NOTICE OF MEETING

The Oregon Council on Court Procedures will be meeting at the Village Green in Cottage Grove, Oregon, on Saturday, October 13, 1984, at 9:30 a.m.

The Council on Court Procedures is responsible for promulgation, amendment, or modification of the Oregon Rules of Civil Procedure.

Comment from the public, bench, and bar is invited.

# # # # #

October 5, 1984

TO: COUNCIL ON COURT PROCEDURES:

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

FROM: DOUGLAS A. HALDANE, Executive Director

RE: PROPOSED AMENDMENTS TO ORCP - MEETING, OCTOBER 13, 1984, COTTAGE GROVE

Enclosed is the agenda for the Saturday, October 13, meeting to be held at the Village Green in Cottage Grove, Oregon. Also enclosed are proposed amendments to the ORCP which will require Council action at that meeting.

Since Judge Dale was appointed federal magistrate, he has resigned his position on the Council. The Circuit Court Judges Association has not yet made an appointment to fill the vacancy. Since Judge Dale has served as the Council's vice-chairman, however, the Council should fill that vacancy at its earliest opportunity.

The proposed rule changes are as follows:

RULE 7 C.(2). The proposed change is simply to correct the misnumbering of the reference to subsection D.(5) in the rule.

RULE 9 C. This change would allow a certificate of mailing to be signed by an attorney's secretary or other staff member. It would allow certification of mailing in the attorney's absence and probably reflects more closely the reality of law of this practice.

RULE 16 B. This would be changed to require the numbering of paragraphs in arabic numerals. This change has been suggested by a number of lawyers objecting to the use of Roman numerals because of their inability to read them.

RULE 17. This rule would be changed to require that all parties sign a pleading in the absence of the signature of a resident attorney. This change has been suggested by the Unauthorized Practice of Law Committee to help combat the filing of pleadings by non-lawyers who have taken an assignment of a portion of a plaintiff's claim.

RULE 21. The change to Rule 21 would delete language which was added by the legislature in the 1983 session. As presently written, Rule 21 E. has the potential of becoming a "mini summary judgment" proceeding. This change would take us back to the prior practice of having motions to strike determined on the face of the pleading.

Re: PROPOSED AMENDMENTS TO ORCP

RULE 32. The change to Rule 32 would provide for an attempt at actual notice to a foreign corporation when that corporation was a potential defendant in a class action.

RULE 47. The change to Rule 47 would require an earlier filing of a motion for summary judgment as well as service of a response not later than five days prior to the hearing. It has been suggested that a time limit prior to the trial date, after which a motion for summary judgment could not be filed, should be provided. Due to varying lengths of dockets throughout the state, this may be more appropriate for local court rules. Providing a uniform standard should, however, be the subject of Council discussion in Cottage Grove.

RULE 57. The change to Rule 57 would make explicit the power of the court to limit the scope of questioning on jury selection. This was originally suggested by the Commission on the Judicial Branch and was submitted to the Council for its approval.

RULE 68. The change to Rule 68 would clarify some confusion concerning awards of costs for the taking of depositions. As changed, the rule would allow recovery of costs for depositions only where the depositions were used or anticipated for use as testimony at trial.

RULE 79. The change to Rule 79 would exempt all of ORS 107.095(1) from the rules concerning temporary restraining orders.

Since we only have one meeting left for final approval of rule changes, any suggestions that members of the Council have should be made at the October 13 meeting in order that proposed drafts can be prepared for approval at the December 5 meeting.

DAH:gh

cc: State Court Administrator
Linda Zuckerman
Paula Abrams
Other interested parties

A G E N D A

COUNCIL ON COURT PROCEDURES

Meeting

9:30 a.m., Saturday, October 13, 1984

VILLAGE GREEN

Cottage Grove, Oregon

1. Announcements
2. Appointment of vice-chairman
3. Public comment
4. Proposed rule changes:

    Rule 7 C.(2)
    Rule 9 C.
    Rule 16 B.
    Rule 17 A.
    Rule 21 E.
    Rule 32 H.
    Rule 47 C.
    Rule 57 C.
    Rule 68 A.(2)
    Rule 79 B.(2)(b)

5. Additional suggestions or proposals

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held October 13, 1984

The Village Green

Cottage Grove, Oregon

Present:	John H. Buttler	James E. Redman
	John F. Hunnicutt	Wendell H. Tompkins
	William L. Jackson	John J. Tyner
	Roy Kilpatrick	James W. Walton
	Sam Kyle	William W. Wells
Absent:	Joe D. Bailey	Edward L. Perkins
	J. R. Campbell	R. William Riggs
	John M. Copenhaver	E. B. Sahlstrom
	Jeffrey P. Foote	William F. Schroeder
	Robert H. Grant	J. Michael Starr
	John J. Higgins	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 Chairman Roy Kilpatrick. Chairman Kilpatrick moved the adoption and approval of the minutes of the meeting of June 9. The minutes were approved unanimously.

