*** NOTICE ***

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, January 15, 1994
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

AGENDA

1. Call to order
2. Approval of November 13, 1993 minutes (copy attached)
3. Introduction of new members
4. Election of Treasurer in accordance with Council's Rules of Procedure (see Attachment A)
5. Report on proposed clarifying amendments to Rule 32 F (Mike Phillips and Maury Holland) (see Attachment B)
6. Status report regarding Rule 69 (Bruce Hamlin)
7. Status report from Subcommittee on Hospital Records (Rule 55 H) (Mick Alexander, Sid Brockley, Mike Phillips)
8. Status report from Subcommittee on Council's Mission (Bruce Hamlin, John McMillan, Janice Wilson)
9. Proposed amendment to Rule 9 (see Attachment C)
10. Mike Williams' letter of 11/24/93 to John Hart et al., for preliminary discussion (John Hart) (see Attachment D)
11. Other matters for consideration during 1993-95 biennium (Chair)
12. Future meeting schedule
13. Old business
14. New business
15. Adjournment

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of November 13, 1993

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

Present:	J. Michael Alexander	Bernard Jolles
	Sid Brockley	John H. McMillan
	Patricia Crain	Michael H. Marcus
	William D. Cramer, Sr.	Michael V. Phillips
	Bruce C. Hamlin	Stephen J.R. Shepard
	John E. Hart	Nancy S. Tauman
	Nely L. Johnson	Janice R. Wilson
Excused:	Robert D. Durham	
	Susan P. Graber	
	Milo Pope	
	Charles A. Sams	
Absent:	John V. Kelly	
	Robert B. McConville	

Kathryn S. Chase, liaison from the Oregon State Bar Practice & Procedure Committee, was present. Attorneys Douglas Wilkinson and Scott Elliott were present for a portion of the meeting. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1. Chair John Hart called the meeting to order at 9:40 a.m.

Agenda Item 2. The previously distributed minutes of the October 9, 1993 meeting were approved with the following corrections: Dick Kropp's name should be deleted as he is no longer a Council member, and Judges Sid Brockley and Nely Johnson should be shown as excused.

Agenda Item 3: Everyone present introduced themselves, including the following new members: Judge Sid Brockley, Judge Michael H. Marcus, Judge Janice R. Wilson, Mr. J. Michael Alexander, Ms. Patricia Crain, Mr. Stephen J. R. Shepard, Ms. Nancy Tauman, and also Ms. Kathryn Chase, who is the OSB Committee on Practice & Procedure liaison person with the Council.

Agenda Items 4 and 5 were consolidated for discussion. John

Hart discussed some matters held over from the previous biennium. He mentioned that some fine-tuning might be needed with Rule 32 and asked Maury Holland to draft some clarifying language in consultation with Mike Phillips, and then to distribute the agreed upon language to the Council prior to the next meeting. He also mentioned that the committee that had begun some preliminary work regarding Rule 55 H and subpoenaing of hospital records needs to be reconstituted and gets its work underway. Mick Alexander, Sid Brockley and Mike Phillips agreed to serve on this committee, in addition to the following non-members who had expressed interest in this project or who it is thought could make a special contribution: Karen Creason, Larry Thorp and Larry Wobbrock. Holland said he would contact each of these non-members to reconfirm their continued interest in serving on this committee, and would then distribute to each committee member a packet of materials reflecting the preliminary work done and correspondence received during the last biennium.

John Hart noted that some review of the work done last year regarding Rule 69 is needed. Bruce Hamlin said that he would do that review and report back on any recommendations he might develop.

Agenda Items 6 and 7 were consolidated for discussion. John Hart opened a wide-ranging discussion about what the Council should do during the current biennium, and according to what order of priorities, by suggesting the desirability of having a subcommittee examine and review the Council's budget and funding. He expressed the hope that John McMillan, among others, would agree to serve on such a subcommittee. McMillan said he was willing to do so. In the ensuing discussion, various members identified other issues, distinct from funding though not entirely unrelated to it, that need to be addressed.

