
Eugene, Oregon 97440

RE: Council on Court Procedures

Dear Doug:

The purpose of this letter is to propose an amendment to Rule 22. The proposed amendment would prohibit a third party complaint against a party's insurance company or the joinder of a party's insurance company in all cases except those where the plaintiff's complaint seeks a declaration of insurance coverage.

The reason for the proposed change is that ORCP 22C(1) presently provides that a third party complaint may

> "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."

Read literally, this could mean that a defendant whose insurance carrier denies coverage could file a third party complaint against his insurance carrier seeking a declaratory judgment of insurance coverage.

As a practical matter, I suspect most courts would order a separate trial under ORCP 22E on the insurance issues. However, such an order would be discretionary. If the claim were not severed, the insurance carriers' attorneys would be entitled under ORCP 22C to assert against the plaintiff any defense which the third party plaintiff had to the plaintiff's claim. The plaintiff would be facing two attorneys rather than one. The jury also would then know whether there was or was not applicable insurance and the amount of the insurance limits.

The proposed rule would not prohibit the traditional method of filing a separate declaratory judgment action which can be expedited on the trial docket without prejudicing any of the parties to the principal case.

This issue is presently being litigated in a case in which I am involved. A defendant in a products liability claim has filed a third party complaint against an insurance carrier claiming that the insurance carrier is or may be liable to the plaintiff solely be virtue of an insurance contract and seeking to have the entire matter litigated in one hearing.

PROPOSED AMENDMENT TO RULE 22:

F. INSURANCE

No insurer shall be joined as a third party defendant or an additional party based upon a claim that the insurer is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff because of an insurance contract unless the subject matter of the plaintiff's claim is insurance.

Very truly yours,

James C. Tait

JCT:cw

LAW OFFICES
CEGAVSKE & SEITZ
420 S E JACKSON STREET
P O BOX 218
ROSEBURG, OREGON 97470

WALLACE D CEGAVSKE
DANIEL W SEITZ
JOAN G SEITZ
RANDOLPH J STEVENS

EDWARD M MURPHY
OF COUNSEL

TELEPHONE
AREA CODE 503
673-5528

November 1, 1983

Mr. Michael Williams
Attorney at Law
1050 Citizens Building
975 Oak Street
Eugene, OR 97401

Mr. Fred Merrill
c/o University of Oregon
College of Law
Eugene, OR 97401

Gentlemen:

I enjoyed very much your presentations at the Discovery CLE this past weekend.

Since Mr. Williams has invited suggestions for changes in ORCP, I would suggest that the Committee for Court Procedures take a look at the application of Rule 46, Sanctions for Failure to Make Discovery. Informal survey of attorneys practicing in Douglas County has revealed that although we have had to resort to Rule 46 Motions in order to compel discovery and have requested the award of expenses and attorney fees where the responding party has not provided discovery, the judges in Douglas County almost universally do not award expenses. Speaking personally, while the Rule 46 Motion does not at this time take very much attorney or secretary time (it has become one of those "standard motions" which is in the program of our word processor), it does tend to add two to three months' delay in prosecution of an action. Given the continuing delays in Douglas County with having these motions scheduled, that delay is expected to increase. The attitude of the judges has been one of mildly chastising the non-responding attorneys, and asking for some cooperation. If the rule could be changed to require an assessment of costs unless the non-responding attorney can show that there was substantial justification for opposition or non-response, the courts might then begin awarding expenses. I maintain to the judges that even a nominal award of expenses will get the word out that one must comply with the discovery statutes and will have the effect of moving cases much more quickly and elimination the motion docket backlog of Rule 46 motions.

In summary, then, I would suggest a change in Rule 46 to require the award of expenses unless there is an affirmative showing by the opposing party that opposition or non-compliance was substantially justified under the law. I would even be willing to assist the Committee in drafting language to incorporate that change, should the Committee share my feelings about Rule 46.

Very truly yours,

CEGAVSKE & SEITZ

Randolph J. Stevens

By Randolph J. Stevens

to the sender within 20 days after it has been mailed to such person, the sender may attempt to effect service on him in another manner authorized by this chapter, and, except for good cause shown, the plaintiff is entitled to recover the costs of other service or attempted service from the defendant regardless of whether he, the plaintiff, is otherwise entitled to recover his costs in the action. If service is effected in another manner before it is effected under this section, service is deemed complete at the time specified in the section governing that manner of service. (See Sections 415.10 through 415.50.)

Proof of service is governed by Sections 417.10 through 417.30.

Cross References

Action for injuries to minor, service on parent [illegible] see § 372.
Applicability of procedural provisions to all [illegible] see § 34.
Associates sued under common name, service, see § 388.
Corporations, service of process, see Corporations Code § 6500 et seq.
Foreign partnerships, mailing notice of service on secretary of state, see Corporations Code § 15700.
Motion to quash service of summons, see § 418.10.
Nonresident motorist, see Vehicle Code § 17455.
Proof of service by mail, see § 417.10.
State license tax, action to collect, applicability of [illegible] see Business and Professions Code § 16222.
Telecopied copy, service, see § 1017.
Time not extended by reason of service [illegible] see § 413.20.
Unincorporated association, service on [illegible] see Corporations Code § 24007.

Law Review Commentaries

Bases of jurisdiction of California courts to render judgments against foreign corporations and non-resident individuals. Harold W. Horowitz (1958) 31 So.Cal.L.R. 349.

Legislative changes in service of process. [illegible] Santa Clara L. 192.

Service [illegible] 22 Hast.L.J. 1294.

Unincorporated association, a study [illegible] Vol. 8, p. 381 et seq.

Library References

Process ⇐42

C.J.S. Process §§ 77.

§ 415.40 Service on person outside state

A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by any form of airmail requiring a return receipt. Service of a summons by this form of mail is deemed complete on the 10th day after such mailing.

(Added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.)

Comment—Judicial Council

Section 415.40 provides one of two methods authorized by this article for delivering process by mail to the person or persons to be served. The other method of mail service is specified

mons is executed, if such acknowledgment thereafter is returned to the sender.

(d) If the person to whom a copy of the summons and of the complaint are mailed pursuant to this section fails to complete and return the acknowledgment form set forth in subdivision (b) within 20 days from the date of such mailing, the party to whom the summons was mailed shall be liable for reasonable expenses thereafter incurred in serving or attempting to serve the party by another method permitted by this chapter, and, except for good cause shown, the court in which the action is pending, upon motion, with or without notice, shall award the party such expenses whether or not he is otherwise entitled to recover his costs in the action.

