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Robert Meisenholder
University of Washington School of Law

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THE EFFECT OF PROPOSED RULES 7 THROUGH 25 ON PRESENT WASHINGTON PROCEDURES†

ROBERT MEISENHOLDER*

On January 2, 1957, the Supreme Court of Washington published the pleading and party rules, previously recommended by the Judicial Council for adoption as part of the procedural law of this state.¹ The court did not make the rules effective but requested criticism and study by members of the bar.² This preliminary publication permits examination for possible defects in the new procedure and acquaints the lawyers of the state with the rules in advance of their effective date.

For aid in the study of the proposed rules, this article will review the general changes they would make in present Washington procedure.

Since the proposed rules were copied almost verbatim from the federal rules, they are not untested and untried. They have been used in the federal courts for almost two decades. All eighty-six of the federal rules, including the proposed rules, have been adopted in ten states, two territories and the Commonwealth of Puerto Rico.³ Experience with them has been very satisfactory in the federal courts, and so far as can be ascertained from written sources, reaction is favorable in the states and territories mentioned.⁴

The change-over to the proposed rules could probably be accomplished with little difficulty. There would be fewer problems in Washington than were faced by lawyers in the jurisdictions which adopted all of the federal rules. Yet there is testimony that in those jurisdictions no great difficulty was encountered.⁵ This was undoubtedly due

† In this issue Professor Meisenholder discusses proposed rules 7 to 12. Discussion of proposed rules 13 to 25 will appear in the December issue of the law review.

* Professor, School of Law, University of Washington.

¹ 149 Wash. Dec. i-xix (1957).

² It was stated that the recommended rules had not yet been given consideration by the court. See footnote 1, supra.

³ The ten states are Arizona, Colorado, Delaware, Kentucky, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, and Utah. The movement to adopt the federal rules in state jurisdictions is reviewed in Holtzoff, Judicial Procedure Reform: The Leadership of the Supreme Court, 43 A.B.A.J. 215, 217 (1957).


⁵ See articles cited in footnote 4, supra.
in part to the fact that the federal rules embody some familiar procedures. There is also a wealth of readily accessible written material explaining the rules and publishing the memorandum decisions of federal trial courts.\(^6\)

Turning to the general objectives of the proposed pleading rules, the more detailed comments below indicate they would tend to simplify the pleading stage of a suit. One of the assumptions underlying the proposed rules is the notion that the code pleading system does not always formulate the issues satisfactorily. After the pleadings are at issue, it is not unusual that the pleadings alone will fail to reveal the real facts of the controversy although the purpose of the pleadings is to set forth the facts and form the fact issues. At the same time, it is said that the process of code pleading emphasizes various technicalities. Particularly, it places a premium upon stating the facts in a pleading broadly enough, and yet narrowly enough, to avoid attack upon it.

By comparison, the proposed rules intentionally reflect the viewpoint that the major purpose of the pleadings is to notify the opponent of a party’s general positions and to define the issues only in a general way. Thus, although the rules do not use the words, “notice pleading” is emphasized. But the rules do not simply embody a system of notice pleading, for the pleadings should tend to point up the general issues of law and fact between the parties. Generality of statement is authorized, but the rules still make necessary “the statement of circumstances, occurrences and events in support of the claim” and require that “the complaint must disclose information with sufficient definiteness.”\(^7\)

To the extent that general pleadings do not point up fact issues, and indicate any detailed facts, the facts and issues may be revealed by the use of the federal pre-trial devices which are already authorized in Washington—deposition and discovery, motion for summary judgment and pre-trial conference. In passing judgment on the proposed rules one must constantly keep in mind the availability of these procedures.

The general theory of the proposed party and joinder of issue rules is also clear. Disregarding technical pleading considerations, the rules attempt to answer this basic question: Is it fair and is it convenient to

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have particular issues and parties involved in one trial? The rules are based on the idea that the subject matter of issues and parties should not be primarily related to pleading; rather, the whole subject should be related to fairness and convenience of trial. Although they set forth various restrictions at the pleading stage of a suit, on an overall basis they are liberal in dealing with the subjects of issues and parties at this stage. To promote convenience and fairness of trial, they provide for separate or combined trials largely at the discretion of the trial court.

The comment which follows indicates how these objectives are accomplished, but before each rule is discussed a special problem should be mentioned. In the past there have been problems of relating some of the present Washington court rules to similar statutory sections (to say nothing of the inconvenience and time necessary to check back and forth). Many of such problems with respect to the recommended rules could be avoided by promulgation of an official list of statutes which would be abrogated or otherwise affected. The fact that the supreme court has already adopted this technique makes it probable that an appropriate list of affected statutes would be published if and when the proposed rules are adopted. It might also be desirable to add a rule indicating the scope of the proposed rules and to promulgate an appendix of forms similar to the forms officially issued with the federal rules.

In the discussion below each rule is first set out to indicate the text of the similar federal rule as well as the text of the proposed rule. For the text of the federal rule, read the rule with matter in brackets, omitting matter in italics. For the text of the rule published by the Washington Supreme Court, read the text with matter in italics, omitting matter in brackets.

Federal Rules 1 through 6

Various Washington pre-trial procedures would remain unchanged by virtue of the omission of federal rules 1 through 6 from the recommended proposal. Federal rule 4 governs the issuance, service and return of summons. These matters would not be affected, and present methods of commencement of suit would be unchanged. Federal rules 5 and 6 are concerned with methods and times of service and filing of pleadings and motions. In general, the present methods and times of

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service of papers in actions would continue under the recommended rules unless a particular rule contains some provision to the contrary.

Are there any detailed provisions in the proposed rules which would be inconsistent or unworkable with the present Washington methods of commencement of suit and methods of service and filing papers in a suit? Problems which might arise along these lines are mentioned below in connection with the particular rule involved, but it appears no serious difficulties would be encountered. If none would arise then the omission of rules 1 to 6 is not of great consequence in the adoption of the federal rules concerning pleading and parties. The principal rules embodying the heart of the federal system are those which have been recommended. If some difficulty has been overlooked in this respect, consideration could be given to adding the appropriate federal rule to the recommended proposal or changing the appropriate proposed rule.

Proposed Rule 7

(a) Pleading. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and other papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

Proposed rule 7 should be read with proposed rules 8 and 12. Together with these rules it is basic in the federal system of pleading. In most states in which it has been adopted, federal rule 7 has not been changed.

Replies. Rule 7 designates the only pleadings permitted under the proposed rules. Such pleadings would ordinarily consist of a complaint
and an answer.\textsuperscript{10} A reply is \textit{required} only when there is a counterclaim denominated as such, or when it is ordered by the court in case there is no such counterclaim.\textsuperscript{11} The plaintiff is favored by this rule since he need not guess whether the answer contains a counterclaim requiring a reply.

When there is no counterclaim denominated as such, the plaintiff or the defendant can move for a reply.\textsuperscript{12} Of course, if one is ordered it must be served; but if no reply is ordered, affirmative defenses in the answer are deemed denied or avoided.\textsuperscript{13} Unauthorized replies can be disregarded, stricken on motion, or treated as amendments to the complaint.\textsuperscript{14}

The theory of this portion of the rule is that the complaint and answer usually are sufficient to give notice of plaintiff's claims and defendant's defenses. If the court feels it would be helpful for plaintiff to reply to affirmative defenses, the court, on application, may order a reply.\textsuperscript{15} It has been said that in practice under federal rule 7, the parties do not often request a reply.\textsuperscript{16}

In effect, the rule is a compromise between two different code pleading rules. In a few states no reply is allowed at all; in most, a reply to affirmative defenses is necessary.\textsuperscript{17}

\textsuperscript{10} Of course, in multiple party suits, the rule also requires an answer to a cross-claim made pursuant to rule 13 and to a third-party complaint made pursuant to rule 14.

\textsuperscript{11} In rule 13 permissive counterclaims are broadly defined to include set-offs, counterclaims and cross-complaints as known in Washington practice. In multiple party suits, a counterclaim may be made or may be required in an answer to a cross-claim under rule 13. If one is had, a reply to the counterclaim is required by rule 7(a). Also, a third-party answer to a third-party complaint made pursuant to rule 14 may contain a counterclaim. If it does, rule 7(a) seems to indicate that a reply is not required but no case authority to support this conclusion has been discovered.

\textsuperscript{12} The defendant would ordinarily be the party desiring a reply. However, plaintiff should obtain leave to reply if he desires to do so. See Beckstrom v. Coastwise Line, 13 F.R.D. 480 (D.C. Alaska, 1953), and cases cited therein. But in Leimer v. State Mutual Life Assurance Co., 1 F.R.D. 386 (W.D. Mo. 1940), appeal dismissed, 127 F.2d 862 (8th Cir. 1942), the court said it did not seem necessary for plaintiff to obtain leave to reply.

\textsuperscript{13} This conclusion follows from the provision of rule 8(c) which states, "averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

\textsuperscript{14} 1 Barron and Holtzoff, \textit{Federal Practice and Procedure} 403 (1950).

\textsuperscript{15} The rule grants the court discretion to order a reply to any kind of a defense, but some good reason must be advanced to obtain such an order. Such a reason might be that the complaint and an answer which contains new matter do not cover the issues in the case. For example, see Bankers Bond and Mortgage Co., 3 F.R. Serv. 7a. 222, Case 1, 1 F.R.D. 197 (E.D. Pa. 1940). But in what may have been such a case the court refused to permit a reply. Bickart v. Union Barge Line Corp., 10 F.R. Serv. 7a. 222, Case 1, 6 F.R.D. 579 (W.D. Pa., 1947). The availability and expense of discovery procedures is suggested as a factor for the court to consider in \textit{The Permissive Reply}, 5 F.R. Serv. 803 (1942).

\textsuperscript{16} Holtzoff, \textit{New Federal Procedure and the Courts} 22 (1940); 2 Moore, \textit{Federal Practice}, 1508 (2nd ed. 1948).

\textsuperscript{17} Clark, \textit{Code Pleading} 688-689 (2d ed. 1947).
Obviously, the above rules are different from present Washington procedure, which contemplates a reply to affirmative defenses in the answer as a matter of course and provides for a penalty upon failure to reply to a good defense when it is required.\textsuperscript{18}

Under our present law it is not clear whether the plaintiff must analyze an answer at his peril to determine whether it contains a real counterclaim to which there should be a response.\textsuperscript{19} As a practical matter, however, counterclaims, set-offs, or cross-complaints are now usually labeled. Also, counterclaims should demand affirmative relief if any is to be granted by the court.\textsuperscript{20} As a result, there is usually little question as to whether matter in the answer constitutes an affirmative demand against plaintiff which requires some response to the answer. If there is any question, plaintiff probably will not suffer greatly should he reply or answer.

Several Washington statutes may authorize pleadings other than those mentioned in the proposed rules. These statutes include those dealing with judgment by confession, enforcement of foreign judgments, agreed cases, and assessment of damages without answer.\textsuperscript{21} If the supreme court were to list the statutes abrogated by the proposed rules, it could then deal with these statutes. It seems logical to consider the above-mentioned statutes and procedures as supplementary to the proposed rules. Under such a view they would not be abrogated.

**Motions.** Rule 7 (b) does not make any sweeping changes in motion practices in Washington.

In specifying that all motions except those made at a hearing or trial be in writing, it spells out a rule which can be inferred from the language of rule 1 of the General Rules of the Superior Courts.\textsuperscript{22} It is in

\textsuperscript{18}RCW 4.32.210 and RCW 4.56.180 (provides for judgment for failure to plead to new matter).

\textsuperscript{19}No decision has been discovered which covers the necessity for answer should there be a counterclaim or cross-complaint wrongly labeled or indicated as such. There may arise a problem of whether matter in the answer is merely an affirmative defense or whether it constitutes a good counterclaim or cross-complaint. See for example Chandler v. Miller, 172 Wash. 252, 19 P.2d 1108 (1933).