Nely Johnson suggested that ways should be found to establish and maintain contact with legislators well before the 1995 session, to make them aware that the Council exists, what its function is, and that it would welcome hearing about any concerns or suggestions, relating to the ORCP, that they or their constituents might have. There was general agreement that many, probably most legislators have very little knowledge or understanding of what the Council is or does, beyond their misperception that it is a Bar committee.

John McMillan asked whether, as a general matter, judges have any opinion about the Council, and specifically whether they value its work. Sid Brockley responded that, from his observation, Oregon's judges find the ORCP workable and efficient, and are pleased that the Council, rather than the legislature, has primary responsibility for the rules amendment

process. Brockley and others added that the collective and individual memories of the unsatisfactory results obtained when the legislature handled rules amendments were diminishing as that period recedes in time. This point was emphasized by Bill Cramer, who noted that the Council must take account of the fact that, as time goes on, fewer legislators and others can be counted upon to recall the severe shortcomings of rules amending by the legislature.

Nely Johnson stated that the question needs to be addressed whether the functions of the Council could not be as well performed by a Bar committee, such as the Committee on Practice and Procedure. She added that, if the conclusion is that these functions could not be performed by a Bar Committee, the reasons supporting such conclusion need to be articulated specifically. John McMillan suggested that the Council's ability to receive public testimony might be one significant thing that distinguishes it from a Bar committee. Maury Holland mentioned that, as much as many legislators seemed to want the Council to function and be funded as a Bar committee, many of them would be the first to object to having lawmaking authority exercised by an entity that is formally part of the Bar. He added that an important thing that distinguishes the Council from a Bar Committee, and might well give it greater legitimacy, is that its judicial members, as well as its public member, are appointed by the judiciary, not by the Bar.

Discussion then turned to how, apart from whatever could be done to improve communication with the legislature, the Council might be more "activist" in taking the initiative to contact judges and various Bar organizations, to elicit their thoughts and suggestions about what the Council should be doing to improve the ORCP. Several members noted that, as things then stood, the Council appears to have very little rules amending work to do this biennium, beyond attending to a few matters carried over from the previous biennium. Michael Marcus said he would be happy to open ongoing communications between the Council and the Multnomah County Motion Panel, on which he serves. There was general agreement with this suggestion.

Several other suggestions along these lines were made, such as that John Hart publish an article about the Council and its work, that a brochure be prepared summarizing the history and achievements of the Council, and that informational copies of meeting agendas might be distributed to members of the interim Judiciary Committees. While some support was expressed for each of these suggestions, several members cautioned against straining to do things that might foster the impression that the Council is trying to "drum up" business or is acting defensively by contrived efforts to justify its continued existence.

Discussion continued as to whether a single committee should address all the foregoing issues, including budget and funding, outreach and responding to the Appropriation Committee budget note. Sid Brockley stated that he would be opposed to having the Council, or any committee, spending a lot of time and effort trying to justify its continued existence, a thought with which some other members agreed. Nely Johnson mentioned that she was willing to sacrifice the time involved in serving on the Council in order to contribute to the rules amendment process, but was not personally very interested in devoting substantial effort to such philosophical issues as the relationships of the Council to the Bar and the legislature. Bernie Jolles expressed the opinion that the same committee that addresses budget, funding and outreach should also address how the Council should respond to the budget note, with which there was general agreement.

A consensus emerged that, at least for now, a single committee should take cognizance of all of these issues. John Hart asked Bruce Hamlin, John McMillan and Janice Wilson to constitute the membership of this committee, and they agreed. Maury Holland reminded these members, and the members generally, that they should feel free to call upon his office for any research or other supporting efforts they might wish to have done. Toward the conclusion of this general discussion, Bill Cramer emphasized the importance of the Council being clear that its purpose is not simply to add more and more rules, but rather to ensure that civil litigation is as fair and efficient as possible. Relatedly, Michael Marcus added that it would be extremely helpful if the Council could underline the point that workable and well drafted civil trial court rules will save a great deal of money, both for the state and for litigants.