(e) A notice or acknowledgment of receipt in form approved by the Judicial Council is deemed to comply with this section.

(Added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.)

Comment—Judicial Council

Section 415.30 provides one of two methods authorized by this article for delivering process by mail to the person or persons to be served. The other method of mail service is specified in Section 415.40. Still other methods of mail service are specified in other statutes of this state. (For a comprehensive list, see 31 So.Cal.L.Rev. 339.)

The person or persons to be served under this section are enumerated in Sections 416.10 through 416.90. If two or more persons are to be served in an action, each of them may be served by this or any other authorized method.

This method of mail service may be used to deliver process to anyone within or outside this state. Regular communication by mail must, of course, exist between the place of mailing and the place of delivery. (*Cf.* Cal Code Civ.Proc. § 1012.)

Process consists of a copy, in proper form, of the summons and of the complaint, and must be sent by first-class mail or airmail, postage prepaid, to the person to be served, together with two copies of the form of notice and acknowledgment of receipt specified in subdivision (b) and a return envelope, postage prepaid, addressed to the sender. One copy of this form must be executed and returned to the sender by the person to whom it was mailed, or by his agent, if service is to be made on him as an individual. If service is to be made on him in a representative capacity, such as an agent, officer, or employee of a corporate or noncorporate entity, he or another person authorized to receive such service must execute the form in such representative capacity.

Service is complete on the date the form is executed if thereafter it is returned to the sender. But if this form, or an equivalent written acknowledgment of receipt, is not returned

§ 415.30 Service by mail

(a) A summons may be served by mail as provided in this section. A copy of the summons and of the complaint shall be mailed (by first-class mail or airmail, postage prepaid) to the person to be served, together with two copies of the notice and acknowledgment provided for in subdivision (b) and a return envelope, postage prepaid, addressed to the sender.

(b) The notice specified in subdivision (a) shall be in substantially the following form:

(Title of court and cause, with action number, to be inserted by the sender prior to mailing)

NOTICE

To: (Here state the name of the person to be served.)

This summons is served pursuant to Section 415.30 of the California Code of Civil Procedure. Failure to complete this form and return it to the sender within 20 days may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons upon you in any other manner permitted by law. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, this form must be signed in the name of such entity by you or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. Section 415.30 provides that this summons is deemed served on the date of execution of an acknowledgment of receipt of summons.

_____

Signature of sender

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS

This acknowledges receipt on (insert date) of a copy of the summons and of the complaint at (insert address).

Date: _____

(Date this acknowledgment is executed)

_____

Signature of person acknowledging receipt, with title if acknowledgment is made on behalf of another person

(c) Service of a summons pursuant to this section is deemed complete on the date a written acknowledgment of receipt of sum-

COURT OF CALIFORNIA, COUNTY OF .....

NAME OF MUNICIPAL OR JUSTICE COURT DISTRICT OR BRANCH COURT, IF ANY	FOR COURT USE ONLY
TITLE OF CASE (ABBREVIATED)	
NAME, ADDRESS, AND TELEPHONE NUMBER OF SENDER	CASE NUMBER

NOTICE

TO: .....
(Insert name of individual being served)

This summons and other document(s) indicated below are being served pursuant to Section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it to me within 20 days may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. Section 415.30 provides that this summons and other document(s) are deemed served on the date you sign the Acknowledgment of Receipt below, if you return this form to me.

Dated .....

_____
(Signature of sender)

ACKNOWLEDGMENT OF RECEIPT

This acknowledges receipt of: (To be completed by sender before mailing)

1. ☐ A copy of the summons and of the complaint.
2. ☐ A copy of the summons and of the Petition (Marriage) and
   - ☐ Blank Confidential Questionnaire (Marriage)
   - ☐ Order to Show Cause (Marriage)
   - ☐ Blank Responsive Declaration
   - ☐ Blank Financial Declaration
   - ☐ Other: (Specify)

(To be completed by recipient)

Date of receipt .....

_____
(Signature of person acknowledging receipt, with title if acknowledgment is made on behalf of another person)

Date this form is signed .....

_____
(Type or print your name and name of entity, if any, on whose behalf this form is signed)

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

WILLIAM M. DALE
JUDGE

December 7, 1983

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

Dear Doug:

It is my suggestion that the Council might give consideration to being more specific in a couple of respects as to what constitutes awardable costs.

The first is the expense of a video-taped deposition taken for perpetuation and used during the trial. The second is the cost of ordinary depositions which have been attached to a motion for summary judgment. See Straube v. Larson, 287 Or 357 at 374 (1979).

I have had these matters recently before me on more than one occasion. I do not know what other judges are ruling in these areas and it might be advantageous to have a consistent rule laid out in the Rules.

Best wishes for the holidays.

Yours very truly,

William M. Dale

WILLIAM M. DALE
Circuit Judge

WMD/fl

cc: Mr. Roy Kilpatrick
Chairman, Council on Court Procedure

THE SUPREME COURT
Berkeley Lent
Chief Justice

Salem, Oregon 97310
Telephone 378-6006

July 21, 1983

Douglas A. Haldane
Executive Director
Council on Court Procedures
P.O. Box 170
Jasper, Oregon 97401

Dear Doug:

Enclosed you will find copies of a letter by Portland lawyer Bert Joachims dated July 11, 1983, and a letter and accompanying materials dated July 13, 1983, from Ms. Roche.

It appears to me that Ms. Roche's letter should excite your interest as a subject upon which the Council on Court Procedures could adopt rules to improve the administration of justice in the trial courts.

Very truly yours,

BERKELEY LENT
Chief Justice

BL:el

Enclosures

BERT E. JOACHIMS
ATTORNEY AT LAW
1312 COMMONWEALTH BUILDING
421 S.W. SIXTH AVENUE
PORTLAND, OREGON 97204
TELEPHONE (503) 228-3347

July 11, 1983

Honorable Berkeley Lent
Justice of the Supreme Court
Supreme Court Building
Salem, Oregon 97310

Re: Spanish Interpreters - Yolanda A. Roche

Dear Judge Lent:

Like many attorneys, I have a somewhat unusual fascination in things unrelated to my particular practice of law. My fascination is the Spanish language and how the language effects the lives and fortunes of thousands of those Hispanic people living in our state.