\textsuperscript{20}Gudmundsen v. Commercial Bank and Trust Co., 138 Wash. 355, 244 Pac. 676 (1926).

\textsuperscript{21}RCW 4.60 (judgment by confession); RCW 6.36 (enforcement of foreign judgments); RCW 4.52 (agreed cases); RCW 4.28.290 (assessment of damages without answer).

\textsuperscript{22}The rule states:

(1) All pleadings shall be plainly written or printed and paged. Each cause of action, defense, reply, or counterclaim shall be plainly and separately stated and consecutively numbered, and shall be divided into paragraphs according to the subject matter, and each paragraph shall be numbered consecutively. Copies of any pleading shall conform in paragraphing and numbering to the original. Copies of all motions, demurrers, and pleadings, except complaints,
accord with what appears to be the present general practice. If a practice of making oral motions other than at a hearing or trial exists in any locality, rule 7(b) would make a change. Since the proposed rule also requires written motions to contain the grounds for the motions, a probable reason for a court's actions on all motions not made at a hearing or trial would be indicated in the record.

Under the proposed rule a motion procedure should be used in situations in which it might otherwise be assumed that orders to show cause are to be used. Several federal cases have stated that a motion procedure should be substituted for an order to show cause procedure. Nevertheless, an order to show cause has been treated in federal court as a motion. The change involved would be primarily mechanical.

Among the requirements for motions stated in the rule is the above-mentioned provision that the motion state the grounds therefor with particularity. No great particularity as to statement of grounds is actually necessary. Thus, a motion form promulgated with the federal rules provides for statement of grounds of a motion to dismiss in these words: [The defendant moves] “To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.” The remainder of the form stating other grounds is set forth in the footnote. It is contemplated that the motion include the general reason for the motion.

must be served on the opposite party, or his attorney, unless such service is expressly waived in writing. At the trial of any issue of law or fact, or upon the hearing of any motion, the files shall be for the use of the court, except as to affidavits and exhibits.

(2) Pleadings in all cases must be filed on or before the time fixed by the notice of the adverse party for the hearing of any motion or demurrer addressed thereto. The party whose pleading is not filed within such time may be adjudged in default. (General Rules of the Superior Courts, 34 A Wn. 2d.)

In Hammond-Knowlton v. Hartford Connecticut Trust Co., 26 F. Supp. 292 (C.D. Conn. 1939), the court said that under the federal rule oral argument on a motion is not a "hearing" at which another motion can be made orally.

23 In Walling v. Moore Milling Co., 62 F. Supp. 378 (W.D. Va. 1945), the court stated that it should not have allowed a show cause order procedure to be substituted for a motion procedure when plaintiff sought a preliminary injunction. See also, Application of Tracy, 106 F.2d 96 (2d Cir. 1939).


25 Federal Rules, Appendix of Forms, Form 19.

26 2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the Southern District of New York, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively.

3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States and (b) the defend-
No important change in Washington practice is indicated by the above requirement. At present the only similar state-wide provision is rule 6 (1) of the General Rules of the Superior Courts, which requires that the grounds of a motion be stated only when it is supported by affidavits or other papers. But it is not uncommon at present to state the grounds for a motion to the extent required by proposed rule 7(b).

The sentence in part (b) (1) which refers to "written notice of the hearing of motion" might possibly be deleted since a notice of hearing of motion containing the motion would be a new form. However, the present practice concerning service of documents termed "motions" and noting them for hearing would not be affected even if this deletion were not made.

Abolition of Demurrers, Pleas, Etc. At first glance rule 7(c) is startling because it states that demurrers are abolished. But this statement is not as sweeping as it first appears. The objectives which can be gained by demurrer under present Washington rules could be attained in part by motion or answer under proposed rule 12. If a party demurred under the proposed rules by mistake, the court would have support to treat the demurrer as a motion to dismiss under rule 12. Abolition of the demurrer will be discussed further in connection with rule 12.

Proposed Rule 8

General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain [(1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and

ant is a corporation incorporated under the laws of the State of Delaware and is an inhabitant thereof.

4. To dismiss the action on the ground that the court lacks jurisdiction because the amount actually in controversy is less than three thousand dollars exclusive of interest and costs. (Appendix of Forms, Form 19.)

27 Rule 6, Rules of Pleading Practice and Procedure, 34A Wn.2d.

plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, [including averments of the grounds upon which the court's jurisdiction depends,] he may do so by general denial subject to the obligations set forth in Rule 11.

(c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) **Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **Pleading To Be Concise and Direct; Consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) **Construction of Pleading.** All pleadings shall be so construed as to do substantial justice.

Federal rule 8 does not "do away with pleadings" as it sometimes charged. But it would make important changes in the present rules gov-
erning the adequacy of pleadings (principally the complaint, cross-claims, third-party claims, counterclaims, and affirmative defenses in the answer).

**Statements of Ultimate Fact, Evidential Fact, and Conclusions of Law.** Of course the Washington statute contains the usual rule of code pleading that the complaint must contain "a plain and concise statement of facts constituting the cause of action, without unnecessary repetition."\(^{29}\) The intent of the framers of the original New York code in requiring a statement of facts is not absolutely clear.\(^{30}\) It was apparently intended that the complaint state a somewhat detailed summary of the event or transaction which was the subject of the suit. This was the great reform of code pleading—fact pleading rather than common law issue pleading. After the adoption of the first code the courts attempted to carry out what they conceived to be the original intent; through the cases there was developed our present concept that the complaint be stated in terms of "ultimate facts."\(^{31}\)

The declaration, common law counterpart of the complaint, was not to state detailed facts.\(^{32}\) In part on the basis of this common law background the courts developed the idea that the complaint should not state "evidential facts".\(^{33}\) The statements of "facts" in the complaint should not be statements of details and evidence. Rather, they should be more generalized statements which cover or "blanket" the details of the actual subject matter of the suit. They are to bring out these generalized facts necessary for recovery in the light of the pleader's ideas of the applicable rules of law.

But also, because the code provided that the complaint was to state "facts," it was logical to think that it should not contain "conclusions of law". Such conclusions should be made by the court, not the pleader.

Thus, in states which follow the code pleading system, courts on appeal and trial courts have insisted that there is a logical difference between statements of ultimate fact, statements of evidential fact, and

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\(^{29}\) RCW 4.32.040.

\(^{30}\) "In place of the system which we have thus explained [the common law system] . . . . We propose, that the plaintiff shall state his case according to the facts." *First Report of the Commissioners on Practice and Pleading*, New York, 141 (1848). The report criticizes common law pleadings for stating "the conclusions of fact, instead of the facts themselves."

\(^{31}\) CLARK, CODE PLEADING 225 (1947).

\(^{32}\) CLARK, CODE PLEADING 12-13 (1947).

\(^{33}\) PORMEROY, REMEDIES AND REMEDIAL RIGHTS 561 et. seq. (1876). A leading case is *Crane v. Ryder*, 12 N.Y. 433 (1855). In stating the idea that ultimate facts must be pleaded, the opinion relies on CHITTY, PLEADING, which concerned common law pleading.
statements of conclusions of law. This insistence has resulted in technical distinctions between statements where often no substantial distinctions seem to exist.34

In Washington the supreme court has not insisted on a rigid distinction between the types of statements mentioned in considering whether a complaint would withstand a demurrer on the ground that it did not state facts constituting a cause of action. According to a number of opinions the supreme court will construe "even inferences from averments amounting to mere conclusions of law . . . in favor of the pleader."35 The court has stated the rule in these terms:

Where substantial facts constituting a cause of action are stated in the complaint or can reasonably be inferred from the matters set forth therein, although the allegations of such facts are in effect conclusions of law, or are otherwise imperfect, incomplete, or defective, the insufficiency pertaining to the form rather than to the substance of the pleading, the proper mode of correction is not by demurrer nor by excluding evidence at the trial, but by motion before trial to make the averments more definite and certain by amendment.36

The court has also said that although the insertion of evidentiary matter in a complaint is bad practice and evidentiary matter can be stricken from the complaint, such insertion is not "such a vice as to call for a reversal of judgment."37

A review of a large number of appeal opinions indicates that in deciding whether a cause of action is stated in the complaint, the supreme court has been quite liberal in making inferences from complaints regardless of whether pertinent allegations of the complaints could be considered conclusions of law or statements of evidential facts.38

34 Appeal courts of different states have also disagreed as to particular statements. See examples in CLARK, CODE PLEADING, 229-230 (2nd ed. 1947). Compare examples in 1 BANCROFT, CODE PLEADING (1926) at pages 56 and 106-117. See Cook, Statements of Fact in Pleading Under the Codes, 21 Col. L. Rev. 416 (1921), for a clear challenge to the idea that there is a logical distinction between statements of ultimate facts, statements of evidential facts and statements of conclusions of law.


37 Leavenworth v. Brandon, 76 Wash. 394, 136 Pac. 375 (1913).

38 A broad statement is made in a recent per curiam opinion in Wockner v. King, 48 Wn.2d 83, 291 P.2d 649 (1955). The court said, "The Washington rule is that a complaint is not demurrable where facts substantially constituting a cause of action are alleged or are reasonably inferable from the language used. Allegations of ultimate facts and conclusions of law are good against a general demurrer. Objections to the form rather than the substance of the pleadings must be interposed by motion to make the averment more definite and certain."
Nevertheless, opinions have mentioned the necessity of pleading in terms of ultimate facts. The court has upheld trial court decisions sustaining demurers to complaints in which an essential element of a cause of action was stated in terms of a conclusion of law.\(^9\) It is obvious, too, that a motion to make definite and certain will lie to such allegations.\(^4\)

Distinctions between statements of ultimate facts, statements of evidential facts, and statements of conclusions of law are often made at the trial court level in any event.

This general situation should be compared with that contemplated under proposed rule 8. Subdivision (a) does away with technical distinctions between ultimate fact statements, evidential fact statements, and statements of conclusions of law. A pleading would not be declared insufficient to state a claim entitling the plaintiff to relief because some essential statement in the complaint was not technically a statement of ultimate fact. Allegations in a complaint which are conclusions of law or statements of evidential fact would not be considered insufficient merely because they were allegations of that nature.\(^4\)

The above results are intended by the language of the rule that a "short and plain statement of a claim" should be made. The forms promulgated with the federal rules give examples of what is considered desirable. In the official federal negligence case form (Form 9) the principal allegations of negligence are merely these: "On June 1, 1936, in a public highway called Boyleston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." A paragraph concerning resulting injuries and damage follows.\(^2\)

Even under Washington law it is arguable that this complaint is good

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\(^9\) When it was alleged that the accident which was the subject of the suit was the direct and proximate result of defendant's alleged negligence, the court held that a demurrer did not admit this conclusion of law and that the complaint was defective because the other allegations indicated that defendant's acts were not the proximate or legal cause of the accident. Cook v. Seidenverg, 36 Wn.2d 256, 217 P.2d 799 (1950). Where other allegations did not show a joint venture necessary for a cause of action to exist, a bare allegation that there was such a joint venture was held to add nothing to the complaint. Moen v. Zurich Gen. Accident and Liability Ins. Co., 3 Wn.2d 347, 101 P.2d 323 (1940). As indicated by a dissent, there was difficulty in applying this rule to a complaint in State ex. rel. Pirak v. Schoettler, 45 Wn.2d 367, 274 P.2d 852 (1954). If the conclusion is expressly drawn from the facts alleged in the complaint it should be disregarded. Hamp v. Universal Auto Co., 173 Wash. 585, 24 P.2d 77 (1933).

\(^4\) Wockner v. King, supra, note 38.