At the conclusion of this discussion, John Hart asked the following individuals to establish contact with the following indicated organizations: Michael Marcus with the Multnomah County Motion Panel, Kathy Chase with the OSB Committee on Practice and Procedure, Bernie Jolles with the Professional Liability Fund, Mick Alexander with OTLA, Mike Phillips with the Lane County Motion Judge, and Maury Holland with OLI. John McMillan asked whether differences in procedural rules in different parts of the state do not pose a question of public policy that should be addressed. Phillips responded that these differences, which are significant, derive from differing judicial interpretations of the ORCP and other rules, and therefore are not within the power of the Council to deal with.

Agenda Item 8. John Hart stated that he did not think there is any need for the Council to meet in December, and asked whether there were any objections to having the next meeting at Bar Headquarters on Saturday, January 15, 1994. Hearing none he

set the next meeting date accordingly.

Agenda Item 9. John Hart asked whether there was any old business to discuss. None was proposed.

Agenda Item 10. John Hart asked whether any member wished to raise any item of new business. Bruce Hamlin reminded the Council that the election of a Secretary-Treasurer had been deferred, and pointed out that this officer is called for in the 1977 by-laws. It was decided to defer this matter further until the Council is at full membership. Hart directed Maury Holland to distribute copies of the by-laws to the members prior to the January 15, 1994 meeting.

Agenda Item 11. The meeting was adjourned at 11:20 a.m.

Respectfully submitted,

Maury Holland

Maurice J. Holland
Executive Director

COUNCIL ON COURT PROCEDURES

RULES OF PROCEDURE

The following are suggested Rules of Procedure to be adopted pursuant to Section 2(1)(b), House Bill 2316. The rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in the statute.

I. MEETINGS

Meetings of the Council shall be held regularly at such time and place fixed by the Council or the Executive Committee. Special meetings of the Council may be called at any time by the Chairman or the Executive Committee. Notice of special meetings of the Council stating the time, place and purpose of such meeting shall be given personally by telephone or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of the meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of such meeting except where a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called.

All meetings shall be conducted in accordance with parliamentary procedure.

II. OFFICERS, EXECUTIVE COMMITTEE, SUBCOMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a Chairman, Vice Chairman, and Treasurer. These officers shall be elected for a period of two years at the first meeting of the Council following the adjournment of a regular session of the legislature. The powers and duties of the officers shall be as follows:

1. Chairman. The Chairman shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chairman by the Council.

2. Vice Chairman. The Vice Chairman shall preside at meetings of the Council in the absence of the Chairman and shall have such other powers and perform such other duties as may be assigned to the Vice Chairman by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chairman and Vice Chairman and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and perform such other duties as may be assigned to them by the Council. The Executive Committee shall set the agenda for each Council meeting prior to such meeting and provide reasonable notice to Council members of such agenda.

C. Subcommittees. The Executive Committee may appoint such subcommittees from Council membership as it shall deem necessary to carry out the

business and purposes of the Council. Such subcommittee shall report to and recommend action to the Council.

III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

A. Executive Director. The Council shall select and appoint an Executive Director on such terms and conditions as the Council shall specify.

Under direction of the President, Treasurer and Executive Committee, the Executive Director shall be responsible for the employment and supervision of other Council staff, maintenance of records of the Council, presentation and submission of minutes of the meetings of the Council, provision of required notice of meetings of the Council, preparation and disbursement of Council agenda and receipt and preparation of suggestions for modification of rules of pleading, practice and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council or the Executive Committee.

B. Staff. The Council shall employ or contract with, under terms and conditions specified by the council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council shall be retained by the State Court Administrator's office and shall be paid out only by the State Court Administrator as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. Council shall designate a location for an administrative office for the Council. All Council records shall be kept

in such office under the supervision of the Executive Director.

IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE AND PROCEDURE

The Council shall consider and propose such rules of pleading, practice and procedure as it deems appropriate at its meetings. Two weeks prior to the regularly scheduled meeting in October, or any meeting in October specified by the Council or the Executive Committee, of a year prior to a regular session of the legislature, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the rules and amendments which have been proposed, and notice that copies of any specific rules and amendments proposed may be secured upon request from the Administrative Office of the Council. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to proposed amendments and rules of procedure.