As you know, I have no significant practice in the criminal area, nonetheless, because of my modest ability to understand the language and my great interest in Hispanic culture, I have on countless occasions carefully observed in both Circuit and District courts, cases where Spanish translators were either unable or possibly unwilling to accurately advise the court, jury or one and sometimes both sides of the controversy what the witness meant when he used certain words or expressions to answer a question or to describe an event. Omittedly, the job of a court translator is difficult, and this is so because the job requires not only a complete understanding of two languages, but it requires a thorough knowledge of the culture and background of as many as 300 million people, i.e. Spanish speaking people.

My observation that justice is often thwarted by the failure and/or inability of a Hispanic, "tell it like it is or was" prompted me to inquire of court officials as to how interpreters are usually selected or appointed. Unfortunately, I learned that there is no real meaningful standard other than the interpreter's subjective evaluation of his own competence to guide courts, prosecutors, hearings officers, or attorneys in selecting a qualified and unbiased interpreter.

My concern about the problem in selecting proper interpreters was pretty much abstract until I met Yolanda A. Roche, a person whom I know to be highly qualified for such a position. Mrs. Roche has been unable to obtain court appointments irrespective of her deligent efforts to inform officials of her background and qualifications. I expect the reason for this failure is largely due to the inability of clerks and others to evaluate Mrs. Roche's qualifications. I have spoken to Mrs. Roche about her problem, not in an attorney-client relationship, but only as a friend. I did suggest to Yolanda Roche that she furnish a resume' of her qualifications and experience as a Spanish translator.

I realize the demands of your office make it impossible to devote special attention to any one individual. However, I suspect that if this letter were passed on with the Yolanda A. Roche resume' when and if received, that it may attract some awareness to the problem that is deserving of a solution.

Very truly yours,

Bert E. Joachims

BEJ/tan

cc: Ms. Yolanda A. Roche
6160 Shakespeare
Lake Oswego, Oregon 97034

Gentlemen,

Please allow me to borrow a few minutes of your time to introduce myself.

I am a professional Spanish/English and English/Spanish technical translator, interpreter, instructor, and copywriter.

I have no agents, associates, or representatives (although I have direct access to an extensive network of consultants in a variety of professional fields); and I would like to offer your company my independent contractor services regarding the translation of documents from English into Spanish and viceversa, ranging from a one-page domestic type document (like a birth certificate), to a complete, multi-page industrial-type machinery manual and similar documents.

I am also prepared to undertake the creation, or translation, of promotional and educational audio and audio-visual materials (similar to TAPPI Pulp & Paper courses), or descriptive scripts, supplying the "Native Latin" voice if so desired.

I am also a qualified Court Interpreter, and I am experienced as simultaneous translator. In the past 20 years of serving international enterprises, I have had the opportunity to work with all aspects of engineering, architecture, and construction; pulp and paper and related equipment at all stages; the petroleum industry; industrial and agricultural machinery, including P.I.'s and Specs.; all aspects of international travel, immigration, and law. As advertiser, I have also served race tracks, apparel, foundries, distilleries and breweries, electronic components, supermarkets, cosmetics; and as a volunteer, I have worked with the international newsmedia, the Police, Red Cross blood banks, speakers from the U.S. Navy, the Smithsonian Institute, a President of the United States, and at least four Latin American Presidents.

A copy of my complete resume can be furnished upon request, and samples of my work can be made available for examination should you wish me to visit your office any time.

As of April, 1983, my new, permanent address will be:
6160 S.W. Shakespeare, Lake Oswego, Oregon 97034

My present telephone number (503) 620-8897 will remain the same.

I will be looking forward to hearing from you and, hopefully, working with you in the near future.

Sincerely,

Yolanda A. Roche

THE SUPREME COURT
Berkeley Lent
Chief Justice

Salem, Oregon 97310
Telephone 378-6006

July 21, 1983

Yolanda A. Roche
Spanish Language Professional Services
6160 S.W. Shakespeare
Lake Oswego, Oregon 97034

Dear Ms. Roche:

Thank you for your letter of July 13, 1983.

I do sincerely appreciate your including your paper dated February 27, 1983. It suggested to me many aspects of the "court interpreter" problem about which I had never previously given any thought.

I intend to turn over copies of your material and Mr. Joachims' letter to the Council on Court Procedures as a starting point for consideration of this subject.

Very truly yours,

BERKELEY LENT
Chief Justice

BL:el

cc: Honorable Edwin Peterson
Bert E. Joachims
Douglas A. Haldane

Spanish Language Professional Services
6160 S.W. Shakespeare
Lake Oswego, Oregon 97034

Yolanda A. Roche
Translator-Interpreter-Instructor
(503) 620-8897

July 13, 1983

Honorable Berkeley Lent
Justice of the Supreme Court
Supreme Court Building
Salem, Oregon 97310

Re: Letter from Mr. Bert E. Joachims, Atty., dated July 11, 1983
Spanish language Court Interpreters - Yolanda A. Roche
Credentials enclosed.

Your Honor,

In reference to the above mentioned letter addressed to you by Mr. Bert E. Joachims, and following his kind suggestions, I am allowing myself to submit my resumé and other relevant documents to your attention in order to humbly request your invaluable assistance and advice regarding the difficulties I am encountering to serve as Spanish interpreter in our Courts of Law.

Being the granddaughter of a Justice of the first Supreme Court ever to exist in the country of Mexico, and my father being a lawyer too, the Legal profession, the Courts, as well as proceedings and terminology proper to this field, have been part of my life throughout my education and upbringing years.

That is why, despite my college degree being in Fine Arts, I have always been deeply interested in the Law, and that interest together with the fascination that foreign languages and cultures have always aroused in me, inevitably led me, through the years, into the field of Court Interpretation. Unfortunately, like some observing, interested professionals are noticing, not only in our State, but in other places as well -Washington D.C. included according to my own research-, there does not seem to be a uniform plan for approval of interpreters' qualifications, nor written standards to which the aspiring interpreter must subject him/herself in order to become accepted and acceptable in the Courts of Law.

Other than my experience in Latin American countries, where my abilities as interpreter, translator, and instructor tended to be considered rather special, as twenty years ago there were not too many professionals in this field available, ever since my arrival in this our country back in 1966, most of my participation in Court-interpreting situations has been either hired directly by private attorneys or as a volunteer whenever and wherever required.