\(^2\) Although allegations are not to be stricken because they are conclusions of law, the complaint must give the defendant adequate notice of plaintiff's claim, and it is possible that in particular complaints statements of conclusions of law will not do so.

against a demurrer, although it certainly does not correspond to complaints which lawyers would now file in such a case. Our court has held a similar general allegation of negligence good against demurrer.\textsuperscript{43}

The approved federal form of complaint on a promissory note is simplified by the statement that the defendant owes plaintiff the amount sued for.\textsuperscript{44} This statement that the defendant owes plaintiff the amount of the note is substituted for the more usual allegations in complaints under the codes that the principal and interest has not been paid and that it is unpaid. The official federal form for a suit on an account is likewise simplified by a statement that the defendant owes plaintiff.\textsuperscript{45}

By abolishing the distinction mentioned, the proposed rule would thus allow more generality of statement than is allowed under the present pleading rules. But the statements in the complaint could not be so broad that the defendant would not be informed of the subject of plaintiff's claim against him.\textsuperscript{46}

On the other hand, inclusion of evidential facts in stating the claim would not make the complaint insufficient as a technical matter. Nevertheless, the complaint would have to be plain and concise in stating the claim; inclusion of too many details might make the complaint subject to a motion to strike such details.\textsuperscript{47}

\textsuperscript{43} McLeod v. Chicago, M. & P. S. Ry., 65 Wash. 62, 117 Pac. 749 (1911). In this personal injury suit of an employee against an employer the following part of the complaint, which alleged the employment, the negligence, and the injury, was held good against demurrer:

That on July 6th, 1909, plaintiff was employed by defendant as a carpenter, and was engaged in his said work for defendant on a slip at Ballard, Washington, and while the plaintiff was so engaged in his said work, the said defendant so carelessly and negligently conducted and operated the building of said slip so as to cause a plank or timber to fall from the top of said slip down to and on the plaintiff, striking the right hand of the plaintiff and greatly damaging and injuring the same.

\textsuperscript{44} Federal Rules of Civil Procedure, Appendix of Forms, Form 3. Omitting the paragraph dealing with jurisdiction and the prayer for relief, the form read as follows:

2. Defendant on or about June 1, 1935, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1936 the sum of ten thousand dollars with interest thereon at the rate of six percent per annum].

3. Defendant owes to plaintiff the amount of said note and interest.

\textsuperscript{45} Federal Rules of Civil Procedure, Appendix of Forms, Form 4. The form reads as follows:

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ten thousand dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc. as in Form 3).

\textsuperscript{46} The claim must be identified sufficiently to distinguish it from other possible claims by the statement of circumstances concerning the event, occurrence, or subject matter of the claim. Footnotes 7, 44 and 45, supra.

\textsuperscript{47} See discussion of the motion to strike, infra.
Thus, the general change in the present practice would be that complaints containing statements of conclusions of law or statements of evidential facts would be judged more liberally by the court. Complaints which rely on conclusions of law or statements of evidential fact would more likely withstand a motion to dismiss—the substitute for our demurrer. Conclusions of law would not usually be stricken on motion. Evidential facts would not be stricken on motion merely because they would have been considered such under our present rules.

It is still true, however, that a good complaint in terms of ultimate facts under our present practice would undoubtedly be a good complaint under the proposed rules. The official federal form specifically authorizes general allegations of negligence, but it is the practice in some federal courts for attorneys to file complaints containing specific allegations of negligence. As Judge Charles E. Clark stated the matter at a panel discussion when asked whether pleading ultimate facts was to be perpetuated under the federal rules,

Not in any sense of making the judge formally decide that the pleading states only ultimate facts and that everything else is erroneous. In the sense that good pleading would call for you to state those more general facts, yes. Perhaps I might say that the idea is still continued as an idea of worthwhile pleading, but not as a strict rule for which you should be hung, drawn and crucified when you don't follow it.

Statement of a Claim. Under present rules the complaint must state facts constituting the “cause of action”, whereas under rule 8 the complaint must state a “claim” entitling the plaintiff to relief. What is the effect of this change in language of the governing rule? In a general way, the language of the rule, “statement of a claim”, involves the same concept as the code language, “cause of action”. Present code pleading rules demand that the complaint must include facts which, under the applicable substantive law, will indicate that the plaintiff has a right as to the defendant and the defendant has a duty as to the plaintiff, and that the defendant has breached his duty. Obviously, under this concept in a negligence case, the complaint must allege facts showing plaintiff’s duty, his negligent act, and the proximate causation of injury by defendant’s acts.

One of the principal effects of abandoning the term, “cause of action”, is that facts which show the existence of all the elements neces-

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48 2 BENDER, FEDERAL PRACTICE FORMS 2 (1956).
50 POMEROY, CODE REMEDIES 519 (5th ed. 1929).
sary for recovery need not be stated. But a complete abandonment of the "cause of action" concept would not result, for under the rule the complaint still must state a claim which entitles the plaintiff to relief. A motion to dismiss the complaint made under rule 12 on the ground that the complaint does not state a claim which entitles the plaintiff to relief raises the basic question whether under any state of facts which could be proved in support of the claim the complaint states a claim entitling plaintiff to relief. To this extent the complaint would still contain statements which show that the plaintiff has a "cause of action" in the sense in which that term is presently used.

In view of this test for the complaint, it would be proper and desirable for a complaint to be drafted in the light of legal theories. A complaint cannot be drafted very successfully under code pleading rules if the drafter does not have in mind some legal theory under which the facts he alleges will give the plaintiff a right to recover. The same situation would exist under proposed rule 8. If the drafter of the complaint under the federal rules has no legal theory or theories in mind when he attempts to state the claim of plaintiff, it is mere accident if the complaint states a claim which will entitle the plaintiff to relief. Therefore, under rule 8 statements of the claims should reflect legal theory, just as complaints now should.

Perhaps the most convenient method of ascertaining what is desirable would be to glance at the various form books cited for use under the federal rules. The forms for complaints recommended for federal cases do not appear greatly different, by and large, from similar complaints which should be used in code pleading.

To summarize, the overall change that would be made by rule 8(a) is a change in the direction of less technicality in the drafting and in the judging of complaints. Generality in complaints is authorized. The complaint and the answer would not be designed particularly to make specific and detailed issues of fact. The chief function of these plead-

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51 See discussion of motion to dismiss, infra.
52 The official federal forms and the forms suggested in unofficial form books for federal practice clearly reflect legal theories.
53 In a famous case plaintiff, with "limited ability to write and speak English" served a complaint "obviously home drawn" in which he detailed grievances against the Collector of Customs at the Port of New York. The court on appeal concluded that the complaint showed a claim of conversion and a second violation of a legal duty by the defendant and reversed a dismissal of the complaint. Although the complaint apparently did not state ultimate facts as required in code pleading, and was in the nature of an inartistic recital of some events, the court resorted to applicable law to ascertain whether a claim entitling the plaintiff to relief was stated. Dioguardi v. Durning, 139 F.2d 774 (2d cir. 1944).
54 2 Moore, Federal Practice 1656-1658 (2d ed. 1948).
ings would be to give fair notice to the opponent, to indicate the res judicata effect of any judgment in the case, and to indicate the general issues. The discussion of the motion to make definite and certain under rule 12 is closely related to this matter.

**Prayer for Relief.** The proposed rule states that the prayer for relief is not determinative of the relief which the court is authorized to grant. No holding or holdings completely cover this matter in our state, but in some cases this rule is mentioned. Most complaints are now drafted to include a general prayer for relief. Such prayers will justify a judgment (other than a default judgment) in accordance with facts alleged in the complaint and the evidence.

The proposed rule does not authorize default judgments beyond the relief sought in the complaint. This result would be similar to the present Washington rule.

Not only the complaint, but also counterclaims under rule 13, cross-claims under rule 13, and third-party claims under rule 14, are governed by rule 8(a). In addition, the principles for stating a claim presumably govern the statement of an affirmative defense in the answer.

**Changes in the federal rule.** The deletions from the federal rule in paragraphs (a) and (b) of proposed rule 8 are provisions relating to practice in federal courts. Express allegations showing jurisdiction (usually on the basis of diversity of citizenship or on the basis that a federal question exists) are required in federal court. Such allegations are not necessary in our superior courts.

**Defenses; Form of Denials.** No sweeping changes in the present rules governing denials in answers are contemplated by proposed

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55 See for example Colvin v. Clark 83 Wash. 376, 145 Pac. 419 (1915); Dale v. Cohn, 14 Wn.2d 214, 127 P.2d 412 (1942); Prichard v. Conway, 39 Wn.2d 117, 234 P.2d 872 (1951). Broad dictum can be found in many cases. The amount of damages prayed for fixes a maximum limit of recovery. Olwell v. Nye & Nissen Co., 26 Wn.2d 282, 173 P.2d 652 (1946). The amount of attorney’s fees prayed for was held to be the maximum limit for recovery in Lundsten v. Langert, 149 Wash. 49, 149 P.2d 544 (1943) and cases cited therein; State ex rel Adams v. Superior Court, 36 Wn.2d 858, 220 P.2d 1081 (1950); Miller v. Miller, 32 Wn.2d 438, 202 P.2d 277 (1949).

56 This rule has been referred to in a number of cases on appeal. See for example, Loutzenhiser v. Peck, 89 Wash. 435, 154 Pac. 412 (1916); Salt v. Anderson, 107 Wash. 149, 180 P. 873 (1919).

57 Federal Rules of Civil Procedure, Rule 55 provides: “A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.” Although this rule is not included in the proposed rule, the proposed rule will undoubtedly be read with this restriction.

58 Relief in case of default judgments cannot exceed the relief prayed for. Erney v. Erney, 18 Wn.2d 544, 139 P.2d 1016 (1943) and cases cited therein; State ex rel Adams v. Superior Court, 36 Wn.2d 858, 220 P.2d 1081 (1950); Miller v. Miller, 32 Wn.2d 438, 202 P.2d 277 (1949).
rule 8(b). Both specific denials and general denials are permitted. However, proposed rule 11 emphasizes the obligation of the attorney who signs an answer containing a general denial. Under that rule he certifies that there is good ground for such an answer to the best of his knowledge, information, and belief and that such an answer is not interposed for delay. As is already the case in this state, denials on information and belief are permitted. Denials which amount to a negative pregnant would probably be treated as they are now treated. It appears that an amendment to remedy such a defect should usually be allowed under our present rules and similar treatment should be anticipated under the proposed rule.

Affirmative defenses. Rule 8(c) provides that certain specific matters be alleged as affirmative defenses. A check of Washington cases indicates that all of the defenses listed would now probably be considered affirmative defenses in this state.

The list of affirmative defenses in the rule is not exclusive; other matters are required to be stated as affirmative defenses. For this purpose rule 8(c) embodies the rule of code pleading that distinguishes between matters which should be alleged affirmatively in the answer and matters which may be proved at the trial under denials in the answer. The factors now considered in deciding whether particular defenses not listed in the rule are affirmative defenses for the purposes of the answer would also be considered under the proposed rule. If our
court has decided that a particular matter not listed in rule 8 is an affirmative defense to be stated in the answer, such matter would probably continue to be an affirmative defense for such purpose. In spite of the distinction between affirmative defenses and other matter, there is authority for a ruling that when matters which are not affirmative defenses are pleaded affirmatively under the proposed rule, the defendant will not lose such defenses.  

It is particularly important to note that the rule affects only the answer. It is only a pleading rule and is not intended to lay down any rule concerning the burden of proof with respect to the listed defenses at the trial. Present Washington law concerning burden of proof questions in connection with specific defenses would probably still control. This result would follow from the possibility that rules governing burden of proof are rules of substantive law and not matters of procedure to be governed by court rules.

