

COUNCIL ON COURT PROCEDURES

Saturday, November 13, 1993, Meeting
9:30 a.m.

Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Call to order
2. Approval of October 9, 1993 minutes (copy attached)
3. Introduction of new members
4. Matters for consideration during 1993-95 biennium (Chair)
5. Appointment of subcommittees focused upon ORCP 69, ORCP 55 H, and ORCP 32
6. Discussion of Council's budget for 1993-95 biennium (Executive Director's 10-26-93 memorandum and final budget as approved by the Governor attached)
7. Possible appointment of subcommittee which promotes the Council for ORCP revision, with emphasis on fostering better relations with the Bar's Section on Litigation and Procedure & Practice Committee, as well as with other organizations, e.g. OTLA, OADC, OLI, PLF, and others.
8. Future meeting schedule
9. Old business
10. New business
11. Adjournment

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of October 9, 1993

Eugene Hilton Hotel
Thornton Wilder Room
Eugene, Oregon

Present: Robert D. Durham Robert B. McConville
Susan P. Graber John H. McMillan
Bruce Hamlin Michael Phillips
John Hart Milo Pope
Bernard Jolles Charles R. Sams
John V. Kelly Nancy Tauman

Excused: William Cramer, Sr.

Absent: Nely L. Johnson
Richard Kyopp

Henry Kantor, former Council member and Chair Emeritus for this meeting, and Susan Bischoff, former Council member, were also present.

The following visitors were present: Frank R. Alley III, Hon. Charles S. Crookham, Julie Frantz, Susan Grabe, Charles F. Hinkle, Janet Hoffman, R. William Linden, Jr., Lisa Kloppenberg, Robert Neuberger, Bob Oleson, Karsten Rasmussen, George A. Riemer, Peter Sorenson, Charles Tauman, Bob Udziela, Douglas R. Wilkinson, Charles S. Wilkinson. and Michael L. Williams. (Also present were Maurice J. Holland, Executive Director, and Gilma J. Henthorne, Executive Assistant.)

Agenda Items 1 and 2. Chair Emeritus Henry Kantor called the meeting to order at 9:40 a.m. He introduced the newly appointed Council members present (Nancy Tauman and John McMillan) and called upon them, along with continuing members and others present at the meeting, to identify themselves.

Agenda Item 3. The minutes of the February 27, 1993 meeting, without objection, were approved as previously distributed.

Agenda Item 4. Henry Kantor announced his nominations of John Hart to be Chair and Mike Phillips to be Vice Chair for the 1993-95 biennium. He asked whether there were any additional nominations for either office. Upon hearing none he asked the members to vote either in favor of, or opposition, to his nominees. The members unanimously voted affirmatively on both nominations. He mentioned that he was making no nomination with respect to the office of Secretary-Treasurer so that that

election might be made by the full Council after appointment of all the new members. Kantor then relinquished the Chair to John Hart. On the Council's behalf Hart thanked Kantor for his fine work and leadership as Chair during the 1991-93 biennium and presented him with a suitably inscribed gavel and stand.

Agenda Item 5. Chairman Hart then led an open, informal discussion concerning the Council and its future, with particular reference to some criticisms and concerns about it reportedly expressed by some legislators and others during the recently concluded legislative session.

Bob Oleson, Public Affairs Director of the Oregon State Bar, said that the difficulties the Council had experienced during the session were owing to many different factors and reflected very different perceptions of the Council on the part of various legislators. Some legislators resisted continued funding of the Council simply because of the need to make very substantial spending cuts on account of Measure 5. Others opposed continued funding from the General Fund because they think of the Council as a Bar activity that should be supported by OSB funds. Still others seem to be concerned about what they believe to be excessive delegation to the Council of legislative authority. Oleson urged Council members and the Executive Director to make good use of the interim before the 1995 session to "mend fences" with legislators and with representatives of the important organizations having a special interest in the work of the Council, by keeping them better informed and establishing with them a sound working relationship that functions in both directions.

Sen. Karsten Rasmussen stated that the Council inevitably suffers from the fact that some legislators do not like administrative rule-making because they regard it as encroaching upon the legislature's authority, a view he indicated he does not share. It also suffers from a vague, but detectable, perception in some quarters that the Council is riven by "bar politics," in the sense of plaintiffs' versus defendants' interests, rather than in the partisan sense. The feeling of some is not so much that the Council is imbalanced as between those interests, but that it suffers from too much rancor and division along these lines. Sen. Rasmussen urged the Council to be careful to avoid doing anything that would unnecessarily heighten this perception.