Here in Oregon, since 1979 through April 30, 1982, I was a full-time technical translator for an engineering company in Portland, and I did free-lance translation and teaching work on weekends and evenings; however, regardless of a constant search for legal-type assignments with both government entities and

private lawyers and foreign language "brokers" (e.g. Language Banks, Chambers of Commerce, etc.), none was obtained. Then, when the engineering company I worked for reduced their personnel to a minimum and many of us became unemployed, I devoted all my time and efforts to offer my interpreter's services where I know the need for experienced professionals does exist. With this purpose, for over one year now, I have presented my credentials, repeatedly in some cases, to State and County Courts, City Managers, Police Departments, and other government offices and officials, such as Mr. Sam Juncker, Court Administrator of Washington County, where the Spanish-speaking-population problem seems to be accute. Mr. Juncker acknowledged my most recent communication dated June 17th, but his only comment was that he "hopes I get some assignments". I appreciate his good wishes, and I am using his name only as an example to illustrate my plight.

Last year, I approached the Multnomah County Court House with the purpose of registering my name as translator/interpreter: English/Spanish, Spanish/English. I was then advised by the office of Mr. Chuck Barnard that aspiring interpreters were encouraged to register in a course to be taught at the Portland Community College early in 1983. The course was not mandatory, but only the names of those who attended would be listed as "qualified" interpreters, and from this list the names would be drawn and referred to requesting parties. I registered, paid my tuition and purchased my books.

On January 5th, 1983, the 11-week course called "Introduction to the Criminal Justice System" started at the Sylvania Campus and later the class moved to the Juvenile Court building in South East Portland; the course was taught by Mr. Reginald Norbury, Criminal Investigator, Multnomah Co. D.A.'s office (Last week a former classmate advised me that Mr. Norbury had been dismissed from his position and that she had been asked to testify against the former teacher, but I declined to hear the particulars of the case). There were guest instructors too, but Mr. Norbury explained that among the benefits of attending the course we students would, at the end, have our names listed in the Oregon State Bar Association Lawyers' Deskbook and Directory, where my name was already listed, with basis only on a telephone call I placed and no other requirements to backup my claimed expertise and experience. Also, on the first day of class, a short questionnaire was dictated for us to fill-in the answers at home, and these answers would be entered in the files as proof of our qualifications. However, I found it a little disturbing that many of the students (in order to register in the course, the person had to be <u>fluent</u> in English and at least one foreign language) did not understand enough English to write down the questions, and several among the Spanish-speakers approached me after class for an explanation of the meaning which, in some cases, some did not understand in any language I believe, because of a poor general education. However, every student who was present, was "qualified" with basis on that questionnary on the second and third sessions, and to the best of my understanding every name was listed in the above mentioned Directory, including those of students who dropped out soon after, or those who did not pass the mid-term and final exams. Every student, too, received a certificate (copy of mine enclosed) prior to taking the final exam.

The tragedy of all the above, in my opinion, is that there <u>are</u> truly bilingual, expert, and experienced interpreters in our area eager to work in a field we have been trained to perform at professional levels and, maybe because of the confusion that prevails in regard to the training, selection, and referral of qualified interpreters, we are witnessing cases where, like a Latin American diplomat said some time ago, "the defendant never knew what the trial was all about or what the papers he signed -in Spanish- really said... because of faulty translation/interpreting"

Please understand, your Honor, that I do not wish to complain about or criticize any official, instructor, classmate, or colleague in particular, or enter into professional competition through any unfair or discriminating means. The intention this letter carries is no other than bringing before your attention some facts about a problem that maybe only now, because of the increasing number of immigrants moving into our area, is becoming more accute and noticeable and which, because of its nature, is affecting, in an adverse manner, not only those who require the services of qualified translators/interpreters, but those who are better prepared to render the service as well.

Among the enclosed documents is the copy of a school paper I wrote as an assignment for the PCC class (To the best of my understanding, I was the only one in the group who carried out, completed, and presented the project). This paper outlines, to the best of my ability and based upon my own experiences, what I believe the interpreter's role must be, and actually is with all its pro's and con's from an insider's viewpoint. And maybe some of the suggestions contained therein can be of some use to those who have the extremely difficult job of issuing ethical codes and professional performance regulations.

I will sincerely appreciate anything you can do in my behalf. If you deem it advisable, I will be very glad to visit your office at your convenience, or I can call you on the telephone should you wish me to answer any questions and/or supply further information.

I thank you greatly for your attention and your patience. I will be looking forward to hearing from you, and I can promise that I will not let you nor Mr. Joachims down.

Sincerely,

Yolanda Roche

Yolanda A. Roche

Enclosures

c.c. Bert E. Joachims, Attorney at Law
1312 Commonwealth Building
Portland, Oregon 97204

CONFIDENTIAL RESUME
OF
YOLANDA AMALIA ROCHE

6160 S.W. Shakespeare
Lake Oswego, Oregon 97034
(503) 620-8897

WORK EXPERIENCE

Dec. 79-Apr. 82	Sandwell International Incorporated, Consulting Engineers. Portland, Oregon. TITLE: Technical Translator and Interpreter. Latin American Division. Special duties: Communications Coordinator for the Celulosicos Centauro Project, Mexico. Training materials production coordination and proposals. P.R. For the Tuxtepec Project, Mexico. Spanish language instructor to engineers and technicians. Correspondent, copywriter and area editor for the Sandwell "Griffin" magazine. Assistant photographer.
1978-79	Orlando Police Department. Orlando, Florida. TITLE: Spanish language instructor (20 police officers) Volunteer interpreter on call.
Dec. 74-Mid 76	English and Spanish as Second Languages instructor to PEMEX (Mexican Petroleum Secretariat) engineers and their families, as well as U.S. engineers assigned to petrochemical plants and refineries in Mexico. Coatzacoalcos, Veracruz, Mexico. (Personal contract).
1973-74	The Museum of New Mexico, Santa Fe, New Mexico, U.S A. TITLE: Public Information Officer and Editor. Special duties: Liason between Agency and Newsmedia; P.R. Executive, international; copywriter and art designer; interpreter and guide; assistant photographer.
1972-Part Time	General Instrument, El Paso, Texas. TITLE: Spanish language instructor (30 engineers and technicians) Y.W.C.A., El Paso, Texas. Spanish language instructor. Free Lance: Court Interpreter (On call - through "The Bilingual Institute")
1970-72	De Bruyn Advertising, El Paso, Texas. TITLE: Account Executive, International Accounts. Special duties: Copywriter, English and Spanish; T.V. and radio production and recording (bilingual); art design, all media; interpreting, dubbing and translating both as client/agency liason and as part of the audio-visual production. Free lance: Court interpreter. (Individual contract work with private law firms).