Finally, the last sentence of rule 8(c) simply indicates that a party is not to be penalized for mislabeling an affirmative defense or a counterclaim. The court should treat the matter in the answer for what is really is.

**Effect of Failure to Deny.** Rule 8(d) involves no change from the present general rule in Washington concerning the effect of failure to deny averments when a responsive pleading is required. Such averments are admitted at present and they would be admitted under the proposed rule. The second sentence of rule 8(d), and the provisions of rule 7, indicate that if no order for a reply to an affirmative defense is sought by either party and there is no reply, an affirmative matter of avoidance may be brought into the case by the plaintiff. This is not the rule in Washington. It seems possible that surprise to the defendant might result in some cases, but in many instances the defendant could avoid surprise by proper investigation of the facts and effective use of discovery rules. In addition, if a defendant in the pleading stage had a real question concerning the possible nature of plaintiff's position on an affirmative defense, he could request an order for a reply under rule 7.

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in the case of the federal rule, necessary to state a claim entitling plaintiff to relief. See Morse v. McGrady, 149 Wash. Dec. 489 (1956).

63 Best Foods, Inc. v. General Mills, Inc., 59 F. Supp. 201 (Del. 1945) (refusing to strike matter which could be proved under a denial but which was stated affirmatively).

64 RCW 4.36.160. (But the section does not require a response to affirmative matter in the reply.)

65 Footnote 18, supra.
Consistency in Pleading. Rule 8(e)(2) makes some fairly important changes in the present practice.

The rule now seems to be that inconsistent causes of action cannot be included in the same complaint. Our supreme court has been liberal in holding that various causes of action are not inconsistent factually, but absolute factual inconsistency between causes of action will not be tolerated if objected to. Furthermore, if substantive law requires an election of remedy so that causes of action are made inconsistent, it appears that such causes cannot be included in one complaint if objection is made. Under the proposed rule factual inconsistency or inconsistency of legal theory would not bar the inclusion of inconsistent and contradictory claims in one complaint.

Official federal form 10 indicates what it is possible to do. The form contains the following allegation (plus allegations of jurisdiction and damage). "On June 1, 1936, on a public highway called Boylston Street in Boston, Massachusetts, defendant C.D. or defendant E.F., or both defendants C.D. and E.F., wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway."

The proposed rule cannot change substantive law governing election of remedies, but it appears that the complaint, at least, would not be affected by such law. If the complaint included two causes of action between which the plaintiff must elect under rules which are regarded as rules of substantive law, a motion to elect at the pleading stage would probably be denied. If any election were to be required it would probably have to come at some later stage in the proceeding. For as

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60 Bernot v. Morrison, 81 Wash. 538, 143 Pac. 104 (1914); Willis T. Batchellor Inc. v. Welden Const. Co., 9 Wn.2d 392, 115 P.2d 686 (1941) (dictum); Washington Cooperative Chick Assn. v. Jacobs, 42 Wn.2d 460, 256 P.2d 294 (1953). Various allegations involving different theories may be included. For example plaintiff may plead facts showing liability for trespass and negligence in the same transaction and he will not be required to elect. Pacific Telephone and Telegraph Co. v. Slezak, 151 Wash. 457, 276 Pac. 904 (1929). See Starwich v. Ernst, 100 Wash. 198, 170 Pac. 584 (1918) (breach of warranty of deed and false representation as to building on land conveyed); Holm v. Chicago, M. & P.S. Ry, 59 Wash. 293, 109 Pac. 799 (1910) (express contract and implied contract plead alternatively); Buckley v. Massachusetts Bonding & Insurance Co., 113 Wash. 13, 192 Pac. 924 (1920) (accidental death or wrongful death inflicted by another).

61 No good illustrative Washington case directly holding to this effect has been discovered. The statement is an inference from various cases involving election of remedies.


64 In Vern-Severin Machine Co. v. John Kiss Sons Textile Mills, Inc., supra note 39, the court rejected an objection to a counterclaim on the ground that it sought rescission of a contract and also damages for breach of implied warranty, but stated it would require defendant to elect during the trial. See also Neumann v. Bastian-Blessing Co., 9 F.R. Serv. 8c. 611, Case 1, (N.D. Ill. 1946).
a matter of procedure, the complaint could include inconsistent claims regardless of the reason for their inconsistency.

The obvious purpose of the rule is to permit the pleading to cover possible states of fact which may be shown at the trial but with respect to which the pleader is presently uncertain. For similar reason, factually inconsistent defenses would also be permitted rather than prohibited as at present.\textsuperscript{71}

Generally speaking, hypothetical allegations are subject to objection in code pleading states.\textsuperscript{72} They are clearly allowed under the proposed rule.

A present Washington rule would be cancelled by the second sentence of subdivision (2), which states that a pleading is sufficient though one of two alternative statements is not sufficient. The present Washington rule is based in part on dry logic and to that extent seems unrealistic.\textsuperscript{73}

On an overall basis would the above changes be desirable? Perhaps the most important question is whether an opponent would be prejudiced. It seems that the opponent would not be prejudiced unless he could not make out the pleader's claims in view of the nature of the alternative or hypothetical pleadings used by the pleader. Under such circumstances the opponent could attack the pleading by motion to make definite and certain or by motion to strike.\textsuperscript{74} Rule 10 provides that different claims and defenses should be stated separately and that claims and defenses should be stated clearly and concisely. This admonition of the rules can be enforced.\textsuperscript{75} Discovery devices and summary judgment procedure could also be used. Affirmatively, the rule affords an advantage to the pleader because it enables him to cover unforeseen and unknown exigencies concerning the facts which may arise at the trial. Harking back to the primary objective of pleadings under all of the proposed rules, pleadings that contain permissible allegations and denials under rule 8 would still give notice of the claims of the pleader and make general issues.

\textbf{Construction of Pleadings.} Rule 8(f) contains a familiar liberal construction rule. The legislature already has directed our courts to

\textsuperscript{71} The Washington rule is liberally interpreted. It has been said that the defenses must be "utterly inconsistent," Seattle National Bank v. Carter, 13 Wash. 281 (1895), and that one in fact must contradict the other. Dooley v. Mesher, 168 Wash. 451, 12 P.2d 406 (1932).

\textsuperscript{72} \textsc{Bancroft, Code Pleading} 51-52 (1926).

\textsuperscript{73} The Washington rule is stated in Price v. Gabel, 162 Wash. 275, 293 Pac. 444 (1931); McNamara v. Hall, 38 Wn.2d 864, 233 P.2d 852 (1951).

\textsuperscript{74} See discussion of Rule 12, infra.

\textsuperscript{75} See discussion of Rule 10, infra.
take a liberal attitude under present pleading rules and the proposed rule would direct nothing new or different. The liberal attitude commanded has often been reflected in supreme court opinions and in actions at the trial court level.

Proposed Rule 9

PLEADING SPECIAL MATTERS

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, [except to the extent required to show the jurisdiction of the court]. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader’s knowledge.

(b) Fraud, Mistake. Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

Rule 9 is less important than rules 7, 8 and 12. Apparently the framers of the rule felt that the pleading of the special matters listed had previously caused difficulties in the federal courts and could be clarified in connection with the present federal pleading system. Recognizing the desirability of having these matters dealt with specifically, all of

\(^{76}\) RCW 4.36.050.
the states which have adopted the federal rules have adopted rule 9
with the change indicated in the quotation above or with paragraphs
indicating how additional specific matters should be pleaded.

The clause deleted from the federal rule is related to the require-
ments of federal rule 8(a) that there be special allegations to show
jurisdiction of the federal court. As previously stated, proposed rule
8(a) properly deletes such a requirement.\textsuperscript{77}

**Capacity.** Rule 9(a) eliminates the necessity for averments of
capacity of the plaintiff to sue or the defendant to be sued. The central
theory in support of such rule is that capacity is not a real issue in
many suits, and that allegations necessary to show capacity to sue or
be sued are often merely formal.\textsuperscript{78} Pleadings are simplified and issues
of capacity are made only in cases in which capacity is actually a mat-
ter of contention. In such cases the defendant is to raise it as a matter
of defense.

The rule applies strictly to matters of capacity such as corporate
existence and representative capacity. It should be noted, however, that
it refers to "averments", and that it does not refer to the caption of a
pleading. Thus, in the case of a corporation, there need be no averment
of the organization and existence of the corporation, but the caption
should contain the corporate name. Or in the case of suit by or against
a representative, there need be no averment of the authority to act in
such a capacity, but the fact that the suit involves such a party should
be indicated in the caption.\textsuperscript{79} In this connection it should be added that
the rule is not intended to affect allegations of representation in a class
suit.\textsuperscript{80}

The rule goes on to state that the issue of capacity shall be raised
by answer. Nevertheless, an issue of capacity has been raised by mo-
tion to dismiss under federal rule 12.\textsuperscript{81} Practically speaking, there may

\textsuperscript{77} See discussion of rule 8(a), supra.

\textsuperscript{78} Federal Rules of Civil Procedure and Proceedings of the American Bar Associa-
tion Institute, Cleveland 234 (1938); 2 Moore, Federal Practice 1903 (2d ed. 1948).

\textsuperscript{79} This matter is discussed in further detail in 2 Moore, Federal Practice 1903-1906
(2d ed. 1948).

\textsuperscript{80} The complaint should indicate when a class suit is brought within proposed rule
23. See discussion of rule 23 in the next issue of the review.

which are contra include Syracuse Broadcasting Corp. v. Newhouse, 18 F. R. Serv. 128.334, Case 1, 14 F.R.D. 168 (N.D.N.Y. 1953) (motion to dismiss); Waldrip
v. Liberty Mutual Ins. Co., 15 F.R. Serv. 9a.4, Case 1, 11 F.R.D. 426 (W.D. La. 1951)
(motion for judgment and new trial). It has also been said that if the issue of capacity
appears on the face of the pleading (as would rarely be the case), the issue may be
raised by motion. Brusch v. Harkins, 13 F.R. Serv. 9a.4, Case 2, 9 F.R.D. 604 (W.D.
Mo. 1949).
be nothing wrong with such a procedure, but technically, it is not in compliance with the wording of this rule or rule 12. That rule states no such ground for a motion to dismiss.

A provision makes it clear that if the matter is to be pleaded in the answer and the defendant does not have complete facts at hand, he needn't plead a complete fact defense.

A change in Washington practice would result. No longer would a demurrer for lack of capacity of the plaintiff be used. It would not be necessary, as is now the case, to allege facts showing the capacity of a party.

**Fraud, Mistake, Condition of Mind.** Rule 9(b) would make little change in present Washington procedure. For example, in pleading fraud the plaintiff now must state the fraud in terms of ultimate facts by pleading the representations made, that they relate to material facts, that they are false, that defendant knew they were false (if such knowledge is essential in the case), that plaintiff was ignorant of their falsity and believed them to be true, and that so believing he acted upon them. The rule does not appear to contemplate a change in this method of pleading. Usually, good pleading of fraud under our present rules would be a good pleading of fraud under the proposed rule.

The same conclusion should hold good as to the pleading of mistake.

Finally, under the proposed rule, malice, intent, knowledge, and other conditions of the mind may be averred generally. But the nature of the present state of mind must be indicated sufficiently to show the nature of the defense or claim related to the state of mind. At present, the propriety of generally pleading a state of mind depends upon the particular action.

