

**COUNCIL ON COURT PROCEDURES**

**February 20, 1988 Meeting**

**Oregon State Bar Offices  
5200 SW Meadow Road  
Lake Oswego, Oregon**

**A G E N D A**

1. **Introduction of new members**
2. **Appointment of Executive Director - recommendation of Executive Committee**
3. **Rule 69 (subcommittee report by Messrs. McConville and Starr)**
4. **Alternate jurors (Judge Ashmanskas) (report by Judge Riggs)**
5. **Plans for 1987-89 biennium; suggested meeting schedule and subjects to be covered**
6. **NEW BUSINESS; letters received**

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of February 20, 1988

Oregon State Bar Offices

Lake Oswego, Oregon

Present:            Raymond J. Conboy                                 Richard P. Noble  
                     Lafayette G. Harter                               James E. Redman  
                     Robert E. Jones                                   R. William Riggs  
                     Henry Kantor                                     Martha Rodman  
                     John V. Kelly                                     J. Michael Starr  
                     Winfrid K.F. Liepe                             Laurence Thorp  
                     Robert B. McConville                         Elizabeth Yeats  
                     Judith Miller

Absent:             Richard L. Barron                                 Jack L. Mattison  
                     John H. Buttler                                  Steven H. Pratt  
                     Paul J. Lipscomb                                 William F. Schroeder  
                     Ronald Marceau

The meeting of the Council on Court procedures was convened at 9:30 a.m by Chairer Raymond Conboy.

The Chairer announced that Douglas Haldane, Executive Director, had resigned effective March 1, 1988. Under the Council Bylaws, the Council Executive Committee, consisting of the Vice-Chairer, Treasurer, and Chairer, are responsible for selection of Council staff. The Chairer announced that the Executive Committee had contacted Fredric R. Merrill, the former Executive Director of the Council, and he had agreed to serve as Executive Director again, at least through this biennium, if the Council so wished. The Chairer stated that the Executive Committee expressed its wish to appoint Mr. Merrill as Executive Director to replace Mr. Haldane. The appointment was put to a vote of the Council, which unanimously approved Mr. Merrill's appointment. Mr. Merrill was then asked to join the meeting.

The Council members then discussed plans for the Council's work during the biennium. It was suggested the present meeting satisfied the requirement of a public meeting in the third congressional district, and that the public meetings required by statute to be held in the other four congressional districts be conducted during the next four Council meetings, with subsequent meetings at the State Bar office. The following meeting schedule was agreed upon:

April 30, 1988: Newport (Public Meeting)  
May 21, 1988: Kah-nee-ta, Warm Springs (Public Meeting)  
June 25, 1988: Sunriver - Bend (Public Meeting)  
September 17, 1988: Eugene (Bar Convention) (Public Meeting)  
October 15, 1988: Bar Office, Lake Oswego  
November 12, 1988: Bar Office, Lake Oswego

Other meetings may be scheduled depending upon the workload of the Council during the biennium.

Henry Kantor requested that copies of the Council Bylaws be distributed to Council members, and the Executive director indicated that would be done. Copies of the committee membership list and member addresses were distributed to committee members. Several members stated that they understood that Judge Lee Johnson had been appointed to replace Judge Haas on the Council. The Executive Director was asked to check with the Circuit Court Judges Association on that question.

Judge Riggs then moved that the minutes of the meeting of November 7, 1987 be approved as presented. The motion was seconded by Ray Conboy and passed unanimously.

The Council then discussed general plans for work to be accomplished during the biennium. Fred Merrill suggested that, in addition to matters brought to the Council by letter and at the public meetings, Council staff prepare an analysis for Council members of problems in the existing rules, which have been noted by the appellate courts. Judge Riggs moved, with a second by Henry Kantor, that the Executive Director submit an agenda of items to be considered with background analysis. The motion passed unanimously. Mr. Merrill indicated he would submit a memorandum relating to the rules covering judgments before the next meeting.

The Council discussed the question of some method of dissemination of Council action before or during the legislative session. It was pointed out that at the present time, after the Council acts to promulgate new rules, Council amendments are never printed or available from the legislature because they are not a bill submitted to the legislature. They first appear for public consumption when the new ORS is issued. The desirability and feasibility of having the Council amendments of the ORCP published in the Advance Sheets or distributed through the printing office of the legislature was discussed. It was unclear whether legislation would be necessary to address the problem. No action was taken, but the Chairer suggested that Council members continue to think about the problem and it would be considered at a later meeting.

Judge McConville and Mike Starr reported that the notice

provisions in ORCP 69 had been considered by the Trial Court Rules Committee and the Oregon State Bar Procedure and Practice Committee. The Trial Court Rules Committee decided that the matter was outside their jurisdiction. The Procedure and Practice Committee is considering the issue and will submit their recommendation to the Council. Mike Starr suggested that the Council wait until that recommendation is forthcoming and consider it together with the alternatives that the Council had previously considered when it promulgated the last amendment to Rule 69.

P Judge Riggs reported that he had contacted Judge Ashmanskis relating to the question of alternate jurors and Judge Ashmanskis indicated that his previous letter stated the extent of his concern and suggestions. Judge Riggs suggested that there was some substance to the problem raised. The Chairer asked Judge Riggs to look at the matter more closely and submit a specific suggestion for amendment of the Rules to the Council, if any was warranted.

Judge Liepe raised the question of authority of a court to release jurors for meals, which was discussed at the last meeting. After discussion, the Chairer appointed Judge Riggs and Judge Liepe to prepare and submit a specific proposal for Amendment of ORCP 59 to deal with the problem.