Chairman Kilpatrick announced the resignation of William Dale from the Council due to his appointment as a federal magistrate. Judge Jackson announced the appointment of R. William Riggs, Judge of the Circuit Court of the State of Oregon for Multnomah County, to fill the vacancy created by Judge Dale's resignation.

At the suggestion of Mr. Kilpatrick, James Walton was unanimously elected Vice Chairman.

Mr. Haldane was requested to provide Council members with a current list of Council members (including the expiration dates of their terms).

The Council then began consideration of the proposed rule changes, a copy of which is attached to the original of these minutes.

Rule 7 C.(2). The proposed change corrects an incorrect reference in the present rule and was adopted without opposition.

Rule 9 C. The proposed change to allow a certificate of mailing to be signed by an attorney's secretary or other staff

member was turned down. Discussion on the proposal indicated concern regarding appropriate limitations on the proposed practice.

Rule 16 B. In addition to the proposal that paragraphs in pleadings be numbered with arabic numerals, it was suggested that the last sentence of Rule 16 B. be changed to read:

> "Each separate claim or defense shall be separately stated."

Both proposals were tabled for consideration at the December 8 meeting.

Rule 17 A. In addition to striking the language:

> "except that if there are several parties united in interest and pleading together, the pleading may be signed by at least one of such parties or one resident attorney"

it was proposed that the first sentence be amended to read:

> "Every pleading shall be signed by each party or by a resident attorney of the state."

The proposed changes were adopted.

Rule 21 E. The proposal to delete the language added to Rule 21 E. by the 1983 Legislative Session was adopted.

Rule 32 H. The changes proposed in the notice requirements for class actions were tabled for consideration at the December 8 meeting. Discussion indicated a belief that the proposal was a wise, voluntary step for attorneys to follow but should not be a requirement.

Rule 47 C. A proposal to change Rule 47 C. was approved after extensive discussion and amendment. As changed, Rule 47 would read:

> C. Motion and proceedings thereon. The motion and all supporting documents shall be served and filed at least [10] 45 days before the [time fixed] date set for [the hearing] trial. The adverse party[, prior to the day of the hearing, may serve opposing affidavits] shall have not less than 20 days in which to serve and file supporting documents. 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.

Rule 57 C. The proposal to change Rule 57 C. to specifically allow courts to regulate examination of jurors failed adoption. A more limited proposal was adopted which would add the following sentence to the end of Rule 57 C.: "The court shall regulate the examination in such a way as to avoid unnecessary delay."

Rule 68 A.(2) The Council adopted a proposal to change Rule 68 by deleting the language, "the necessary expenses of taking depositions," and by adding to the end of Rule 68 A.(2) the sentence: "The expense of taking depositions shall not be allowed, even though the depositions are used at trial."

Rule 79. The proposed changes to Rule 79 were not adopted. The discussion indicated a belief on the part of the Council that ORS 107.095(1)(a)(b) are not restraining orders and are not limited by Rule 79, and thus need not be excepted.

It was suggested that the meeting originally scheduled for Kah-nee-ta on December 8 be changed to a location in Hood River (preferably the Hood River Inn) due to posible adverse driving conditions. Mr. Haldane was directed to make the appropriate arrangements in Hood River.

The meeting was adjourned at 11:00 a.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

at Urbana-Champaign
209 Law Building
504 East Pennsylvania Avenue
Champaign
Illinois 61820
217 333-0931

July 16, 1984

James A. Arneson, Esq.
Arneson, Wales & Bernier
346 S.E. Rose Street
P.O. Box 2190
Roseburg, Oregon 97470

Dear Jim:

Sorry for the delay in responding to your letter but, as you can see, I am out of the state for the summer and this just caught up with me.

I agree that the Court of Appeals is misinterpreting Rule 7 badly in its recent cases. Looking at the papers you sent, however, I am not sure even they could miss the point that badly. Walton is not arguing that you did not follow the rule in serving his corporation but that your complaint does not allege corporate capacity. That is not a jurisdictional or summons defect but a pleading question.

There is an old case that may require you to plead corporate existence (Buffington) but at most you would be subject to a Rule 12 Motion to Dismiss but not an attack on your service of summons. Unfortunately cases like Steinkamp and Adkins v. Watrous encourage this garbage.

I will send your letter to Doug Haldane. Maybe the Council can do something.