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82 RCW 4.32.050.
83 No clear support for the idea that a representative must allege his authority or that a corporation must allege its organization and existence has been found. However, these requirements seem to be assumed in Harvey v. Pocock, 92 Wash. 625, 159 Pac. 771 (1916) (executor); Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119 (1901) (executor); and McKay v. Elwood, 12 Wash. 579, 41 Pac. 919 (1895).
84 Simons v. Cissna, 52 Wash. 115, 100 Pac. 200 (1909); Roser v. Moomaw, 78 Wash. 653, 139 Pac. 622 (1914).
86 Under the usual code pleading rules, malice may be alleged generally. 3 BANKROFT, CODE PLEADING 2979 (1926). It may be so pleaded in a complaint for malicious prosecution. Jones v. Jenkins, 3 Wash. 17, 27 Pac. 1022 (1891). But to state that an act is wilful, or intentional may be a conclusion of law. 1 BANKROFT, CODE PLEADING 107 (1926). As in fraud cases, knowledge can be alleged directly. Scribner v. Palmer, 81 Wash. 470, 142 Pac. 1166 (1914).
Conditions Precedent. The provision that performance of conditions precedent may be generally averred incorporates the present rule in Washington as to pleading of conditions precedent in a contract action. However, the rule is broader than the Washington statute concerning contract conditions precedent because it is not limited to contract actions in terms. This type of pleading is often convenient and useful, and usually involves no injury or inconvenience to a defendant.

As is true now, fulfillment of conditions precedent or waiver of such conditions would usually have to be pleaded. And also as at present, it would not be necessary to plead fulfillment of conditions subsequent. Nor does the proposed rule affect questions of whether particular conditions are conditions precedent or conditions subsequent.

The provision for a denial to raise the issue of performance of a condition precedent is not intended to affect any rules concerning the burden of proof at the trial. Our present statute dealing with conditions precedent would not be affected insofar as it deals with this burden.

Official Document or Act. Since rule 9(d) provides that in pleading an official document or act it is sufficient to aver that the document was issued, or the act done, in compliance with law, it would not be necessary for a pleading to state facts showing that the official act or document was authorized. This rule does not affect proof of such acts or documents at the trial. It does not affect judicial notice doctrines with respect to such acts or documents. The acts of officials or documents referred to are acts or documents issued by governmental officers in their official capacity.

The present rules and statutes governing the pleading of foreign statutes, private statutes, municipal ordinances, and the existence of cities or towns, would not be affected.

Judgment. Rule 9(e) requires little comment for it would merely replace and broaden RCW 4.36.150, which dispenses with the necessity of pleading facts to show the jurisdiction of a court or officer of special jurisdiction (in pleading a judgment). The rule would also extend the present case law that it is not necessary to plead the facts showing

88 RCW 4.36.080.
89 Note 88, supra.
90 1 BARRON AND HOLZOFF, FEDERAL PRACTICE AND PROCEDURE 553 (1950).
91 RCW 5.24.040 (foreign laws), RCW 4.36.090 (private statutes), RCW 4.36.110 (ordinances), RCW 4.36.100 (existence of towns and cities).
jurisdiction of a foreign court of general jurisdiction when its judgment is pleaded. Under the proposed rule, such pleading of facts is not necessary when the judgment of an inferior tribunal is pleaded.

Rule 9(e) would accomplish a minor simplification in pleading without sacrificing any substantial advantage the defendant now has.

Time and Place. Under proposed rule 9(f) allegations of dates are material. As explained in connection with proposed rule 12, some federal courts have held that a motion to dismiss may be made on the ground that the complaint shows that the applicable statute of limitation bars the suit. To this extent the rule would not change Washington practice, for a demurrer will now lie if it appears from the face of the complaint that an action is barred by the statute of limitations.

However, the rule does not mean that specific allegations of time and place must necessarily be included in a complaint. They need not be included if they are not necessary to state a claim and are not material to any defense.

It is probable that amendments could cure erroneous allegations of time and place; and as in Washington now, variances in proof would be immaterial if the defendant were not misled.

Special Damage. Proposed rule 9(g) merely adopts the general rule in Washington. Whatever special damages must now be pleaded for recovery in this state presumably would have to be pleaded under the proposed rule.

Proposed Rule 10

FORM OF PLEADINGS

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number if known to the person signing it, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. When the plaintiff is ignorant of the name of the

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93 Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125 (1900).
94 RCW 4.32.050. But the return of service may not be referred to. It is not part of the complaint. Dolan v. Baldrige, 165 Wash. 69, 4 P.2d 871 (1931).
95 Bleecker v. Drury, 7 F.R. Serv. 981, case 1, 3 F.R.D. 325 (W.D.N.Y. 1944).
96 Breeden v. Seattle, Renton & S. R. Co., 60 Wash. 522, 111 Pac. 771 (1910), (place); Wilbert v. Sturgeon, 118 Wash. 551, 204 Pac. 185 (1922) (place).
97 King v. King, 83 Wash. 615, 145 Pac. 971 (1915); Sudden & Christenson v. Morse, 48 Wash. 101, 92 Pac. 901 (1907).
defendant, it shall be so stated in his pleading, and such defendant may be designated in any pleading or proceeding by any name, and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

When the heirs of any deceased person are proper parties defendant to any action relating to real property in this state, and when the names and residences of such heirs are unknown, such heirs may be proceeded against under the name and title of the "unknown heirs" of the deceased. In any action brought to determine any adverse claim, estate, lien, or interest in real property, or to quiet title to real property, unknown parties shall be designated as "also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein."

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each 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. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Caption and Names of Parties. A few changes have been made in the federal rule from which proposed rule 10(a) was taken. In the first sentence a provision, "if known to the person signing it", has been added. This is a very minor change. Because the complaint is filed with the clerk at the commencement of the suit under the federal rules, it may originally be assigned a file number. In Washington it is possible that pleadings may not be filed until after the suit is at issue, and consequently it is desirable to qualify the requirement that every pleading shall contain the file number.

The last sentence and the second paragraph of the proposed rule have also been added to the federal rule. These provisions were copied from RCW 4.36.230, 4.28.130 and 4.28.150, which do not make it necessary to state the actual names of the parties under the outlined circumstances. Similar additions have been made to this rule in a number of the states which have adopted it.

With the modifications indicated, rule 10(a) involves virtually no changes from present practice.
Paragraphs and Separate Statements. Copied verbatim from the federal rule, rule 10(b) is aimed at promoting clarity of pleadings. Two distinct requisites are set forth. First, the averments of a claim must be paragraphed as far as practicable, each paragraph to be limited to the statement of a set of circumstances. Second, each claim or each defense other than a denial shall be set forth separately.

The first rule is substantially the same as the present Washington rule which provides that each cause of action, defense, etc. shall be divided into paragraphs according to the subject matter.99 Paragraphing is mandatory under the proposed rule but the addition of the words, "so far as practicable," gives some leeway to the pleader in paragraph construction. It seems apparent that the present rule and the proposed rule demand paragraphs based on the principles of good English composition.

The second rule is qualified in its requirement that claims and defenses be stated in separate counts or defenses. The qualification is accomplished by the clause that such separate statement is only required "whenever a separation facilitates the clear presentation of the matter set forth." To this extent the proposed rule differs from the present rule requiring separate statement of causes of action and defenses.100 If the claims related to different transactions, or different plaintiffs, or different defendants, they would usually be clarified by presentation in separate counts. Sometimes, as between the same parties, however, claims which relate to the same transaction could be included in one count at the discretion of the pleader.100 In almost any situation where there are separate claims the rule would seem to authorize the pleader to state separate claims in separate counts if he desired.

Separate Claims. In the discussion of rule 8(a) it has been pointed out that the term, "claim," does not have exactly the same meaning as the term "cause of action". There is a further difference between a "claim" and a "cause of action" which is pertinent to this rule that

99 Rule 1, General Rules of the Superior Courts, 34A Wn.2d provides that each cause of action or defense, reply or counterclaim "shall be divided into paragraphs according to the subject matter, and each paragraph shall be numbered consecutively ... ."

100 Rule 1, General Rules of the Superior Courts, 34A Wn.2d; RCW 4.32.090 (defenses to be stated separately); RCW 4.36.220 (allows motion to strike when causes of action and defenses are not pleaded separately).

100 If the complaint gives fair notice, a motion to separately state the claims involved may be refused. Trebuh Realty Co. v. News Syndicate Co. 16 F.R. Serv. 106, 21, Case 2, 12 F.R.D. 110 (S.D.N.Y. 1951).
claims be stated separately. A cause of action for purposes of separate statement has traditionally been defined as a right of plaintiff, the corresponding duty of defendant, and the violation of such duty, when the law is applied to the facts at hand.\(^\text{101}\) In contrast, the central idea of the term "claim", in connection with separate statements of claim, is the idea of the term, "transaction".\(^\text{102}\) From this standpoint a claim will cover any group of facts unified in actual life. Or as it has been otherwise stated, a claim is "an aggregate of operative facts."\(^\text{103}\) A few random examples from federal cases illustrates this idea. Thus it has been held that claims for negligent wrongdoing and intentional wrongdoing arising from one event need not be separately stated.\(^\text{104}\) A negligence claim for injuries from a fall and from defendant's subsequent failure to treat the injuries did not require separate statement of claims.\(^\text{105}\) On the other hand a suit for libel which also contained an allegation of slander was said to involve two claims—the publication of the document and the oral circulation of the same statements.\(^\text{106}\)

For the purpose of separate statement and numbering of causes of action, a cause of action does not seem to be clearly defined in the Washington cases. In some cases it appears that a broader viewpoint is taken than in others, but to the extent that the more traditional concept of a cause of action is used, the federal rule would make a change.\(^\text{107}\)

\(^{101}\) Pomeroy, Code Remedies, 519-520 (5th ed. 1929).
\(^{102}\) 2 Moore, Federal Practice 354-396 (1948).
\(^{103}\) Clark, Code Pleading 137-148 (2nd ed. 1947). There apparently has been divergence from this concept in some federal cases.


\(^{105}\) McCormick v. Moore-McCormack Lines, 7 F.R. Serv. 10b.21, Case 1, (E.D. Pa. 1943).


\(^{107}\) The cases concerning the pleading of an express contract and a quasi-contract theory for recovery are somewhat typical. In Holm v. Chicago, Milwaukee & P. S. R., 59 Wash. 293, 109 Pac. 799 (1910), the plaintiff pleaded these grounds in one cause of action and it was held that the trial court properly refused a motion to separate and elect, the court stating that there was but one cause of action. But in Staples v. Esary, 130 Wash. 521, 228 Pac. 514 (1924), the court states that a plaintiff may plead two causes of action alternately—one on the express contract and one on quantum meruit. That these grounds may be pleaded separately seems to be assumed in Holmes v. Radford, 143 Wash. 644, 255 Pac. 1039 (1927). That they may be pleaded in one count seems to be assumed in Adjustment Department, Olympia Credit Bureau v. Norman Brostrom, 15 Wn.2d 193, 130 P.2d 67 (1942). The point was not at issue in these latter two cases.

A somewhat liberal viewpoint of a cause of action for the purpose of separate statement is taken in Lloyd v. Fidelity National Bank, 169 Wash. 107, 13 P.2d 504 (1932) (suit in connection with usurious interest payment on several loans was treated as one cause of action); Hutchison v. Mt. Vernon Water and Power Co., 49 Wash. 469, 95 Pac. 1023 (1908) (suit to establish water rights based on riparian ownership, appropriation, and contract could be stated in one count); Hurley-Mason Co. v. Pacific Commissary Co., 111 Wash. 439, 191 Pac. 624 (1920) (the court stated that an account
The proposed rule would not be enforced by a motion to dismiss for failure to state claims separately. Instead, the proper motion should seek to require separate statement of claims.\textsuperscript{108}

Adoption by Reference; Exhibits. Rejecting the traditional objection that any adoption by reference makes a pleading incomplete and confusing, proposed rule 10(c) enables the pleader to avoid repetition and undue length in his pleading.

The provision for adoption by reference to other parts of the same pleading would continue the present Washington rule that such a pleading is not bad on demurrer.\textsuperscript{109} Reference to other pleadings does not seem to be specifically authorized by any case or rule in this state.