Sen. Peter Sorenson recalled that he wrote his third year paper in law school about the then new ORCP under the direction of the late Prof. Fred Merrill and stated that he had always valued the Council. He further stated that, as a legislator, he wants to support the Council and would oppose putting the rules-amendment process back in the Legislative Assembly.

Judge Charles Crookham briefly recalled the historical background that led to the creation of the Council. The principal purpose of its creation was to retain the rules amendment process within the legislative process but to do this in a manner that streamlined the process and made it both efficient and current.

Mr. Mike Williams, President of OTLA, stated that the ORCP are the "envy of the nation," because they cause civil litigation in Oregon to be fair, efficient and cost-effective. He gave the absence of elaborate and expensive discovery as a prime example of what he regards as a strongly positive feature of the ORCP. He stated that OTLA has always valued and supported the Council, which he said he thinks must get some of the credit for the excellence of the ORCP, and hopes and expects that it will continue to do so. He added that OTLA had supported the amendment requiring a fifteen-member supermajority because of its view that this requirement is more in keeping with Oregon's tradition of consensus decisionmaking. He gave as an example of a recent action that had given OTLA some concern was the very close vote at its December 12, 1992 meeting by which the proposed amendment to Rule 36 to authorize discovery sharing was totally reversed before being withdrawn.

Mr. Frank Alley, Vice President of the Oregon State Bar and member of the Board of Governors, reported that the process of filling existing vacancies had been slowed by changes in the boundaries of Oregon's Congressional districts. He reported that the Board had decided that "residence" for purposes of assuring representation from all five districts means where a prospective member has his or her office, not where the home is located. He added that the Bar is creating two new sections that might be of interest to Council members, one concerning appellate practice and another concerning business law.

Ms. Julie Franz, President of the Oregon State Bar and member of its Board of Governors, stated that the Bar is concerned with fostering the greatest possible degree of "balance" in selecting new Council members, which she explained referred primarily to kinds of practice and areas of specialization.

Mr. Charles Hinkle, member of the Bar Board of Governors and Chair of its Appointments Committee, reiterated that "residence" had been determined to mean where a lawyer's office is located. He added that the effort to select new Council members was focusing upon the Third Congressional district in particular.

Mr. Bill Linden, State Court Administrator, stated that his perception is that the value of what the Council does is not well

enough understood by some legislators, as well as others whose support the Council needs. He seconded the point made by Bob Oleson to the effect that it is too late to wait until the middle of a hectic legislative session to build up needed support and good will, and joined Oleson in urging that effective use be made of the time remaining before the 1995 session. He further stated that the Judicial Department always stands ready to assist the Council in this and any other ways possible.

John McMillan asked how the Council's budget process worked, whether this was the product of the Council, some committee thereof, or of staff. John Hart and Henry Kantor responded that the Council has in the past had very little to do with the budget, which is prepared for each biennium by Judicial Department budget analysts, and suggested that it might be useful for the Chair and the full Council to give some thought to this matter prior to the time the next biennial budget is put together. John Hart indicated agreement with this idea.

Judge Robert Durham asked Bob Oleson for his sense of how much legislative opposition to the Council was attributable to actions taken by the Council, to general concerns about undue legislative delegation, and to how much the Council costs. Oleson responded that all of these factors contributed to such opposition as there was, and also endorsed John McMillan's suggestion that the Council give some thought to its budget and the process by which it is set.

Bruce Hamlin raised the question of how the Council will go about complying with the budget note appended to HB 5045. John Hart responded that the Council would have to give some focused attention to that question, either at the next scheduled meeting or quite promptly thereafter. He mentioned that he would probably appoint a subcommittee to determine the Council's response to the budget note and other related questions that have been raised, adding that he was inclined to ask John McMillan to serve as a member. Susan Graber expressed strong agreement with the idea of appointing a special subcommittee.

Agenda Item 6. Maury Holland noted that, in the interest of time, by way of reviewing legislation in the 1993 legislative session affecting the ORCP he would simply refer to part I(d) of his Briefing Memo distributed at the beginning of this meeting, a copy of which is attached to the file copy of these minutes.