Very truly yours,

Fredric R. Merrill
Visiting Professor of Law

FRM/nr

ARNESON, WALES & BERNIER
ATTORNEYS AT LAW

JAMES A. ARNESON
DIANA WALES
THOMAS C. BERNIER

346 S.E. ROSE STREET
P. O. BOX 2190
ROSEBURG, OREGON 97470

TELEPHONE
503/673-0696

May 15, 1984

Fredric R. Merrill
Professor of Law
University of Oregon School of Law
Eugene, Oregon 97403

Dear Mr. Merrill:

I have enclosed some documents on a recent issue that arose in Circuit Court in Douglas County and I would appreciate your review. I am concerned that our Court's interpretation of ORCP 7 and its interpretation of recent Court of Appeals cases interpreting rule 7 puts us in the same position that we were before the rules were adopted. It appeared at first that the rules would allow more flexibility in the service of summons. The results in the case that I have enclosed are ridiculous. There is no question that Oregon has the power to exercise jurisdiction over the out-of-state defendant---the only issue is whether notice was adequate. The attorney for the defendant filed a motion to dismiss for failure to receive adequate notice. In the affidavit in support of the motion the attorney admitted notice.

It certainly makes sense to me that a defendant does not waive its right to contest the jurisdiction of the court where it's claiming that the court doesn't have the authority to summon the defendant before it. It strikes me as ridiculous, however, to dismiss a lawsuit, require a refiling of the lawsuit and personal service in the foreign state where the defendant has admitted receiving adequate notice of the lawsuit.

I would favor amendments to the rules of civil procedure to clarify the issue of service by mail and waiver of notice. I'd appreciate your thoughts.

Sincerely,

ARNESON, WALES & BERNIER

James A. Arneson

JAA/mk
Enc.

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

ROBERT V. MARSHALL and KELLY MARSHALL,

Plaintiffs

v.

FIRST SECURITY BANK OF UTAH,

Defendants

Case No. L84-148

ORDER

FILED
12:30 O'CLOCK P M
APR 23 1984
TRIAL COURT ADMINISTRATOR
BY JESSIE M. LARNER

This matter coming on regularly for hearing before the Court on Defendant's Motion to Dismiss the above-entitled cause upon the ground and for the reason that the Defendant had never been served with summons as provided by law under the Oregon Rules of Civil Procedure, and the Court being fully advised in the premises and having heretofore rendered its opinion;

Now, therefore, pursuant to rule established in the case of Lake Oswego Review v. Steinkamp, 67 Or App 197 (1984), it is hereby

ORDERED, ADJUDGED AND DECREED, that the above-entitled cause be and the same hereby is dismissed.

DATED this 23rd day of April, 1984.

Don H. Sanders

Don H. Sanders, Circuit Judge

Prepared and Submitted by:
Dudley C. Walton OSB#48078
Geddes, Walton, Nilsen & Walker
Of Attorneys for Defendant
P. O. Box 1265
Roseburg, OR 97470

STATE OF OREGON } SS
COUNTY OF DOUGLAS }

I Certify that the foregoing has been compared by me with the original in the records of the Douglas County Circuit Court of the State of Oregon and that it is a full and correct transcript thereof.

Dated this 23 day of apr 19 84

Roseburg, Oregon

Trial Court Administrator

By Jessie M Larner

LAW OFFICES
GEDDES, WALTON, NILSEN & WALKER
435 S.E. KANE STREET
ROSEBURG, OREGON 97470
(503) 673-4451

DON H. SANDERS
CIRCUIT JUDGE
DOUGLAS COUNTY COURTHOUSE
ROSEBURG, OREGON 97470
672-3311 EX. 304

APR 13

FILED
AT 11:20 O'CLOCK A M
APR 13 1984
TRIAL COURT ADMINISTRATOR
BY JESSIE M. LARNER

April 13, 1984

James A. Arneson
Attorney at Law

Dudley Walton
Attorney at Law

Re: Marshall v. First Security Bank of Utah
Case No. L84-148

Counsel:

Concerning defendant's motion to dismiss, be advised:

"Special Appearances" have been eliminated. ORCP 21(a) and commentary.

Defendant is entitled to an order granting its motion pursuant to Lake Oswego Review v. Steinkamp, 67 Or App 197 (1984).

Mr. Walton is requested to prepare the order.

Very truly yours,

Don H. Sanders

DON H. SANDERS
Circuit Judge

DHS/cs

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

ROBERT V. MARSHALL and KELLY MARSHALL,

Plaintiffs,

v.

FIRST SECURITY BANK OF UTAH,

Defendant.