The authorization for making exhibits a part of a pleading would not make much change in Washington rules. At present an instrument which forms the basis of a suit may be attached as an exhibit and made part of the pleading.\textsuperscript{110} No case has been found which now authorizes other instruments which are not the basis of the complaint to be incorporated into the complaint by attachment as an exhibit.\textsuperscript{111} If the pleader now attaches such instruments he may be incorporating evidential facts in his pleading.

\textbf{Proposed Rule 11}

\textbf{Signing of Pleadings}

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall

\textsuperscript{108} Starwich v. Ernst, 100 Wash. 198, 170 Pac. 584 (1918) (suit for false representation and breach of warranty of a deed relating to same transaction was said to involve one cause of action which may be stated in one count. "In other words, separate and distinct acts, culminating in one result and giving rise to but one liability, do not require statement in separate counts . . . "). See also Barto v. Nix, 15 Wash. 563, 46 Pac. 1033 (1896).

\textsuperscript{109} Hays v. Dennis, 11 Wash. 360, 39 Pac. 658 (1895).

\textsuperscript{110} RCW 4.36.040 does not appear to authorize such an attachment. In Gregory v. Seattle, 32 Wn.2d 836, 239 P.2d 349 (1951), the supreme court considered plaintiff's
sign his pleading and state his address. Except when otherwise specifically provided by rule [or statute], pleadings need not be verified or accompanied by an affidavit. [The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished.] The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

The rule is self-explanatory and in the federal courts no important difficulties have arisen as far as can be ascertained. But perhaps a few comments are warranted. The rule is based on the premise that it is more realistic to have the attorney certify to pleadings than it is to have the client who is represented by an attorney swear to them. The drafting of pleadings is often a technical matter; and therefore the attorney is made responsible for them, with emphasis on his obligation to act in good faith.

Except in the case of a flagrant violation of the rule, it does not seem that a court should strike the pleading for lack of compliance and proceed as though there had been no pleading. A client might be penalized without sufficient warrant should such action be taken. If a party is not represented by counsel, however, this is the only method for enforcement.

The rule applies to motions as well as pleadings.

Our present general requirements for verification of pleadings would be abrogated. This result is emphasized by the fact that the federal rule is changed by deletion of the provision for verification if verification is required by statute. This deletion seems a necessary revision to make clear that the proposed rule would replace our general statutes

appeal from a judgment of dismissal after the trial court had sustained a demurrer to the complaint. In deciding whether the complaint stated a cause of action, the court took into account two photographs which were attached to and made a part of the complaint.


The court may grant leave to sign an unsigned pleading. Universal Laboratories, Inc. v. V. Vivandau, Inc. 8 F.R. Serv. 11.51, Case 1 (S.D.N.Y. 1944).

Proposed rule 7(a) (2).

RCW 4.36.010, RCW 4.36.020, and RCW 4.36.030.
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requiring verification of pleadings. Complaints which accompany applications for restraining orders would not have to be verified. Unless a contrary rule defining the scope of the proposed rules is added, it appears that the signing of confessions of judgment under RCW 4.60 would not be affected, nor would there be any effect on the requirement for a verified petition mentioned in RCW 6.36.030 in connection with registration of foreign judgments.

Proposed Rule 12

DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—
BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

(Subdivisions are reproduced below)

General Summary. Rule 12 is designed to afford the defendant a simple method of pleading his defenses. Yet it should insure notice of defenses to the plaintiff. These objectives are promoted by the provisions that all defenses can be made by the answer and that such defenses may be inconsistent. But it is recognized that certain defenses are fairly and conveniently raised by motion, and those defenses are listed in the rule. Except for the defense of lack of jurisdiction over the subject matter, the defense of failure of a complaint to state a claim entitling the plaintiff to relief, and the defense of failure to join an indispensable party, all of the listed defenses not made by the designated motions or by the answer are waived as explained below. In the main, a two-stage defense is thus provided for in the pleading stage of a suit—first, the listed motions may be used, and second, an answer may be made. Motions to challenge jurisdiction, or preliminary motions for change of venue, are not authorized prior to the making of other motions under rule 12(b).

Rules as to defenses are to apply to defenses to counterclaims and cross-claims under rule 13 and to defenses to third-party complaints under rule 14.118

Excluding certain preliminary motions and procedures such as special appearances to challenge jurisdiction over the person, our present rules generally contemplate two stages of defense—the stage of motions and demurrer, and the stage of answer.

116 Supra, note 115.
117 This change does not seem to have any important significance.
118 An excellent summary of federal rule 12 is contained in 2 Moore, Federal Practice 2219-2223 (1948).
Proposed Rule 12(a)

(a) When Presented. A defendant shall serve his answer [within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4(e).] within the following periods: (1) within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him; (2) within 20 days, exclusive of the day of service, after the service of the summons without the complaint upon him, if he fails to appear within 10 days after such service of summons; (3) within 10 days after the service of the complaint upon him or his attorney where the defendant has appeared after service of summons and the complaint has been served in accordance with Rem. Rev. Stat. Section 224, R.C.W. Section 4.28.060; (4) within 60 days from the date of first publication of the summons if the summons is served by publication in accordance with the laws of 1953, Ch. 102, Section 1, RCW Section 4.28.100 and Rem. Rev. Stat. Section 233, RCW Section 4.28.110; (5) within 60 days after the service of the summons upon him if the summons is served upon him personally out of the state in accordance with Rem. Rev. Stat. Section 234, R.C.W. Section 4.28.180; (6) within the period fixed by any other applicable statutes or rules. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. [The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted.] The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court’s action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

Changes in the Federal Rule. Federal rule 4 provides for the commencement of suit by filing a complaint with the clerk, whereupon a summons will be issued by the clerk. Federal rule 12(a) properly relates a twenty-day time period for answer to service of summons under federal rule as indicated in the above quotation of the federal rule in brackets.

But, as already pointed out, proposed rules 7 through 25 would not change Washington methods of beginning a suit, which are different
from the method outlined in the first part of federal rule 4.\textsuperscript{110} At the same time, our present statutes on commencement of suit outline various times for answer. Therefore, proposed rule 12 should continue these present periods for answer. It does so by the changes in federal rule 12(a) italicized in the quotation above.

To accomplish such a result it appears that the proposed rule could have stated that the defendant should serve his answer within such times as are required by applicable rules and statutes. By such a general wording, the times for answer or appearance in connection with present methods for service of process would be preserved. The proposed change, however, deals with the matter more specifically. It takes into account in more detail the presently authorized methods of beginning a suit in this state and should be read in connection with the applicable statutes on that subject.

Clause (1) of proposed Rule 12(a) takes into account the present method of commencing a suit by the service of summons and complaint.\textsuperscript{120} Clauses (2) and (3) take into account the present method of commencing a suit by service of summons without the complaint as governed by RCW 4.28.060. Pursuant to that section a suit may be commenced by service of summons without the complaint, provided that the summons notifies the defendant that the complaint will be filed within five days after service of the summons. If the defendant appears within ten days from the date the summons alone is served upon him, then the statute provides that plaintiff must serve a copy of the complaint within ten days of the appearance. The defendant shall then have ten days after service of the complaint to answer. Clause (3) states the time for answer in this situation. If the defendant does not appear within ten days after such service of summons, it is logical to assume that under the statute the complaint need never be served on the defendant, but that the suit is commenced and appearance must be had in the regular twenty-day period (at least if the complaint has been filed within the five day period).\textsuperscript{121} Clause (2) provides for answer in this situation.

Our present statutes make it possible to file the complaint and then

\textsuperscript{110} See discussion of federal rules 1 through 6, supra.

\textsuperscript{120} When summons and complaint are served the defendant is to appear in twenty days. RCW 4.28.030, RCW 4.28.040, RCW 4.28.050 and RCW 4.28.060.

\textsuperscript{121} RCW 4.28.060. No case has been found to support the conclusion that if defendant does not follow the procedure of appearance in ten days he should appear within the regular twenty day limit (provided the complaint is filed within five days of the service). This result may be inferred from the statute even though it is not directly stated.
serve summons and complaint. Clause (1) of proposed Rule 12(a) would govern. It also seems theoretically possible at present to file the complaint and then serve the summons without the complaint, stating either that the complaint will be filed in five days or that it has been filed. In that case either clause (2) or clause (3) would seem to govern, depending on whether defendant appeared within 10 days.

The remaining clauses as to time of answer do not need explanation. They refer to other statutory periods of time for appearance.

There are two important questions which arise with respect to the clauses just discussed. Would the procedure of serving a notice of appearance be affected by the statements in the proposed rule that the answer shall be filed in a specified number of days? Would present default procedures be affected?

These questions are raised by the fact that under the federal rules a defendant is in default if he does not serve an answer (or a motion under rule 12 which postpones answer) within the time limit specified by the rule, unless he obtains a time extension. This is not in accord with our state procedure, under which a defendant may serve a notice of appearance and then as a matter of right serve an answer at any time prior to service of motion for default upon him.

The federal procedure is in part based on federal rule 6, which provides for obtaining extensions of periods of times specified in the federal rules, and in part on federal rule 55, which outlines default procedure. Because the proposed rules do not include federal rules 6 and 55 it is reasonable to conclude that proposed rule 12 is not intended to affect default procedures now in operation. The use of a notice of

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122 RCW 4.28.010 and RCW 4.28.060.
123 Statutes cited in footnote 122, supra. Mounts v. Goranson, 29 Wash. 261, 69 Pac. 740 (1902), is an inconclusive case on the point of whether the summons may state that the complaint has been filed. The plaintiff served a summons and complaint on May 20. The summons was quashed. Then, on June 3, plaintiff filed the complaint and on June 13 plaintiff served a summons "requiring defendants to appear and answer the complaint on file in the clerk's office on or before June 20." A motion to quash was made on the ground that no copy of the complaint was served with summons. The motion was denied. On appeal from an adverse judgment this ruling was upheld, but the court mentioned as a ground for its decision that the complaint had not been served within ten days after notice of appearance. A related case is Rauch v. Zander, 138 Wash. 610, 245 Pac. 17 (1926).
124 Clauses (4) and (5) refer to answer when summons is served by publication or personally on defendant out of the state. Miscellaneous times for appearance set forth in other statutes are covered by clause (6).
125 Federal Rules 5, 6 and 55. Orange Theatre Corporation v. Rayhertz Amusement Corp., 130 F.2d 185 (3rd cir. 1942) holds that a stipulation to extend the time of answer must be approved by the court.
126 Rule 4, General Rules of the Superior Courts, 34A Wn.2d (default); See RCW 4.56.160 (default); RCW 4.28.210 (appearance).
appearance in our state has several results, but it is primarily significant in connection with default procedure; therefore, in connection with default, the effect of serving such an appearance should remain as it is now.

A related matter should be discussed. If a motion to dismiss on the grounds listed in subdivision (b) is made, or if a motion under subdivisions (e) and (f) of rule 12 is made before answer and within the times for answer, the making of such a motion will postpone the time for answer as indicated in the rule. Under the federal rule, unless an extension of time for such motions or answer is sought by defendant, he must therefore make such motions or answer in 20 days or be in default. However, under proposed rule 12, if no answer or motions within the rule were filed within the applicable time limit, it would seem that our present rules concerning default and the effect of a notice of appearance would govern.

Other Questions with Respect to Times for Pleadings and Motions. In specifying time periods, proposed rule 12(a) provides for service of the answer. The other subdivisions of rule 12 refer to the service of motions by the use of the verb, "make". It has also been stated above that the proposed rules do not deal with filing of pleadings and motions, and therefore our present rules concerning the filing of pleadings and motions would still be effective. No change of practice in that respect is foreseen. If a reply is ordered to an affirmative defense pursuant to rule 7, the time limit for the reply is twenty days after the service of the order. A change in the present time limit would result.