1968-70 — Rust Tractor Co., El Paso, Texas and Albuquerque, New Mexico.
TITLE: Technical Translator and Interpreter (Part Time and special assignments).
Special duties: Heavy equipment, simultaneous translation in-situ for sales and maintenance of silver mining equipment.
Editor of the monthly "Bargain Bulletin", Spanish issue, translated from the original English version.

1969-70 — DIFUSA Foundry, El Paso, Texas/Juárez, Mexico.
TITLE: Designer and Artist, Ornamental Division (aluminum, bronze).
P.R. Executive, international accounts.

1968-69 — The University of New Mexico, Albuquerque, N.M., U.S.A., College of Education.
TITLE: Translator/Interpreter for the Special Projects Division.
Special duties: P.R. Executive, Latin America; simultaneous translation duties; translation of textbooks (English into Spanish) and student papers and dissertations (Spanish into English) for Grad Student College courses and degrees.

1967 — "Casa Colonial, Furnishings", Albuquerque, New Mexico.
TITLE: Interior Decoration Consultant, Furniture Designer.
Special duties: Interpreter for Spanish-speaking Mexican-Colonial carpentry staff; supervisor of production; advertising consultant.

1966-67 — Ludwig Photo Enterprises, Cheyenne, Wyoming.
TITLE: Color Photography Technician (PAKO electronic equipment)
On-the-job training.

1965-66 — GAISA Alpine and Underwater Research Group of Mexico. Mexico City.
TITLE: Director of International Events, Translator and Interpreter.
Special duties: P.R., international; editor of Year Book on Underwater Medicine; simultaneous translator at seminars (U.S. Navy, Mexican Navy, Smithsonian Institute, etc.); photographer; Display designer (marine archaeology shows).

1966 — First semester, Part time. "Motolinia" University, School of Art and Interior Design. Mexico City.
TITLE: Instructor (40 students, college level). Subject: Psychology in Advertising.

1965 — "Camacho y Orvañanos", Advertising Agency. Mexico City.
TITLE: Assistant Account Executive; copywriter (English/Spanish).
Special duties: Translation and dubbing of U.S. commercials into Spanish for radio and television; some TV production; layout; campaign designer.

1962-64 — San José, Costa Rica, Central America.

a) "Publicentro Limitada", Advertising Agency: TITLE: Copywriter. Special duties: translation and dubbing of U.S. commercials for radio and TV; campaign designer; TV production; survey.
b) "Publicidad Centroamericana de Integración" (An expansion of Publicentro). Consultant to a chain of Ad agencies (Costa Rica, Nicaragua, Panama, Honduras).
c) Volunteer translator/interpreter/guide at the Foreign Correspondents Center (Costa Rica) during late President Kennedy's meeting with Central American presidents.

Central America - Cont.

d) Volunteer translator/interpreter/guide to foreign correspondents during the Irazú volcano disaster in Costa Rica - one year. (National Geographic, London BBC).

EDUCATION

College graduate. Motolinia University, School of Art and Interior Design. Degree: 1953, (equivalent to) MS Fine Arts. Major: Advertising. Mexico City.

Post Grad:-Psychology, Ibero-Americana University, Mexico City
-English as a Second Language:Instituto Mexicano-Norteamericano de Relaciones Culturales, Mexico City. Graduated 1955.
-Statistics and Research, computer applications:Mexican Secretariat of Industry and Commerce, IBM of Mexico.
-Summer School, National University of Mexico, Mexico City, three Post Grad Summers. Fine Arts.
-Portland (Oregon) Community College. Credit course, "Introduction to the Criminal Justice System".1983.

SPECIAL SKILLS

Fully bilingual (English/Spanish). Qualified Court Interpreter.

PERSONAL DATA

Full name: Yolanda Amalia Cruz Escalante Roche
Sex: Female
Marital status: Divorced. No children.
Birthday: April 12th
Place of birth: Mexico City, Mexico.
Citizenship: United States of America (Naturalized 1982)
Permanent resident since 1966.

REFERENCES

Furnished upon request

PORTAFOLIO

Available for inspection upon request.

MEMBERSHIPS

Oregon International Council

Toastmasters International. Club #103, Spanish Language Chapter. Chapter Member and Board of Directors Officer. Portland, Oregon.
League of Women Voters, Beaverton, Oregon Chapter.

LISTINGS

(For reference only, under Translators/Interpreters - English/Spanish and Vs.)
Latin American Chamber of Commerce
State of Oregon - Talent Bank
Oregon International Trade Division
Oregon State Bar Lawyers Desk Book and Directory
Oregon Republican Committee
Multnomah County Court House

City of Orlando, Florida
POLICE DEPARTMENT
POLICE HEADQUARTERS
POST OFFICE BOX 913
ORLANDO, FLORIDA 32801

HOWARD P. McCLAIN
DIRECTOR OF PUBLIC SAFETY

JAMES W. YORK
CHIEF OF POLICE

March 28, 1979

To Whom It May Concern:

This will introduce and recommend to you Mrs. Yolanda Roche who was employed by this department between 30 October 1978 and 1 April 1979 as a Latin-American Spanish language instructor.

Mrs. Roche, in April 1978, offered her resume and services to the City of Orlando and the result was a pilot Spanish language course sponsored by the City for police department officers and employees. Initial attempts to include firefighters, airport and other City personnel met with failure because of scheduling problems and/or uncertainty over needs.

Initially, forty-nine police employees expressed their interest, twenty-eight actually enrolled, and seven completed the course successfully. The severe attrition is attributable only to conflicting on and off duty demands placed on students, and is by no means a reflection on Mrs. Roche's instructional abilities. She, in fact, devoted herself to offering individualized instruction outside of class hours to prevent or discourage dropouts and she volunteered well beyond her contract obligations.

Consensus among students is that Mrs. Roche is a highly qualified, capable and effective language instructor. Her knowledge of Latin American culture was combined well with the mechanics and practice of the Spanish language, furnishing a very exciting and interesting course. Her command of English is outstanding and her ability to relate to students has been excellent. We believe we have had a worthwhile experience.