FILED
AT 8:45 O'CLOCK A M
FEB 23 1984
TRIAL COURT CLERK
BY

Case No. L84-148

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

SUMMARY OF FACTS

Defendant has filed a motion to dismiss the complaint in the above-captioned case for the reason that the Court lacks jurisdiction over the person of the defendant and because the summons and service of summons were insufficient. It is uncontradicted that the summons and complaint were sent to the "Managing Officer" of the defendant's bank located in Vernal, Utah. It is also uncontradicted that the summons and complaint were received at the defendant's branch situated at Vernal, Utah. See affidavit of defendant's attorney in support of motion to dismiss. The complaint alleges that the wrongful repossession occurred in the State of Oregon and that the defendant is a bank which is authorized to sue and be sued by Utah laws. A review of the Oregon Rules of Civil Procedure, the complaint and the affidavit of defendant's attorney establish that the Court has personal jurisdiction over the defendant because it has jurisdiction of the subject matter and because defendant has notice pursuant to Rule 7.

ARNESON, WALES & BENNIER
ATTORNEYS AT LAW
346 S.E. ROSE STREET
P.O. BOX 2190
ROSEBURG, OREGON 97470
503 672-6698

The Action Injuring Plaintiffs and Their Property Occurred Within the State and Arose out of an Act by the Defendant Within this State.

ORCP 4 establishes that a Court has jurisdiction over a party where it has jurisdiction of the subject matter and service pursuant to Rule 7. The complaint alleges that all the material facts set out in the complaint arose in Douglas County in the State of Oregon. This complies with ORCP 4C.

Plaintiffs have served defendant pursuant to ORCP D(3)(b)(ii) on the assumption that defendant bank is a corporation or limited partnership. Defendant, in its motion to dismiss, does not contend that it is not a corporation or limited partnership. It maintains that because we have not alleged specifically that it is a corporation or a limited partnership, that service should not be allowed in this manner. It does not deny that it is a corporation or a limited partnership and no where in its affidavits does it claim that it is not a corporation or limited partnership.

Even if Service Does Not Comply With the Rules, Defendants Have Admitted Proof of Service in Writing.

ORCP 7F(3) provides that in any case proof may be made by written admission of the defendant. Mr. Walton, acting as an attorney for defendant, filed an affidavit in support of his motion to dismiss admitting that a copy of the complaint and summons was received by defendant's branch situated at Vernal, Utah.

ARNESON, WALES & BERNIER
ATTORNEYS AT LAW
548 S.E. ROSE STREET
P.O. BOX 2150
ROSEBURG, OREGON 97470
503/672-0656

Even if Service Does Not Comply With the Rules and the Defendants Have Not Admitted Service in Writing, the Defendant has Received Actual Notice and the Court Should Disregard any Error.

ORCP 7G provides that failure to comply with the provisions of Rule 7 in certain instances shall not effect the validity of the service of summons or the existence of jurisdiction over the person, if the Court determines that the defendant receives actual notice of the substance and pendency of the action. It further provides that the Court shall disregard any error in the content or service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued. It is clear that defendant has received actual notice of the substance and pendency of the action and no claim is made by defendant that its substantive rights have been materially prejudiced.

CONCLUSION

The defendant's motion to dismiss should be overruled.

ARNESON, WALES & BERNIER

By: _____
James A. Arneson
Of Attorneys for Plaintiffs

ARNESON, WALES & BERNIER
ATTORNEYS AT LAW
145 S.E. ROSE STREET
P. O. BOX 2190
ROSEBURG, OREGON 97470
503/672-0666

STATE OF OREGON)
) ss.
County of Douglas)

I certify that the foregoing _____
is a true, exact and full copy of the original.

DATED: _____, 19___.

ARNESON, WALES & BERNIER

BY: _____
Of attorneys for _____

I certify that on _____, 19___, I personally served a true, exact and full copy of the within _____ on _____, attorney of record for the _____ by leaving the copy with his clerk in his absence at his office at _____, Oregon.

ARNESON, WALES & BERNIER

BY: _____
Of attorneys for _____

I certify that on _____, 19___, I personally served a true, exact and full copy of the within _____ on _____, attorney of record for the _____

ARNESON, WALES & BERNIER

BY: _____
Of attorneys for _____

I certify that I served the foregoing MEMORANDUM IN OPPOSITION on Defendant, by depositing a true, full and exact copy thereof in the United States Post Office at Roseburg, Oregon on February 22, 1984 enclosed in a sealed envelope, with postage prepaid, addressed to:

Dudley C. Walton
Attorney at Law
P.O. Box 1265
Roseburg, Oregon 97470

Attorney(s) of record for the Defendant.