Agenda Item 7. By way of summarizing matters held over from the 1991-93 biennium Maury Holland referred to part II(a)(b) and (c) of the aforementioned Briefing Memo.

Agenda Item 8. Maury Holland reported that no

correspondence had been received at his office regarding suggested amendment or other proposals regarding the ORCP.

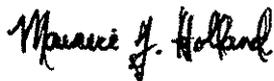
Agenda Item 9. John Hart asked whether, in addition to the items included in Holland's Briefing Memo as held over from the 1991-93 biennium, anyone had other suggestions about the Council's agenda and priorities during the current biennium. It was agreed that this should be discussed in detail at the Council's next meeting, which Hart stated would, unless there was objection, take place at Bar Headquarters on Saturday, November 13, 1993. No objections to this meeting time were expressed.

Agenda Items 10 and 11. John Hart asked whether any member had any additional items of old or new business to raise. Durham stated that greater efforts should probably be made to keep other interested individuals and organizations, such as the Bar's Committee on Practice and procedure, informed in a timely fashion about the Council's activities, including meeting agendas and rules amendment currently under consideration. He also asked whether there is any form of preferred or established process by which suggestions regarding possible rules amendments are placed before the Council. He added a suggestion that it might be a good idea to publish a notice soliciting suggestions and informing interested persons how that should be done, to whom addressed, etc.

Bernie Jolles commented that he is a bit puzzled by apparent criticisms that Council members are too divided along lines of those who primarily represent plaintiffs and those who represent defendants. He added that the function of Council members is to exercise their best judgment on matters pertaining to the ORCP and their possible amendment, and that they should not be expected to put out of their minds the lessons and perspectives they have gained from the kinds of practice in which they have engaged.

There being no further new business, the meeting was adjourned at 11:05 a.m.

Respectfully submitted,



Maurice J. Holland
Executive Director

October 26, 1993

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES
FROM: Maury Holland, Executive Director
RE: Minutes of 10/9/93 meeting and other matters

1. Attached are minutes of the October 9th meeting. They have been preliminarily approved by John Hart, but of course are subject to formal approval by the Council at the November 13th meeting. These minutes are based upon notes taken by Gilma and me. We try to be as accurate and complete as possible, but neither of us are stenographers. The minutes attempt to paraphrase statements, and do not purport to quote them. Particularly because so many non-members spoke at the October 9th meeting, there is the possibility that these minutes might inadvertently misattribute statements to the wrong speaker or omit a statement that should have been included. Naturally, the minutes will be subject to corrections prior to official approval. For subsequent meetings, where legislative history regarding proposed amendments is being created, and most especially for the meeting at which final voting on promulgation takes place, the Council might think the services of a professional stenographer worthwhile, as was done during the last biennium. That of course can be arranged and paid for if the Council so decides.

2. Since there was quite a lot of discussion of the Council's budget at the October 9th meeting, I attach to this memo a copy of the official budget report of the House Appropriations Committee, which was subsequently voted upon favorably by the House and Senate and signed by the Governor. The rather large increase from the 1991-92 biennium was occasioned by some internal budgetary reshuffling to show the Council as paying for certain auditing and other services the costs of which were previously absorbed by the agencies providing them.

As you can see, the bulk of the Council budget is non-discretionary in the sense of being attributable to Gilma's and my salary and benefits. I believe that the formula of .5 FTE for Gilma and .21 FTE for the Executive Director goes back to the beginning of the Council. I would defy anyone to conclude that Gilma is overpaid for the work she does. It is not for me to say anything about my own salary. When I was appointed Executive Director, the understanding between Henry and me was that I would receive the same as what Fred Merrill had been paid. In this sense it was not really renegotiated. I felt no reason then, and feel no reason now, to ask that my salary be renegotiated. As Henry and John Hart can attest, at several points during the