I recommend Mrs. Roche to you as an honest, sincere and efficient person in her field of endeavor. It has been our pleasure to have worked with her and we regret that she and her husband must now move out-of-state.

Sincerely yours,

Robert Strange

Robert Strange, Major
Administrative Services Bureau

RS:rk

Sandwell
International
Incorporated

500 N.E. Multnomah Street
Portland, Oregon 97232 U.S.A.
Telephone (503) 238-6321
Cable: SANCONSULT
Telex: 36-0106

3 May 1982

TO WHOM IT MAY CONCERN:

This will verify that Yolanda Roche was an employee of Sandwell in Portland, Oregon for over two years, from 19 December 1979 to 30 April 1982. During that time, Yolanda's principal duty was Spanish/English, English/Spanish translation of verbal and written communications and business and engineering documents. In addition to her translation work, she taught in-house Spanish classes and served as editor of Sandwell's monthly internal newsletter.

Yolanda performed her work competently and with an exceptionally constructive attitude. She left Sandwell because responsibility for project work in Spanish speaking countries has been transferred away from the Portland office. We are sorry to lose her, because she has been a model employee whose diligence and professionalism have been exemplary, and we can recommend her unequivocally to any prospective future employer.

SANDWELL INTERNATIONAL INCORPORATED

A. J. McSwain
Chief Engineer

AJM/mrr

PORTLAND COMMUNITY COLLEGE

AND

THE CIRCUIT/DISTRICT COURTS

OF

THE STATE OF OREGON

DO HEREBY RECOGNIZE

YOLANDA A. ROCHE

AS HAVING SUCCESSFULLY COMPLETED THE COURSE

IN

COURT INTERPRETATION
(CJA 112)

CIRCUIT COURT STATE OF OREGON
MULTNOMAH COUNTY

March 16, 1983
Date

Reginald Norkunas
Instructor

LITHO. IN U. S. A.

27 February, 1983

SUBJECT: "The Translator/Interpreter and his/her role in the Courts of Law"
A Sensitivity Study

BY: Yolanda Amalia Roche, Translator/Interpreter/Language Instructor

Languages: Native language: Spanish Second language: English

For: Mr. Reginald Norbury, Instructor. CJA 112

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According to ORS 133.515 Interpreter to be made available to handicapped person, this Statute clearly indicates that Oregon legislators have deemed the presence of an adequate, "Qualified interpreter" necessary in Court Room and prior/subsequent situations involving individuals unable, for any of the reasons therein described, to communicate in the English language.

Although the wording in ORS 133.515 states that an interpreter should be made available to a person who..." (a) cannot understand the proceedings or a charge made against him, or is incapable of presenting or assisting in the presentation of his defense...", the qualified, experienced interpreter (as well as those who request, accept, or hire his/her services), must understand that this "understanding ability" of a given witness of the above mentioned facts to defend him/herself, may go far beyond the spoken, written and heard word... in any language. This understanding goes into the depths of ancestry, education, culture, geographical origin, and idiosyncrasy proper to the individual and to the world from where he/she has been extracted, whether by choice or need.

Personally, I can speak only for what I am proficient in: the Spanish language and the countries where it is spoken; the many different cultural and educational levels, and social-economic strata that sub-divide a Latin country's population into so many sub-categories that only years of studying them, and living with as many of them as possible, can supply the in-depth knowledge required to function in an ethical, professional, accurate manner, when, as translator/interpreter one takes the stand to practice one's expertise. In my opinion, there are no short-cuts in the making of an interpreter.

Whenever a foreign language is involved in a Court Room situation, everybody, except the truly <u>bilingual and bicultural</u> individual is at a disadvantage to start with, because of the language barrier preventing direct communication.

It is at this moment, at the onset of <u>any</u> foreign language situation, that the interpreter may well become the most important (though anonymous) performer in a drama where doomsday or liberty, justice or injustice, maybe even life or death, are at issue... for good or bad!

Just as the police officer must be one of the most important decision-makers of all professions, the translator/interpreter must be:

a) Intelligently humble enough to assume a non-entity position where he/she has no vote or opinion and where he/she can officially take no sides. His/her words are not his/her own.

b) Educated enough to understand the subject matter at issue whenever technical and special professional terminology is being used IN THE TWO LANGUAGES being used, that is ENGLISH and the foreign language. e.g., like in a medical malpractice suit, or the investigation of a building that collapsed because of faulty engineering.

c) Ethical enough to decline accepting any assignment he/she is NOT qualified to undertake. Childish schemes like copying the notes someone else took in class are NOT applicable to any professional translating situation, as someone else may be paying a very high price for one's vanity and bluff.

d) Ethnical enough to understand not only the words but the THOUGHT and MEANING behind the words of underprivileged individuals (or those who rule the underprivileged) whose way of life may not be common knowledge in our modern American society. The adequate, qualified interpreter should be able to tell, by HOW the witness uses his/her native language (such is the case with the Spanish language): whether the individual comes from North, Central or South America, by "North" meaning mostly Mexico, especially Mexican states on the U.S. borderline; or Spain; whether the individual has a college education, or whether he is a farmer or a city-slum dweller. Confusion on the interpreter's part about any or all the above, could well lead to total misinterpretation of the subject matter.

e) Professional enough to ACCURATELY translate profanity whenever used AS PROFANITY by the witness. The qualified interpreter must realize that there are instances where profanity may well be the deciding factor in a given issue, and he/she must be able to use the lowest kind of language and still keep his/her detached, serious, unabashed professional poise and cool. Should profanity lead to objections in the Court Room, it is the witness, not the interpreter who might be held in contempt. Therefore, there is no reason to tolerate any bashfulness when one is practicing one's expertise as interpreter, since "softening" a witness's words will result in distortion of character of that witness, and the responsible translator must not forget that things are difficult enough for witnesses, attorneys, Judge and Jurors in the presence of a foreign language without an additional obstacle, i.e., distortion of character. Also, as I mentioned in (d) not all words mean the same when used by different people. To illustrate this, let me try to describe the same person in the words of 1) a Mexican, 2) a Costa Rican and 3) a Spaniard. The described subject is: female, blond, young, and her hair is curly. The Mexican would say: " la muchacha güera china "; the Costa Rican would say:" la chavala macha crespa"; and the Spaniard would say: " la moza rubia ondulada", or something very similar. However, to the Costa Rican, what the Mexican said was:"the rotten female Chinese", and to the Mexican, the Spaniard referred to the girl as "the maid, the servant". And so on, and on. I'm not kidding. The qualified interpreter will use his/her knowledge of these differences to give his/her client an additional insight into the witness' character if so requested.