At present, it is the general rule that the pendency of a demurrer (which is similar to a motion to dismiss on the grounds listed in proposed rule 12(b)) or a motion to strike or a motion to make definite and certain enlarges the time to answer (or reply) until three days after an adverse decision, unless the court otherwise orders. The last sentence of rule 12(a) of the proposed rule would alter the time for answer when motions authorized by the rule are denied by a different period of time.

These time limit changes appear to have little significance, particu-
larly when it is considered that the order of the court on a motion can deal with the time for answer.

Proposed Rule 12(b)

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue or change of venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule [56]——, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule [56]——.

Defense by Motion and Answer. It has been pointed out above that the answer may contain all the defenses which defendant intends to make, whether of fact or of law. To this extent the federal rule was based upon English procedure which provided that all defenses be made by answer, except certain defenses considered unusual. The rule simply means that all defenses which are apparent on the face of the complaint, all jurisdictional defenses including the defense that there is lack of jurisdiction over the person, objections to venue, request for change of venue, and any other defenses in abatement or in bar may be raised in the answer without making any motion or appearance prior to answer. If no motions are made prior to answer and various defenses which could have been made by motion under the rule are stated in the answer, these defenses may be considered before trial.

The rule does not follow English rules which contain greater restrictions on defenses by motion. The defenses listed in the rule may be

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131 The English rule is explained in 2 Moore, Federal Practice 2224-2229 (1948).
132 Proposed rule 12(d).
133 Footnote 131, supra.
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raised by motion prior to the answer at the option of the defendant. In addition, under the federal rule there is authority for making motions other than those indicated in rule 12. The making of such other motions would not delay the time for answer under rule 12(a).

The later discussion of rule 12(g) and (h) indicates that a motion to dismiss on the grounds listed in rule 12(b), and perhaps a motion for a more definite and certain statement under Rule 12(e), and a motion to strike under rule 12(f) cannot be made successively in time. With the limitations indicated later in this article these motions must be consolidated or joined. Motions not covered by rule 12 would not be waived because such motions were not made with motions covered by rule 12. This matter is discussed further in connection with rule 12(g) and (h).

How would present methods of making important types of defenses be changed by the general method of defense through motion to dismiss or answer which is described by the rule? The following defenses which are raised by defects on the face of the complaint and which may now be attacked by demurrer would be made by a motion to dismiss under rule 12(b), or by answer: (1) that the court has not jurisdiction of the person of the defendant, or the subject matter, (2) that there is a defect of parties plaintiff or defendant (non-joinder), and (3) that the complaint does not state facts constituting a cause of action (that the claim does not entitle the plaintiff to relief under rule 8). These defenses are not waived under the proposed rule if not made by motion to dismiss or by answer.

In the rare case in which the pendency of another suit would appear on the face of the complaint, the defense would be made in the answer and not by demurrer as at present.

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134 Examples of such motions are as follows: motion for security for costs, Wheeler v. Lientz, 25 F. Supp. 939 (W.D. Mo. 1939); motion for stay, Parker v. Transcontinental & Western Air, Inc., 8 F.R. Serv. 12e.231, Case 16, 4 F.R.D. 325 (W.D. Mo. 1944).

135 Proposed rule 12(g) and (h), discussed infra.

136 Footnote 134, supra.

137 RCW 4.32.050 (grounds of demurrer).

138 Proposed rule 12(h).

139 See Dirk Ter Haar v. Seaboard Oil Co., 4 F.R. Serv. 12b.334, Case 1; 1 F.R.D. 598 (S.D. Cal. 1940) (perhaps the defense was not indicated in the complaint); Sproul v. Gambone, 34 F. Supp. 441 (W.D. Pa. 1940) (defense not indicated in complaint). But it has been stated that a preliminary motion to stay proceedings because of another pending suit between the parties is proper. Green v. Gravatt, 35 F. Supp. 491 (W.D. Pa. 1940). In Butler v. Judge of the United States, 116 F.2d 1013 (9th Cir. 1941), the court held that a district court could grant a motion to stay proceedings pending an action in state court and that the matter need not be pleaded in the answer, because the pendency of action in state court was not relied upon as a ground of abatement. It amounted to a temporary suspension of proceedings in the federal court. A declaratory
The two remaining present grounds for demurrer would be dealt with as follows: The bar of the statute of limitations appearing on the face of the complaint would be raised by motion to dismiss or by answer. Lack of capacity would usually have to be challenged by the answer because no affirmative allegation of authority is required.

Finally, defenses in bar which are not raised by defects on the face of the complaint must now be pleaded in the answer. Such defenses would generally be made by answer under the proposed rules. However, a motion to dismiss for failure to state a claim may be a “speaking motion.” (Furthermore, some federal cases have permitted a “speaking” motion to dismiss on the other grounds listed in rule 12(b)).

Other defenses which may now be made prior to answer would be treated differently. The defense of lack of jurisdiction over the person would not be made by special appearance and motion to quash the summons or set aside the service of summons. The present distinction between a general appearance giving the court jurisdiction and a special appearance to challenge jurisdiction would be abolished. A defendant who wishes to challenge the jurisdiction over his person would raise this defense by motion to dismiss if he made a motion on any of the other grounds listed in the rule. As an alternative, if he did not make a motion under Rule 12, he would make the jurisdictional defense in his answer along with all of his other defenses in the answer. If he did not make it by motion or by answer he would waive it under the terms of subdivisions (g) and (h). On the other hand, if he made the defense by motion or answer with other defenses, he would not waive his objection.

The listing of change of venue as a defense in the rule involves an addition to the federal rule. The reference to change of venue is not
limited. It appears to cover all requests for change of venue by the defendant, including the statutory grounds that the county designated in the complaint is not the proper county, that there is reason to believe that an impartial trial cannot be had therein, that the convenience of witnesses or the ends of justice would be forwarded by the change, and that the judge is disqualified.\footnote{146}

There is a question whether the procedure of motion and affidavit of prejudice authorized by RCW 4.12.040-050 would be within the rule. However, under these sections the objection is primarily to the judge. Although the transfer of the case to another court may be involved, the authorized procedure does not necessarily involve a change of court. For this reason it appears that the affidavit of prejudice procedure might not be affected.

The present time and method of seeking a change of venue would be altered to some extent. The governing statute and rule now provide that a motion for change of venue on the ground that the action is not brought in the proper county must be made at the time the defendant appears and demurs or answers.\footnote{147} But the defendant can make such a motion when he enters a general appearance in some other way, such as by filing notice of appearance.\footnote{148} In contrast, the proposed rule contemplates that he request change of venue when he makes any other defenses under rule 12 by motion, or if he makes no such defenses by motion, that he request change of venue in his answer.

If a venue requirement is jurisdictional under our present venue statutes, as in the case of suits involving injury to real property, the objection could also be taken by motion to dismiss under rule 12 or

\footnote{146} RCW 4.12.030. Under the federal rule, which uses only the term "improper venue", there is some authority that a motion for transfer of a case for convenience of parties and witnesses in the interest of justice (as authorized by 28 U.S.C. 1404) is not a motion involving an objection to "improper venue" within federal rule 12 and can be made after answer. Spence v. Norfolk & W. Ry., 89 F. Supp. 823 (N.D. Ohio 1950).

\footnote{147} RCW 4.12.027; Rule 1, Rules of Pleading, Practice and Procedure 34A Wn.2d.

\footnote{148} In State ex rel. Poussier v. Superior Court, 98 Wash. 555, 168 Pac. 164 (1917), and State ex rel. Owen v. Superior Court, 110 Wash. 49, 187 Pac. 708 (1920), the court held that the motion was not improper when not accompanied by demurrer or answer. There is authority that a motion for change of venue on the ground of improper venue is waived if not made when the defendant appears generally. In State ex rel. Livingston v. Superior Court, 175 Wash. 405, 27 P.2d 729 (1933), it was held a special appearance by defendant to challenge a garnishment on the ground that no service of summons or complaint had been made upon him did not waive the right to request a change of venue on the ground of improper venue, which request was made after his first motion in his special appearance was denied. The court held that the challenge to the garnishment was a special appearance, but stated that if it had been a general appearance the motion for change of venue would have been waived.
by answer. It is probable that objection could be taken after answer on the ground that there is no jurisdiction over the subject matter. 149

Motion to Dismiss for Failure to State a Claim Entitling Plaintiff to Relief. A motion to dismiss on this ground would be the substitute for our present demurrer on the ground that the complaint fails to state facts which constitute a cause of action. 150 Generally speaking, the motion performs the same function as such a demurrer. It would probably be less difficult to obtain a favorable ruling on our present demurrer than on the motion under the proposed rules because the requirements for the complaint would be liberalized. 151 Many federal cases illustrate the broad principle that a motion to dismiss for insufficiency of the complaint should not be granted unless it appears to a certainty that no state of facts entitling the defendant to relief could be proved under the complaint. 152 A motion to dismiss on this ground is further distinguished from a demurrer by the provision that in the discretion of the court it may be a "speaking motion," and may be treated as a motion for summary judgment.

It has been said that under the federal rule it is not proper to use a motion to dismiss the answer to challenge the sufficiency of an affirmative defense in the answer. Rather, a motion to strike under rule 12(f) should be used. 153

Proposed Rule 12(c)

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule [56]———, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule [56]———.

The proposed rule would replace Rule 19.2 of the Rules of Pleading, Practice and Procedure. The first sentence of the present rule is re-

149 Treatment of venue objections under RCW 4.12.010(1) is illustrative. This section, which specifies the place of actions regarding real property, is jurisdictional. Cugini v. Apex Mercury Mining Co., 24 Wn.2d 401, 165 P.2d 82 (1946). In Miles v. Chinto Mining Co., 21 Wn.2d 902, 153 P.2d 856, 156 P.2d 235 (1944), the point of jurisdiction was first raised on appeal. The venue requirement of RCW 4.12.010(2) for actions involving personal property are also jurisdictional. Snyder v. Ingram, 48 Wn.2d 637, 296 P.2d 305 (1956).

150 See discussion of abolition of demurrers under rule 7, supra.

151 Footnote 150, supra.

152 Cases are collected in note 6, 2 Moore, Federal Practice 2245-2246 (1948).

153 Proposed rule 12(f). The substance rather than the form of the motion should usually be determinative. Proposed rule 8(e)(1).
tained. The second sentence is deleted, and a new provision is substituted. The second sentence of Rule 19.2 now states that the denial of a motion for judgment on the pleadings shall not entitle the opponent to judgment on pleadings in his favor if there is any material issue presented by the pleadings. 164

Prior to the adoption of this provision, the court had held that the motion invited judgment against the movant even though material issues of fact remained on the pleadings after refusal of relief in favor of the movant. 165 The above mentioned second sentence of Rule 19.2 reversed that holding.