ARNESON, WALES & BERNIER

BY: _____
Of attorneys for Plaintiff

ARNESON, WALES & BERNIER
ATTORNEYS AT LAW
346 S.E. ROSE STREET
P. O. BOX 2190
ROSEBURG, OREGON 97470

JAMES A. ARNESON
DIANA WALES
THOMAS C. BERNIER

TELEPHONE
503/673-0696

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

ROBERT V. MARSHALL and KELLY MARSHALL, Plaintiffs	)	Case No. L84-148
v.	)	AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS
FIRST SECURITY BANK OF UTAH, Defendant	)	

STATE OF OREGON)
) ss.
County of Douglas)

I, DUDLEY C. WALTON, being first duly sworn upon oath, do depose and state:

That the Defendant has received no service of Summons in the above-entitled cause, save and except by mail to "Managing Officer, First Security Bank of Utah, P. O. Box 980, Vernal, Utah 84078," under letter dated January 17, 1984, of a copy of Complaint and a copy of Summons. That the same was received by Defendant's branch situated at Vernal, Utah, at such address and by that manner only.

DATED this 17th day of February, 1984.

/s/ Dudley C. Walton
Dudley C. Walton

SUBSCRIBED AND SWORN TO before me this 17th day of February, 1984.

/s/ Hazel Lucille Collins
Notary Public for Oregon
My Commission Expires: 10-30-85

LAW OFFICES
GEDDES, WALTON, & NILSEN
435 S.E. KANE STREET
ROSEBURG, OREGON 97470
(503) 673-4451

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

ROBERT V. MARSHALL and KELLY MARSHALL, Plaintiffs	)	Case No. L84-148
v.	)	MOTION TO DISMISS
FIRST SECURITY BANK OF UTAH, Defendant	)	

Comes now the Defendant specially and for the limited purpose of this Motion, and moves the Court for an Order dismissing the above-entitled action upon the grounds and for the reason that the Court lacks jurisdiction over the person of the Defendant, and upon the further ground that there is insufficiency of summons and insufficiency of service of summons upon the Defendant.

This Motion is based upon Rule 21, Subsection A, Rule 4, and Rule 7 of the Oregon Rules of Civil Procedure, and upon the Affidavit of Dudley C. Walton, attorney for Defendant, filed herewith.

DATED this 17th day of February, 1984.

GEDDES, WALTON & NILSEN

By DUDLEY C. WALTON
Dudley C. Walton OSB#48078
Of Attorneys for Defendant
P. O. Box 1265
Roseburg, Oregon 97470

POINTS AND AUTHORITIES

Rule 4 of the Oregon Rules of Civil Procedure pro-

//

LAW OFFICES
GEDDES, WALTON, & NILSEN
435 S.E. KANE STREET
ROSEBURG, OREGON 97470
(503) 673-4451

vides that personal jurisdiction over a Defendant for subject matter stated therein can be obtained over a party who is served in an action pursuant to Rule 7 setting out circumstances. Plaintiffs' Complaint fails to allege any circumstances under which the Defendant, in accordance with the allegations in the Complaint, can be served under Rule 7, Subsection D(3)(b)(ii) under the allegations of Plaintiffs' Complaint. As appears from the Affidavit of Dudley C. Walton filed herewith the Plaintiffs mailed a copy of Summons and Complaint herein to the following address: "Managing Officer, First Security Bank of Utah, P. O. Box 980, Vernal Utah 84078," by United States mail, under letter dated January 17, 1984. Apparently, Plaintiffs rely on the provisions of Rule 7, Subsection D(3)(b)(ii), Oregon Rules of Civil Procedure.

There is no allegation in Plaintiffs' Complaint alleging the legal entity status of the Defendant which will justify the service on such entity, whatever it may be. There is no allegation that it is a sole proprietorship, a partnership, corporation, or any other legal entity.

For the Court's convenience, Xerox copies of Rule 4, Rule 7, Subsection D(3)(b)(ii), and Rule 21, Subsection A, are attached hereto.

GEDDES, WALTON & NILSEN

By DUDLEY C. WALTON
Dudley C. Walton OSB#48078
Of Attorneys for Defendant
P. O. Box 1265
Roseburg, OR 97470

LAW OFFICES
GEDDES, WALTON, & NILSEN
435 S.E. KANE STREET
ROSEBURG, OREGON 97470
(503) 673-4451

WILLIAMS, FREDRICKSON, STARK, HIEFIELD, NORVILLE & WEISENSEE, P. C.
ATTORNEYS AND COUNSELORS AT LAW
1600 SOUTHWEST FOURTH AVENUE, SUITE 775
PORTLAND, OREGON 97201-5578
TELEPHONE (503) 222-9966

DAVID R. WILLIAMS
FLOYD A. FREDRICKSON
OLIVER I. NORVILLE
DONALD R. STARK
PRESTON C. HIEFIELD, JR.
LLOYD W. WEISENSEE
PETER C. McCORD
JOHN DUDREY
MICHAEL D. WILLIAMS

FREDERIC E. CANN
PAUL G. ROBECK
JOHN S. THOMAS
BARRY L. ADAMSON
VIRGINIA VAN VACTOR
SARAH L. BAKER

WENDELL GRAY
OF COUNSEL

IN REPLY PLEASE REFER TO
FILE NO.