f) Travelled enough, which will bring (d) and (e) as a result. This is of outmost importance to those whose native language IS English and find themselves in the presence of a native Spanish-speaker. Here, in the U.S.A., this is a most sensitive issue among "Spanish"-speaking groups. But when it comes to someone's

liberty -or loss of it-, we must understand that those who are more likely to require the services of a translator/interpreter, are people whose ONLY language is the foreign language. They do NOT speak or understand English AT ALL. In my particular case (Portland area and Spanish), many of the individuals we must interpret for are Spanish-speakers from farming, underprivileged classes. By Latin American standards, these people may well be one step above (maybe) total illiteracy in their own native language. By the same token, we may find ourselves in the presence of one overprivileged, shrewd, sophisticated, wealthy, Latin "Junior" caught in some drug or fence beef. But the fact is that none of the above will understand one word of "Anglicized Spanish" (otherwise known as "Spanglish", "TexMex" or "Chicano" on this side of the border, equivalent to the term "Pocho" on the Mexican side). Contrary to common belief, not "just anybody", regardless of the finest college education, will understand, or "figure out" any bastardized rendition of a third "language" made out of two totally different tongues. The reason for this, other than the fact that either due to sheer ignorance or intentional "machismo" most Spanish-speakers THINK in Spanish even if they may possess the elements of another language, is that the above mentioned Anglicized Spanish is formed by English words to which an Spanish-sounding ending has been added, and in order to guess what the speaker meant, it is imperative to be FLUENT in English, and THINK in English. It is not uncommon to see two people (regardless a high educational level) engage in animated "conversation" about two completely different subjects, if one speaks only Spanish, and the other one speaks "Spanglish". This is a very dangerous "dialect".

g) Cold (or gutsy) enough to challenge a fellow interpreter, or any intruder, or counselor, or any interrupting party who may try to divert attention from the witness' statement by claiming faulty translation by the interpreter in charge. A pathetic example of this would be the partially "bilingual" lawyer whose client is "spilling the beans" rather than giving the answers the lawyer WANTS to hear. This is not uncommon when dealing with highly uneducated witnesses, who forget what they have been instructed to say (like "yes" or "no" only) and instead, in a "moment of glory" decide to elaborate on their own on subjects they are not prepared to handle. So, in order to stop the unwanted verbal flow and its translation, the lawyer may decide to add to or change the interpreter's rendition. This, in the presence of accurate interpreting, is outrageous. Should nobody raise an objection, the unhappy translator may well find him/herself challenging an attorney!... Another situation that may force an off-duty, observing interpreter to actually object, would be in the presence of another translator's performance that becomes inaccurate enough to jeopardize justice. These are both factual instances in which I, personally, have had to a) defend myself , and b) object. The need for this should be avoided by measures taken in advance, since a defending/objecting attitude should not be the translator's responsibility and, if forced into it, it may result in the creation of enemies and possible blacklisting for the interpreter.

h) Loyal enough to one's client to carry through the confidentiality of a given case to all necessary extremes. And loyal enough to oneself to know when to withdraw from a case if, due to conflict of interests or any other valid reason, one will not be able to live up to ethical standards adopted by oneself and others.

But the interpreter, alone, can not perform to his maximum best unless he/she counts on the understanding, support, and assistance of those who require, request and accept his/her services.

A widely spread misunderstanding of our profession is the fact that non-bilingual individuals actually believe that a translator/interpreter can be turned on and off at the blink of the eye. This is not true. Also, it is believed that because a given individual speaks two or more languages "beautifully", the same person is qualified to translate and interpret about ANY subject at all. This is not true. An error more often than not leading to faulty interpreting, is made at the time of selecting a translator, or picking one at random with basis on nothing but the language the person speaks. The language is only the beginning.

Many, if not most of all immigrants, have come to work and live in the United States of America in search of equality and freedom. But in this profession, being too "equal" to one's fellow countrymen may also lead to misunderstanding when the native language of an individual is used as coefficient or common denominator for classifying purposes at any Agency serving as Interpreters' Clearing House. Just as important as understanding the DIFFERENCES among witnesses, it is to accept the fact that, in this profession, we too are different.

The ideal achievement of an Interpreters' Clearing House, would be to properly match individuals to participate in a given case. When hired by a private lawyer or client, the same rapport that exists (or should exist) between client/lawyer, should develop between not only the client and the interpreter, but the lawyer and the interpreter as well. Can you imagine what it feels like when you are suddenly called-in on duty and find out (too late) that the foreign-language-speaking individual you are going to interpret for happens to be not the client but the client's opponent?... And can you imagine what the individual at issue feels like when he/she finds out that YOU, on whom he had maybe placed some hopes of "siding with", are actually in his/her opponent's payroll?.. As I mentioned before, some of these people are NOT culturally prepared to understand that a native-speaker of their own native language is, in fact, a neutral professional in a neutral position. The role of the interpreter MUST be understood by ALL persons involved in a given case.

I realize: How is a foreign-language-speaker going to be told about the role of a translator, if communication is not possible without the translator being present?... Personally, I believe that most of these problems can be solved in advance IF the interpreter IS TAKEN INTO ACCOUNT DURING THE CASE PREPARATION STAGES. Unfortunately, this is not always so.

For whatever worth my own personal experience may bear, maybe what I have learned, some times because I have been fortunate enough to having had things happen; some other times because I wish things would have happened, the following steps could be taken into account in order to achieve success (or justice, in our case) in situations where the services of a translator/interpreter are required:

1. When "on-the-spot" translating services are required at the scene of an accident or arrest, or any other street-type incident involving a non-English-speaking person: a) it would help the interpreter to be briefed on the nature of the emergency while on-route to the scene. Some times, pre-arranged measures

have been planned as anticipated by law-enforcing agencies, e.g. like a black & white transporting the interpreter and the officer in charge briefing him/her while on-route. But in any case, the interpreter should be told what it's all about in advance. b) Upon arrival at the scene, the interpreter should be allowed at least a few seconds to tell the foreign-language-speaking person who he/she is and the reason for being there, on neutral grounds. In an arrest situation, the interpreter should EXPLAIN first that he/she is about to read the person his/her Miranda rights. Then proceed to do it in the foreign language. c) Whatever follows in an emergency call, must be "played by ear", but the interpreter should remain available while official reports are being taken, or lawyers called. In accidents, the services (many times voluntary) of a translator, are invaluable to doctors, paramedics, family of the injured, and police officers. d) Whether or not the same interpreter's services will be used in subsequent proceedings, does not matter, but his/her participation in the emergency call should be kept on records for future reference.