recent legislative session, when it appeared the Council might be totally defunded, I offered to continue on a pro bono, volunteer basis, just like all of you if that would remove an obstacle. I am not disappointed that matters did not proceed to the point where that offer was accepted, because I believe that this kind of service as an Executive Director is part of a law professor's stock-in-trade. Obviously, Gilma cannot be expected to work for nothing, since this position represents half her livelihood. Without disparaging their generosity in serving as members, practitioners might be thought to get some returns from that service beyond public spiritedness. As to the public member, nothing but pure public spiritedness suggests itself. The judicial members seem to me to be the ones who are most imposed upon, especially since their salaries have been extremely modest given their responsibilities and the difficulty of their work. But I believe it would be legally impossible for extra compensation, however deserved, to be paid to judges who serve, since they are already being paid, albeit inadequately, on a 1.0 FTE basis. That rule does not prevent my being paid, since my faculty appointment is on a .75 FTE basis. From my discussions with Fred, I gathered that the theory of the Executive Director being paid on a .21 FTE basis was that this substituted for summer teaching for which faculty members are free to earn additional salary. Once the personnel costs and special assessments for auditing and the like are taken away, the Council budget amounts more or less to nickels and dimes. None of this information is provided by way of discouraging the Council or a subcommittee from a full-scale review of our budget and funding.

3. Also attached is a revised Staff Comment to the amendment to Rule 69 promulgated December 12, 1992. The original version of this Staff Comment, as reviewed by the Council, was written to clarify the purpose of that amendment to correct what the Council agreed was the unfortunate holding of Van Dyke and before the opinion of the Court of Appeals in Weaver v. Weaver, 119 Or App. 478, 851 P2d 629 (1993), in which that court indicated it would no longer follow Van Dyke. Revision of this Staff Comment might not have been absolutely essential. But without a revision clarifying the relationship between the two Court of Appeals decisions and Section 69 C as amended, the original Staff Comment might have caused some confusion in the minds of some practitioners after the amendment takes effect January 1, 1994.

Staff Comments are published only in the Butterworths edition of the ORCP. I was caught on somewhat short notice by Butterworths' deadline for inclusion in the Jan. '94 edition, and thus could not wait until the next Council meeting to obtain Council review. I did consult by phone with Judge Durham to make sure that my revised Staff Comment did not misrepresent what the

Memo to Council 10/26/93

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Court of Appeals had done in his opinion for the Court in Weaver v. Weaver. While he did not object to my characterization of what his Court had done in Weaver, as read to him over the phone, Judge Durham did not have a chance to review the full text of the revised Staff Comment and so bears no responsibility for it.

At an earlier point, while the legislature was still in session, a suggestion was forwarded to the respective Chairs of the Senate and House Judiciary Committees that a statute be enacted to delete the new Section 69 C as being redundant in light of Weaver v. Weaver, a suggestion with which I concurred but which was not acted upon. In retrospect I think it was best that the legislature did not act on this suggestion. The reason is that, although the courts obviously have the last word on what the ORCP mean, the Council is primarily responsible for what they say. Although overruling Weaver or resurrecting Van Dyke is about the remotest thing I can imagine either the Supreme Court or Court of Appeals doing, it still seems to me important that the text of the ORCP themselves embody the Council's own intent.

Enclosures: Minutes of 10/9/93 meeting
 Budget report
 Revised Staff Comment to Rule 69

COMMENT

69 C., as amended, was promulgated in response to Van Dyke v. Varsity Club, Inc., 103 Or App 99, 796 P2d 382 (1990), which interpreted a prior version of this rule controlling in that case to require compliance with its 10-day notice requirement before entry of judgment against a defendant who fails to appear, in person or by counsel, at trial as to which he or she had appropriate notice. The reasoning of Van Dyke applied to the current version of this rule would require compliance with the same 10-day notice requirement in order to obtain an order of default against a defendant not appearing at trial. The Council believes that a failure of a defendant to appear at trial should not be treated as a default for any purposes of this rule, since defendants are under no duty or obligation to do so, and because the 10-day requirement causes unnecessary delays and unfairness to plaintiffs who appear prepared for trial. The Council intends that, in the foregoing circumstances, trial judges should have authority to proceed with trial, while retaining customary discretion to proceed otherwise when warranted. Subsequent to promulgation of section 69 C., the Court of Appeals decided in Weaver v. Weaver, 119 Or App 478, 851 P2d 629 (1993), that it would no longer follow Van Dyke in construing the current version of this rule in a holding consistent with section 69 C., as amended.

Former subsections 69 C., D. and F. have been redesignated 69 D., E. and F., respectively, without further change.