August 13, 1984

Douglas A. Haldane, Esq.
899 Pearl Street
Post Office Box 11544
Eugene, OR 97440

Dear Mr. Haldane:

The enclosed article from the California Lawyer, July 1984, analyzes California's attempt to straighten out problems in the area of motions for summary judgment. I suggest that the Council may wish to consider adopting similar rule changes.

Very truly yours,

Lloyd W. Weisensee

Lloyd W. Weisensee

LWW:ggt
Enclosure

Braces for the old tiger's new teeth

A summary and judgment of the new summary judgment law

By Robert I. Weil and
Ira A. Brown Jr.

Six months have now passed since California litigators began grappling with wide-ranging changes in the summary judgment law. By clarifying certain issues, requiring more thorough preparation and providing judges with additional guidance in reaching decisions, the new version of Code of Civil Procedure §437c already has improved the process for both the bench and the bar. Because some counsel apparently are still unaware of these major procedural changes, however, there remains considerable room for improvement.

Timing changes

In an effort to provide all parties and the court with adequate time to prepare for a hearing on a summary judgment motion, the new law requires that more advance notice be given. Section 437c(a) provides for 28 days' notice (more if service is by mail) instead of the 10 days formerly required. Ten days was so clearly inadequate that most law and motion judges used to ignore the statute, choosing instead to apply the 15-day notice requirement of Code of Civil Procedure §1005, which governs motions generally. The new amendments also eliminate that confusion by declaring that neither §1005 nor §1013(a), which also applies to motions generally, applies to summary judgment.

Opposition papers must now be filed at least 14 days before the hearing. This actually gives a respondent about as much time to file his opposition as he used to have to prepare for a hearing. It also gives the moving party time to file a reply, and so eliminates what was once a great source of confusion.

Before the 1983 amendments there was always some question whether the moving party could properly file a reply to the opposing papers. It also was unclear when such a reply, if allowed, might be filed. It was not uncommon for a reply to be filed on the hearing date, in which case the trial judge might not consider it or might have to grant a continuance to enable the responding party to meet any new issues raised. The new amendments now expressly permit a reply to the opposition, which must be both served and filed by the moving party not less than five days before the hearing date.

Because more time is provided to prepare for hearings, they can proceed more expeditiously.

Because more time is provided to prepare for summary judgment hearings, they can proceed more expeditiously. Consequently, the time when the hearing itself may be held has now been shifted closer to the trial date. Ten years ago, summary judgment motions were heard as late as the day before trial, which both interfered with counsel's trial preparation and put law and motion judges under considerable time constraints. To counter these pressures, the law was changed in 1978 to require hearings no later than 45 days before trial, which remained the case until last year's amendments. Now summary judgment motions may be heard no later than 30 days prior to trial except by court order for good cause shown.

The court's task of preparing for a hearing is also made easier by the new statewide law and motion rules, which require that proof of service of the moving papers shall be filed no later than five calendar days before the hearing date. Cal Rules of Ct 317. The rule helps the busy law and motion judge determine whether a summary judgment motion will indeed be heard on its calendar date.

Statements of material facts

The most significant change in the 1983 amendments is the requirement of a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed. Each of these facts must be followed by a reference to the place in the supporting evidence where, the moving party contends, each fact has been established. Counsel are well advised to attach copies of the pertinent documents to their separate statement, to assist the court in confirming counsel's assertion that particular facts are indeed established beyond dispute.

Just as the moving party must file a separate statement of undisputed facts, so must the responding party. The statement must respond to each of the material facts listed by the moving party, indicating whether respondent agrees or disagrees that the facts are indeed undisputed, with references to the evidence that establishes any dispute. This statement must also set forth plainly and concisely any other material facts that the respondent contends are disputed, together with references to supporting evidentiary documents.

Although the requirement of separate statements is newly embodied in the law,

Robert I. Weil is a Los Angeles County Superior Court judge. Ira A. Brown Jr. is a San Francisco County Superior Court judge.

the suggested forms for such a statement have been around for a long time. A word of caution, however, about the general format for the notice of motion itself: The newly adopted statewide law and motion rules provide that the notice of motion shall state "in the opening paragraph" both the nature of the order being sought and the *grounds* for its issuance. Cal Rules of Ct 311. The standard forms for most notices of motion have contained the grounds in the second paragraph, so it would be a good idea for counsel to bring their office forms into compliance with this somewhat hypertechnical new requirement.