2. When short-term assignments are in order, it sometimes gives one the impression that, because the nature of the case itself may be considered "routine" by involved individuals, it is taken for granted that it should also be routine for the translator. Therefore, the translator/interpreter is not briefed at all, to the point that he/she does not really know until he/she is expected to start talking under oath, what the subject matter at issue is, nor who he/she is working for, the defendant or the plaintiff. This of course does not apply when, for instance, a given law firm handles nothing but insurance claims and this law firm uses the services of the same interpreter all the time. But when legal counselors represent a variety of cases and clients, and when a translator's services are used for the first time, it is indispensable that some time be devoted to both, screen the interpreter for adequacy and at the same time allow the interpreter to acquaint him/herself with the basics of the case. Counselors may not deem necessary to "let a third party into the confidenciality of the case" at this early stage, but, if screening steps are followed when selecting a Jury, why not use a similar procedure when selecting a translator?. Isn't it worse to let the interpreter be taken by surprise, unprepared, when it may be too late for all parties involved to reconsider, to brief, or even to substitute the translator?

3. In order to facilitate selection of translators/interpreters to those who may be using their services, all professional listings, directories, and hopefully future multi-lingual services clearinghouses, Courts, and P.D.'s, should list these PROVEN professionals not only by language or languages they speak, but also by SUBJECTS they are proficient in, maybe even by levels of experience (beginners, intermediates, advanced), e.g., if we were talking about doctors we would not want to call a cardiologist when requiring the services of an obstetrician, and by the same token, a surgeon specialized in amputations could possibly be substituted by a Registered Nurse to remove a hangnail. Translators/interpreters can also be specialists in one or several fields,and also, the most specialized of individuals may prove to be totally inefficient in a different discipline or culture alien to him. Standarization should NOT be applicable to translators/interpreters.

4. Once the adequate interpreter has been selected and briefed (we know who and what), the "how's" of the case should be discussed. Some times the how's depend on the where's, but in most formal and informal legal-type situations

I have experience with, the first person form of address is preferred, some times even demanded. If the subject of form of address has not been decided upon or discussed by and among counselors and authorities, the interpreter should be allowed to raise the question and obtain the answer. Once all protocol has been determined, the interpreter should be allowed to explain in the foreign language, to whoever the foreign-language-speaker may be, how the hearing will be conducted.

There are several alternatives. The experienced interpreter who "already knows the lesson by memory" may be given the green light to do the explaining in his/her own words. Or, an authorized legal advisor (neutral) can deliver the instructions to be translated, phrase by phrase by the interpreter.

These instructions MUST include warnings such as a definition of perjury (many underprivileged people do not even know the word in their own language), speed at which the witnesses must talk in order to allow the interpreter time to translate. In many cases, a certain hand-signal given by the interpreter is agreed upon when something simply CAN NOT be translated in just a few words, and the translator requests permission to EXPLAIN THE MEANING of the words or expression in words other than those spoken in the other language. These explanations are usually necessary, and inevitable, when uneducated individuals must use local slang maybe because those are the only words they know. When explanations are to be allowed, the Court Reporter must be instructed in advance as to how to enter this kind of information.

Personally, I believe that the use of the first person singular (the interpreter says "I" when the witness and/or interrogating party says "I") helps the witness understand the position of the interpreter as a neutral party. Also, it helps differentiate statements when the interpreter must explain or elaborate, OR even ask a question, OR admit that he/she did not understand.

Then, it will be up to the interrogating party to repeat the question, or re-phrase it for easier understanding, as it is common that highly technical or legal terms, even if properly translated by the interpreter, have to be rephrased into layman words for the witness to understand (Not long ago I had to explain, in crude slang, what "adultery" meant to a witness whose vocabulary did not include the word, in any language).

5. It may be up to the Judge, or to the individual attorneys, but whether in private or in the Court Room open to the public, the lawyers themselves should and must be instructed on special procedures involving the participation of interpreters. In order to prevent situations (see "g") that may pitch one individual against another, it would be convenient to make a ruling covering the possibility of faulty translation being claimed by a partially bilingual, or bilingual party involved in the case. I believe that, if a lawyer (for instance) wishes to complain about the interpreter's performance, the situation can be handled in exactly the same manner as any other OBJECTION. The qualified interpreter must know he/she must stop talking upon hearing an "Objection", and should the complain be against him/her, at least he/she would have a fair chance to defend his/her issue and, if necessary in cases of extreme disagreement, a different EXPERT should be called. But nobody, nobody at all should be allowed to interrupt and try to put words in the interpreter's (OR worse, in the witness') mouth instead of going through the legal steps required to raise an objection.

Roche - Sensitivity study - Conclusion

To summarize, due to a number of international geographical, economical, social an ethnic factors, our Portland, Oregon area can and should no longer postpone or bypass participation in an increasing variety of situations requiring the use of one or more foreign languages. But in order to properly handle these situations, we must accept the fact(s) that:

- the services of qualified translators/interpreters in Court Rooms and related situations are essential to the pursue and dispensing of justice for all.

- the preparation, intruction, and training of translators/interpreters must be taken seriously, as a profession, by both recipients and lenders of the service.

- the selection of an adequate translator/interpreter is essential to a given case; selection must be made bearing in mind that both, witnesses and interpreters are different, non-standarized individuals.

- all participants in a given case, at all levels, need to learn more, in a more serious manner, about the work a translator/interpreter must perform, under what circumstances, under what limits and limitations as allowed by law.

- the best of translators/interpreters can not perform without the understanding, assistance, and support of other involved parties.

- once the above becomes fact, steps must be taken to implement applicable rules and regulations governing the attitude, protocol, duties and rights to be observed in Law-enforcing, Law-administering situations where the services of professional translators/interpreters are required, with these regulations being created, interpreted, and enforced by our State's three powers: Legislative, Judicial, and Executive.

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