BUDGET REPORT and MEASURE SUMMARY -- 67th Legislative Assembly

Agency: Council on Court Procedures

Budget Page: K-3

Bill Number: HB 5045

Biennium: 1993-95

House Appropriations A:

Senate Ways and Means:

Reps: Baum, Calouri, Clarno, Derfler, Gordly, Jones, Mannix,

Sens: Bryant, Bunn, Dukes, Dwyer, Hannon, Kerans,

McTeague, Oakley, Shiprack, Sowa, Tarno, Van Vliet

McCoy, Roberts, Timms, Yih

Chairperson: /s/ John Minnis
Representative John Minnis

Date: 7/14/93

Chairperson: Cliff Trow
Senator Cliff Trow

Date: 7/27/93

<u>BUDGET SUMMARY</u>	<u>1991-93</u>	<u>1993-95</u>					
	<u>Estimated Expenditures</u>	<u>Governor's Mandated+ Budget</u>	<u>House Committee Recommendation</u>	<u>Difference from Governor's Mandated+</u>	<u>Senate Committee Recommendation</u>	<u>Difference from Governor's Mandated+</u>	<u>Difference from House to Senate</u>
General Fund	\$82,954	\$99,709	\$86,759	\$-12,950	\$86,759	\$-12,950	\$ --
Other Funds	--	--	8,000	+8,000	8,000	+8,000	--
Total	\$82,954	\$99,709	\$94,759	\$ -4,950	\$94,759	\$ -4,950	\$ --

POSITION SUMMARY

Authorized positions	2	2	2	--	2	--	--
Full-time equivalent positions	0.71	0.71	0.71	--	0.71	--	--

SUMMARY OF HOUSE APPROPRIATIONS COMMITTEE ACTION

The Council on Court Procedures has the responsibility of providing a continuing review of the laws relating to civil procedures. Staff for the Council consists of two part-time positions, a director (.21 full-time equivalent position) and an executive assistant (.50 full-time equivalent position), which are recommended to continue at a total cost of \$94,759. The Committee changed the funding for the Council to include \$8,000 in Other Funds from the Oregon State Bar, which would cover instate travel costs. In the 1991-93 biennium and prior biennia, the General Fund was the sole support for the Council.

Prepared by: Rebecca L. Landis Reviewed by: Sue Acuff
Rebecca Landis, Executive Department Sue Acuff, Legislative Fiscal Office

The increase in the budget is mainly due to the new Executive Department assessment and the anticipated charge for an audit by the Secretary of State. Also, \$3,000 is included in the budget for transcription services. The deliberations of the Council are the basis for establishment of legislative intent.

BUDGET NOTE:

The Council is directed to work with the House Interim Judiciary Committee, the Senate Interim Judiciary Committee, and the Oregon State Bar to develop recommendations by September 1, 1994 for changes in the substance and process of the Council. The Committee directed the Council to report to the Emergency Board on these recommendations.

SUMMARY OF SENATE WAYS AND MEANS COMMITTEE ACTION

The Senate Ways and Means Committee concurred with the House Appropriations Committee action.

DETAIL OF COMMITTEE ACTION

HOUSE BILL 5045

COUNCIL ON COURT PROCEDURES
July 27, 1993

	General Fund	Other Funds	Total Funds	Positions	-FTE
1991-93 ESTIMATED EXPENDITURES	\$ 82,954	\$ 0	\$ 82,954	2	0.71
GOVERNOR'S MANDATED PLUS BUDGET	99,709	0	99,709	2	0.71
HOUSE COMMITTEE ADJUSTMENTS					
Secretary of State Audit	(575)		(575)		
Flexible benefits - executive director	(4,388)		(4,388)		
Executive Department assessments	13		13		
State Bar assumes travel costs		8,000	8,000		
Corresponding reduction in GF support	(8,000)		(8,000)		
AGENCY TOTAL ADJUSTMENTS	\$ (12,950)	\$ 8,000	\$ (4,950)	0	0.00
HOUSE APPROVED BUDGET	\$ 86,759	\$ 8,000	\$ 94,759	2	0.71
SENATE APPROVED BUDGET	\$ 86,759	\$ 8,000	\$ 94,759	2	0.71
% CHANGE FROM 1991-93 ESTIMATED	4.59	NA	14.23		
% CHANGE FROM GOV.'S MANDATED PLUS	(12.99)	NA	(4.96)		

Prepared By Rebecca Studis Reviewed By Aue Acuff