The 1983 amendments require greater specificity in the court's statement of decision.

Failure of the moving party to comply with the new statutory requirement of a separate statement permits the court, in its discretion, to deny the motion. Since the statute cites "failure to comply with this requirement of a separate statement" as sufficient ground to deny the motion, it would appear that denial might be based either upon the lack of a separate statement altogether or upon deficiencies found in the format of the separate statement.

Conversely, the new amendments provide that if the responding party fails to comply with the separate statement requirement, the court may *grant* the summary judgment. But this apparent reciprocity is probably illusory. The denial of a summary judgment motion still leaves the litigants with their day in court, so some judges would be quick to seize upon the absence of a moving party's separate statement as a ground for denial. But it is doubtful that any judge would, except in the most extreme case, grant a summary judgment solely on the ground that the responding party had been derelict in the preparation of his separate statement. This is particularly true if the opposing papers otherwise raise a material triable issue of fact.

Law and motion judges should be careful that their reluctance to grant a summary judgment motion on technical grounds is not manipulated by respondents who think they would be better off not complying with the statutory requirements. This advantage arises because a separate statement's acknowledgement that a fact is undisputed may be taken as an admission at trial. Thus, the summary judgment opponent who simply raises one factual dispute sufficient to defeat the motion leaves his options open to raise other issues at trial.

The moving party can and should forestall this tactic of leaving issues open for trial by combining his motion for summary judgment with a motion for partial summary judgment, or, in the words of the statute, "summary adjudication of issues." This forces the respondent to admit or deny each of the motion's allegations.

Summary adjudication of issues

Some doubt previously existed as to whether a party whose motion for summary judgment was denied could then ask the court to summarily adjudicate issues if the only motion that had been noticed was for summary judgment itself. Most courts took the position that summary adjudication of the other issues could not be granted properly, since the responding party had been put on notice only to defeat an entire summary judgment motion, which could be achieved by showing that just one material disputed issue remained as a triable issue of fact. Other judges took the view under the old statute that if only one fact issue was raised in the opposition, the court was required to declare all other issues to be without substantial controversy.

The new amendments now have brought certainty to this question by requiring that if a party intends to request summary adjudication of issues, the request must be in the form of a noticed motion, either as an alternative to a motion for summary judgment or in a separate motion for summary adjudication of issues. Although the statute does not specifically require a separate statement of undisputed facts for a separate motion for summary adjudication of issues, most courts will probably require one. This requirement is easily met, since the separate statement already has been prepared for the summary judgment motion. Indeed, six months of experience under the new law shows that the number of motions for summary judgment has remained relatively constant, while there has been a marked increase in alternative requests for summary adjudication of issues.

Statement of decision

If the court grants a motion for summary judgment or a motion that issues are without substantial controversy, there is no need for findings or a statement of decision, because, by definition, the court has not tried an issue of fact. Cal Rules of Ct 232. But what if the court denies a summary judgment motion? Until this year the court simply stated in its denial that a material triable issue of fact remained, without having to identify that issue and without having to specify how many triable issues still remained.

The 1983 amendments require greater specificity in the court's statement of decision. If the court now denies a summary

PROPOSED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

(For consideration at Council meeting on Saturday, October 13, 1984, 9:30 a.m., Village Green, Cottage Grove, Oregon)

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Proposed Amendments

SUMMONS

RULE 7

C.(2) **Time for response.** If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D.~~(5)~~(6) of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

SERVICE AND FILING
OF PLEADINGS AND
OTHER PAPERS

RULE 9

C. Filing; proof of service. 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. Except as otherwise provided in Rules 7 and 8, proof of service of all papers required or permitted to be served may be by written acknowledgment of service, by affidavit of the person making service, or by certificate of an attorney or a member of the attorney's staff. Such proof of service may be made upon the papers served or as a separate document attached to the papers.

FORM OF PLEADINGS

RULE 16

B. Concise and direct statement; paragraphs; separate statement of claims or defenses. Every pleading shall consist of plain and concise statements in [~~consecutively numbered paragraphs~~] paragraphs consecutively numbered in arabic numerals, the contents of which shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all succeeding pleadings. Separate claims or defenses shall be separately stated and numbered.

SIGNATURE OF PLEADINGS

RULE 17

A. Signature by party or attorney; certificate. Every pleading shall be signed by the party or by a resident attorney of the state [~~except that if there are several parties united in interest and pleading together, the pleading may be signed by at least one of such parties or one resident attorney~~]. If a party is represented by an attorney, every pleading of that party shall be signed by at least one attorney of record in such attorney's individual name. Verification of pleadings shall not be required unless otherwise required by rule or statute. The signature constitutes a certificate by the person signing: that such person has read the pleading; that to the best of the person's knowledge, information, and belief, there is a good ground to support it; and that it is not interposed for harassment or delay.