Under new business, the Council discussed the problems with the new summary requirement for judgments, which was raised by Hugh Collins. The Chairer suggested that the matter be included in the items submitted by the Executive Director relating to judgments for the next meeting.

t The Council also discussed a letter received from Edwin A. Terwilliger relating to Rule 63, but decided to take no action relating to that rule at this time.

Judge Jones suggested that the matters to be considered relating to judgments include questions relating to the allocation of duty between court and counsel to see that a judgment is prepared and entered. Judge Liepe also suggested that the area of satisfaction of judgments be included for consideration. Fred Merrill indicated that he would do so.

r Judge Liepe also asked whether the Council should consider the area of postponement of trial, particularly procedure and time limits related to postponement. After discussion, it was suggested that the matter was covered by local rules and more properly should be subject to consideration by the Trial Court Rules Committee. No action was taken.

The Chairer expressed the appreciation of the Council to Douglas Haldane for the outstanding services that he had provided

to the Council as Executive Director.

The meeting adjourned at 11:15 a.m.

Respectfully submitted,

Fredric R. Merrill  
Executive Director

FRM:gh

January 13, 1988

Oregon Council on Court Procedures  
c/o Doug Haldane  
University of Oregon School of Law  
Eugene, Oregon 97403

Gentlemen:

I am writing to petition the Oregon Council on Court Procedures to review Rule 63.A of Oregon Rules of Civil Procedures. I respectfully request that this rule be repealed or amended to disallow the use of JNOV for the following reasons:

1. JNOV procedure was not allowed until 1922, and has been used since then based solely on the precedent set at that time.
2. JNOV conflicts with the Judges' instructions to the jury - "you are the sole judges of facts." When JNOV procedure is used, the Judge and not the jury, is ruling on the facts. It is also unfortunate that the jurors may never become aware that their verdict was overturned.
3. I have been advised that the purpose for allowing JNOV procedure was to prevent the awarding of outlandish sums of money. I submit that a Judge who is sympathetic to the defendant, can use JNOV to "punish" the plaintiff when even a small sum of money is involved. To my knowledge, no dollar limit has been designated in Rule 63.A.
4. If not all the evidence can be presented at the original trial, I contend that a new trial should be allowed. The use of JNOV greatly lessens the chance of a fair appeal to higher court, since no new evidence can be considered in the appeal.
5. Since JNOV is not included in Criminal Court Procedures, I contend that "law-abiding citizens" should be given the same consideration. Misuse of JNOV in Civil Court can have a dramatic effect on the future of the wronged party.

Thank you for your consideration of my request. I look forward to your reply.

Sincerely,

*Edwin A. Twilleager*

Edwin A. Twilleager

(229 N.E. 17th Avenue  
Portland, OR 97220)

EAT:lf

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DWIGHT L. SCHWAB  
FRANK H. HILTON, JR.  
CHARLES SCOTT HOWARD  
HARRISON LATTO

DENTON G. BURDICK, JR.  
(1916-1980)

February 18, 1988

Mr. Douglas A. Haldane  
Executive Director,  
Council on Court Procedures  
University of Oregon School of Law  
P. O. Box 11544  
Eugene, OR 97440

Dear Mr. Haldane:

Re: ORCP 24A

A question recently arose in litigation in which this firm is involved, that I thought the Council might be interested in. It involves joinder of claims by a third party plaintiff. Unlike the federal rule, which specifically permits liberal joinder by a third party plaintiff, ORCP 24A is ambiguous. It states that a "plaintiff" may join as many claims as he has, but uses the phrase "opposing party" to designate the party against whom the claims are asserted, rather than "defendant."

Under ORCP 22C, only an indemnity claim may be brought as a third party action. In our case, the third party plaintiff did assert an indemnity claim, but joined with it a claim it had against the third party defendant that was unrelated to the original claim brought by the plaintiff. A motion to dismiss the joined claim was denied. (Actually, the joined claim was somewhat related to the original one, but I do not think the motion was decided on this basis.)

Since under ORCP 22A a counterclaim need not be related to the original action, a plaintiff cannot complain when his action expands to include unrelated counterclaims. But presumably a plaintiff would be aware in advance of what

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Mr. Douglas A. Haldane  
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claims a defendant may have against him. In a third party situation, the plaintiff is faced with mandatory joinder of his claim with an unrelated claim between two other parties; on the other hand, ORCP 22C(1) expressly permits counterclaims by a third party defendant against a third party plaintiff, with no requirement that such counterclaims be related to the original action or to the third party claim. This defeats the plaintiff's argument that he should or can be master of the action. The court's discretionary power under ORCP 22E to order separate trials also weighs in favor of liberal joinder in this situation.

I think that ORCP 24A should be clarified to bring it in line with federal procedure.

Yours very truly,



Harrison Latto  
SCHWAB, HILTON & HOWARD

HL:mm  
cc: Mr. Dell A. Alexander  
cc: Mr. Dean M. Quick



## **Rule 24 Joinder of Claims**

**A. Permissive joinder.** A plaintiff may join in a complaint, either as independent or as alternate claims, as many claims, legal or equitable, as the plaintiff has against an opposing party.

**B. Forcible entry and detainer and rental due.** If a claim of forcible entry and detainer and a claim for rental due are joined, the defendant shall have the same time to appear as is provided by rule or statute in actions for the recovery of rental due.

**C. Separate statement.** The claims joined must be separately stated and must not require different places of trial.

## **Rule 18. Joinder of Claims and Remedies**

... **(a) Joinder of Claims.** A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

... **(b) Joinder of Remedies; Fraudulent Conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

(As amended Feb. 28, 1966, eff. July 1, 1966.)