Would abrogation of the second sentence of Rule 19.2 by the new rule restore the prior holding mentioned above? It does not appear that such a result would follow. The prior holding mentioned is contrary to the general spirit of the proposed rules and would be somewhat inconsistent with the new provision that a motion for judgment on the pleadings may be treated as a motion for summary judgment. A federal case raising this exact point has not been discovered, but several related cases have some bearing on the matter. One federal court said that even if both parties move for judgment, the motions should be denied if there are any material fact issues. 166 In another case plaintiff moved for summary judgment. In support of his motion he made the novel argument that there were no real fact issues in the suit because the defendant had made a motion on his part for judgment on the pleadings and thereby had admitted the untruth of his denials of plaintiff’s allegations. This contention was denied. 167

The provision for treatment of a motion for judgment on the pleadings as a motion for summary judgment is not presently authorized by Rule 19 of the Rules of Pleading, Practice and Procedure. Such treatment would be within the discretion of the court. 168

If the motion were not treated as a motion for summary judgment

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165 State v. Vinther, 183 Wash. 350, 48 P.2d 915 (1935), rehearing, 186 Wash. 691, 58 P.2d 357 (1936). The dissent on rehearing analyzes many prior Washington cases. As a consequence of this case, the court treated a motion for judgment on the pleadings, which challenged the complaint, as an exercise of the statutory right to object to the complaint after answer. Treated as such an objection the court said that the motion did not invite judgment for plaintiff. Springer v. Superior Court 4 Wn.2d 53, 102 P.2d 266 (1940).
167 M. Snower & Co. v. United States, 140 F.2d 367 (7th cir. 1944).
168 An illustrative case is Fletcher v. Nostadt, 205 F.2d 896 (9th cir. 1953). Recent cases are noted in BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, 1956 Pocket Part, 191.
most of the present rules for such motions would still be effective.\textsuperscript{159}

**Proposed Rule 12(d)**

(d) Preliminary Hearings. The defense specifically enumerated (1)—(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

The rule of this subdivision has already been mentioned.\textsuperscript{160} It recognizes that in some cases a decision on the ground of defenses listed in Rule 12(b) may dispose of a case without the expense, time and inconvenience of preparation for a trial going to the merits. As the rule is phrased, the holding of hearings on these defenses prior to trial would be discretionary with the judge. But if the defenses should appear substantial and the matter can be dealt with by hearing on motion a judge should deal with them prior to trial. If the judge should feel that the issues raised go to the merits or that the issues could more easily be decided in the light of facts that would be brought out at the trial, he would probably refuse such a preliminary determination.\textsuperscript{161} The motion for preliminary determination of such defenses would state that the issues raised may be determined separately and that if the defense is good, trial of the other issues in the case is unnecessary.\textsuperscript{162}

**Proposed Rule 12(e)**

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

This motion is somewhat similar to the motion to make definite and certain now in use in our state. It has been stated many times that the motion under the federal rule will not lie to obtain facts for use in the defense at the trial.\textsuperscript{163} For this purpose discovery rules are designed

\textsuperscript{159} Federal authority (since 1938) for the practice of "searching the record" on the motion has not been found.

\textsuperscript{160} See discussion of rule 12(b), supra.

\textsuperscript{161} 2 Moore, Federal Practice 2274-2275 (1948).

\textsuperscript{162} 2 Bender's Federal Practice Forms 328 (1956).

\textsuperscript{163} Many cases are collected at 2 Moore, Federal Practice 2281-2284, (1948). "With
to afford the defendant the means to defend on the facts at the trial. Therefore the motion will only lie if the complaint is so stated that the defendant cannot intelligently frame his answer. The fact that alternative and hypothetical allegations are permissible must be taken into account, as well as the fact that allegations in terms of conclusions of law are permissible. The fact that pleadings can be rather general should be taken into account. It probably should be assumed that complaint forms quoted in connection with rule 8(a) are good against a motion to make definite and certain. Contrary to this conclusion, some federal courts have granted the motion to make such complaints more specific and to make certain complaints indicate the theory upon which they are based. In any event, the requirement that a complaint must be sufficiently clear to enable defendant to answer still remains, and the motion is available under rule 12(e) to remedy lack of such clarity.

Nevertheless, under the system of general pleadings set forth in rule 8(a), a restricted use of the motion is contemplated. The granting of the motion would be largely in the discretion of the trial court as it is now.

Bills of particulars are not authorized. Discovery procedures would be used instead.

It is arguable that under code pleading the motion to make definite and certain is theoretically available to obtain amendment of the complaint to state more details in terms of ultimate fact statements, and the request for a bill of particulars is theoretically available for the defendant to obtain details which are not ultimate facts. Such a distinction, if it exists, is difficult to make in daily practice. General allegations of negligence, allegations not specific as to time and place in respect to preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose. Notes of Advisory Committee on Amendments to Rules, 28 U.S.C.A. § 337, 339.

\[\text{Notes of Advisory Committee on Amendments to Rules, note 1, supra.}\]

Cases so holding are cited in 2 Moore, Federal Practice 2283 (1948).

Use of the motion for this purpose is discussed in a note at 35 Col. L. Rev. 888 (1950).

See cases cited in note 11, 2 Moore, Federal Practice 2281 (1948).

Prior to the amendment of the federal rules in 1946, rule 12 provided for bills of particulars. The practice of granting such bills was in great confusion. Notes of Advisory Committee on Amendments to Rules, note 2, supra.

The Washington cases do not appear to establish such a definite distinction. For example, in Goupille v. Chaput, 43 Wash. 702, 86 Pac. 1058 (1906), a distinction between the motion and bill is made, but the distinction is not clear. The distinction has been specifically ignored in some states. CLARE, CODE PLEADING, 339 (2d ed. 1947).
negligence charges and many other allegations which would withstand demurrer are now subject to motion to make definite and certain and in practice the relief of an order of a bill of particulars may sometimes be granted. In some trial courts motions for more definite statements or bills of particulars have probably been refused more often since the adoption of our present discovery rules, but the proposed rules definitely contemplate a more limited area in which relief should be granted.

Under the terms of this subdivision and of subdivision (f) and (g), if a motion to make definite and certain is not made at the time of motion on any other grounds mentioned in Rule 12, the objection is waived. In spite of the terms of these subdivisions there is some difference of opinion under the federal rules as to whether or not a motion to make definite and certain can be made prior to a motion to dismiss (to pave the way for such a motion). Under proper circumstances such a preliminary motion can be made prior to the making of a demurrer under our present rule.

Proposed Rule 12(f)

(f) 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 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

In general, a motion to strike is now available to a party under most of the circumstances outlined in the proposed rule. Also, much of the matter which may now be stricken could be stricken on motion under the proposed rule. Degrading irrelevant charges, legal arguments or legal conclusions coupled with argument, allegations so general that they do not inform concerning the claim or defense, etc. may be stricken on motion under the federal rule. However, it has been said

\[170\] See discussion of rules (12(g), (h), supra.
\[171\] 2 Moore, Federal Practice 2306-2308 (1948).
\[172\] Rule 6(5), General Rules of the Superior Courts, 34A Wn2d.
\[173\] However, insufficiency of an affirmative defense is grounds for demurrer under RCW 4.32.200. In the early case of Hatch v. Tacoma, Olympia & Gray's Harbor Ry. Co., 6 Wash. 1, 32 Pac. 1063 (1893), the court held that the proper method of questioning the sufficiency of an answer in law was not by motion to strike but by demurrer. There is a problem of distinguishing between an attack by motion to strike on the ground of irrelevancy or immateriality of a defense and an attack by demurrer. Thus, affirmative matter in a reply was stricken although it appears the objection may have been that the matter was not a good reply in law. Loewe v. Osner & Melhorn, Inc., 109 Wash. 124, 186 Pac. 643 (1919).
\[174\] Illustrative cases are cited in Barron and Holtzoff 727-744 (1950).
in the federal cases that motions to strike on grounds such as irrelev-
ancy are not favored and if the matter attacked has any bearing on
the case it should not be stricken. Or even if such matters have no
bearing on the case, the motion should be overruled if the matter is not
prejudicial to the defendant. A great deal of discretion is given the
judge.

The motion would not lie in other circumstances under which it may
now be used. For example, it would not be granted to strike statements
of evidential facts merely because such statements are technically state-
ments of such facts. Inconsistent allegations are permitted and therefore
motions to strike will not lie merely because of the existence of
such inconsistency.

When the motion is made to challenge the sufficiency of the answer
a federal court has held that it searches the record as a demurrer to
an affirmative defense now does.

Proposed Rule 12(g) and Rule 12(h)

(g) Consolidation of Defenses. A party who makes a motion
under this rule may join with it the other motions herein provided for
and then available to him. If a party makes a motion under this rule
and does not include therein all defenses and objections then available
to him which this rule permits to be raised by motion, he shall not
thereafter make a motion based on any of the defenses or objections so
omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of Defenses. A party waives all defenses and objec-
tions which he does not present either by motion as hereinbefore pro-
vided or, if he has made no motion, in his answer or reply, except (1)
that the defense of failure to state a claim upon which relief can be
granted, the defense of failure to join an indispensable party, and the
objection of failure to state a legal defense to a claim may also be made
by a later pleading, if one is permitted, or by motion for judgment on
the pleadings or at the trial on the merits, and except (2) that, when-
ever it appears by suggestion of the parties or otherwise that the court
lacks jurisdiction of the subject matter, the court shall dismiss the
action. The objection or defense, if made at the trial, shall be disposed
of as provided in Rule 15 (b) in the light of any evidence that may
have been received.

175 An interesting example is Wanecke v. Northwest Airlines, Inc., 10 F.R.D. 403
(N.D. Ohio 1950).

176 Footnote 175, supra.

177 Some federal cases have held that the rules do not authorize a motion to strike
an allegation or pleading on the ground that it is a sham in the sense that it is false
in fact, unless the attack is on the basis that rule 11 has been violated. See Intra-Mar
Shipping v. John S. Emory & Co. 11 F.R.D. 284 (S.D.N.Y. 1951) and cases cited. See
discussion in 2 F.R. Serv. 644 (1940) to the opposite effect.

These are the subdivisions which indicate that the pleading of defenses should generally be in two stages—by motions authorized under rule 12 and by answer, or in one stage—by answer. As previously pointed out, certain miscellaneous motions may be made which are not in terms covered by any of the provisions of rule 12. The making of these motions prior to motions mentioned in rule 12 will not waive the right to raise by motion the defenses and objections covered by rule 12. But it is clear that if the defenses mentioned in rule 12(b) are raised by motion prior to answer or responsive pleading, the remaining defenses then available to the pleader which could have been raised by motion under the rule (but are not) are waived and cannot be made even in the answer, except as stated in subdivision (h). If no motion is made under rule 12(b) however, all of the defenses listed in rule 12(b) may be made by answer. Except for the defenses stated in subdivision 12(h), all of these defenses which have not been raised by motion and which are not stated in the answer are waived.

The federal decisions do not make clear whether the motions to make definite and certain and to strike come within the above rules. The question raised is whether the defenses listed in subdivision 12(b) (other than those which cannot be waived) must be joined with the above two motions. Some cases have held that they need not be.

However, it appears from subdivision (b) that if no motions are made to raise defenses mentioned in rule 12(b) and motions to make more definite and certain and to strike are not made before interposing a responsive pleading, the right to make such motions is waived.

If the three defenses which are not waived under the terms of subdivision (h) are not made by motion or answer, they may be raised at any time thereafter. They would usually be raised by motion for judgment on the pleadings, or motion to dismiss at the trial.

Our present rules generally contemplate a two-stage system of defense to a pleading with certain exceptions such as challenges to jurisdiction of the person and objections to venue. Since all motions and demurrers or other challenges to a pleading should be made at the same time (except when a decision on a motion is necessary for a ruling on a demurrer), the plan of defense embodied in rule 12 would

179 See discussion of defense by motion and answer under rule (12(b), supra.
180 The wording of the rule leads to this conclusion. Parker v. Transcontinental & Western Air, footnote 134, supra.
181 This question is discussed in BARRON AND HOLTZOFF 765-767 (1950).
183 Rule 6(5), General Rules of the Superior Courts, 34A Wn.2d.
not be unfamiliar.

Looking at the overall changes which would be made in the methods of asserting defenses, one can hazard the guess that lawyers of the state would not have any great difficulty adapting their present experience to the procedure contemplated for pleading defenses. To the extent that general pleading is allowed, the job of pleading defenses is different, however. In this connection it should be remembered that rule 12 was originally conceived as part of the pre-trial procedure which includes our present discovery rules borrowed from the federal rules.