DEFENSES AND OBJECTIONS;
HOW PRESENTED; BY PLEADING OR MOTION;
MOTION FOR JUDGMENT ON THE PLEADINGS

RULE 21

E. Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading. [~~If, on a motion under this section, the facts supporting the motion do not appear on the face of the pleading or defense and matters outside the pleading or defense, 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 motion if such facts are not materially disputed or may defer such determination until further discovery or until the trial on the merits~~].

CLASS ACTIONS

RULE 32

H. Notice and demand required prior to commencement of action for damages.

H.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of section B. of this rule, the potential plaintiffs' class representative shall:

H.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

H.(1)(b) Demand that such person correct or rectify the alleged wrong.

H.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, ~~[if neither will effect actual notice, the office of the Secretary of State]~~ in the case of a corporation or limited partnership not authorized to transact business in this state, to the principal office or place of business of the corporation or limited partnership, and to any address the use of which the class representative knows, or on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

SUMMARY JUDGMENT

RULE 47

C. Motion and proceedings thereon. The motion shall be served at least ~~10~~ 20 days before the time fixed for the hearing. The adverse party, not less than five days 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.

JURORS

RULE 57

C. **Examination of jurors.** The full number of jurors having been called shall thereupon be examined as to their qualifications. The court may examine the prospective jurors to the extent it deems appropriate, and thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant. Examination shall be directed toward the background and qualifications of the prospective jurors, and shall be conducted so as not to create unnecessary delay. The court shall regulate examination of jurors according to these standards, and may prohibit examination principally to influence the outcome of the case.

ALLOWANCE AND TAXATION
OF ATTORNEY FEES AND
COSTS AND
DISBURSEMENTS

RULE 68

A.(2) Costs and disbursements. "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the necessary expenses of taking depositions which are actually used or taken in good faith for testimonial purposes; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the necessary expense of copying of any public record, book, or document used as evidence on the trial; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute.

TEMPORARY RESTRAINING
ORDERS AND PRELIMINARY
INJUNCTIONS

RULE 79

B. Temporary restraining order.

B.(1) Notice. A temporary restraining order may be granted without written or oral notice to the adverse party or to such party's attorney only if:

B.(1)(a) It clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the adverse party's attorney can be heard in opposition, and

B.(1)(b) The applicant or applicant's attorney submits an affidavit setting forth the efforts, if any, which have been made to notify defendant or defendant's attorney of the application, including attempts to provide notice by telephone, and the reasons supporting the claim that notice should not be required. The affidavit required in this paragraph shall not be required for orders granted by authority of ORS 107.095(1)[~~(c), (d), (e), (f) or (g)~~].

B.(2) Contents of order; duration. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance, shall be filed forthwith, shall define the injury and state why it is irreparable, and shall state why the order was granted without notice.

B.(2)(a) Every temporary restraining order shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

B.(2)(b) The 10-day limit of paragraph(a) of this subsection does not apply to orders granted by authority of ORS 107.095 (1) ~~[(c), (d), (e), (f) or (g)]~~.

NOTE: It has been proposed that the specific reference to only subsections (c),(d),(e),(f), or (g) be deleted. As amended, the reference willinclude all subsections of ORS 107.095(1).

107.095 Provisions court may make by order after commencement of suit and before decree. (1) After the commencement of a suit for annulment or dissolution of a marriage or for separation and before a decree therein, the court may provide as follows:

(a) That a party pay to the clerk of the court such amount of money as may be necessary to enable the other party to prosecute or defend the suit, including costs of expert witnesses, and also such amount of money to the Department of Human Resources or the county clerk, whichever is appropriate, as may be necessary to support and maintain the other party.

(b) For the care, custody, support and maintenance of the minor children of the marriage by one party or jointly and for the visitation rights of the parent or parents not having custody of such children.

(c) For the restraint of a party from in any manner molesting or interfering with the other or the minor children.

(d) That if minor children reside in the family home and the court considers it necessary for their best interest to do so, the court may require either party to move out of the home for such period of time and under such conditions as the court may determine, whether the home is rented, owned or being purchased by one party or both parties.

(e) Restraining and enjoining either party or both from encumbering or disposing of any of their property, real or personal, except as ordered by the court.

(f) For the temporary use, possession and control of the real or personal property of the parties or either of them and the payment of instalment liens and encumbrances thereon.

(g) That even if no minor children reside in the family home, the court may require one party to move out of the home for such period of time and under such conditions as the court determines, whether the home is rented, owned or being purchased by one party or both parties if that party assaults or threatens to assault the other.