Thereafter, the Executive Director shall distribute to the members of the Council a draft of the tentative final action to be taken to amend or adopt rules of pleading, practice and procedure as directed by the Council, together with a list of statutory sections superseded thereby, and appropriate explanatory comments, in such form as the Council shall direct, and the Council shall take final action to modify, repeal or adopt rules of pleading, practice and procedure and direct submission of such amendments and rules and any list of statutory sections affected thereby, together with explanatory comment, to the legislature before the beginning of the regular session of the legislature.

December 31, 1993

To: Chair and Members, Council on Court Procedures

From: Mike Phillips and Maury Holland

Re: Proposed "Clean-up" Amendments to ORCP 32F(2)and(3)

At its Dec. 12, 1992 meeting the Council promulgated several amendments to ORCP 32, the class action rule, as set forth in the attachment to this memo. The basic thrust of these amendments was to authorize broader judicial discretion to mold procedures regarding notice and the like according to the circumstances of particular cases without the strictures imposed by the abstract classification scheme of former section 32B. An important component of this effort was the amendment of section 32B eliminating the tripartite classification of class actions provided by its prior language in favor of an enumeration of factors to be considered by a court in deciding whether to certify a class action under what is now the unitary scheme of this section as amended. In thus amending section 32B, a majority of the Council was persuaded that the prior classification scheme, under which the universe of class actions was assumed to be neatly divisible into three sharply distinguishable categories corresponding to subsections B(1), B(2) and B(3) of the former section, was unduly abstract and rigid. This was deemed undesirable, largely because a number of important procedural consequences turned upon whether a given class action was determined to fall within the B(3) category in contrast to either of the categories defined by 32B(1) or (2).

Consistent with this amendment of section 32B the Council also amended subsection 32F(1). The former version of 32F(1) prescribed elaborate and detailed notice requirements, but only in class actions maintained under former subsection 32B(3). Since the latter was in the process of being jettisoned as a discrete category, subsection 32F(1) obviously could no longer refer to it. Unfortunately, the possible impact of these amendments to former section 32B and subsection 32F(1) upon subsections 32F(2) and (3) was not adequately considered by the subcommittee that worked on this project or by the full Council when it voted to promulgate them. The problem left over is that, neither in their present amended form nor in their prior form, subsections 32F(2) and (3) are not limited in their application to any distinct category of class action, but appear to apply indifferently to all. Prior to the '92 amendments, however, the applicability of both subsections 32F(2) and 32F(3) would probably have been understood as being limited by what was then paragraph 32F(1)(a), whose applicability was expressly confined to class actions maintained under prior subsection 32B(3). Since subsection 32F(1) as amended is not in terms restricted to

the no-longer-existing 32B(3) or to any other discrete category of class action, the difficulty is that the "statement" mandated to be requested by 32F(2), with its restrictive consequences for any judgment entered against a defendant, would seem to be pertinent to all class actions.

This is a result we believe should be avoided. Subsections 32F(2) and (3), in combination, constitute the controversial "claim form" provision of Oregon's class action rule, a feature that is unique to it among the class action rules of all American jurisdictions. The Council seriously considered abolishing it as part of the battery of '92 amendments of this rule, but finally determined not to do so. We are not proposing to reopen that debate. But we do think it would be highly regrettable if any Oregon court were to feel compelled by the language effective 1/1/94 to apply these claim form provisions in any class action other than one falling within the category formerly described by the prior version of subsection 32B(3).

The kind of class action described by former subsection 32B(3), which will of course continue to be adjudicated in the courts of this state despite the demise of its distinctive categorization, is generally known as a "common question" or "consumer" class action. Its salient characteristic is that it aggregates in a single action claims, predominantly for money damages, on the part of hundreds or thousands of class members, each of which could be litigated separately in a conventional civil action. While all class members will have sustained harm or injury arising out of more or less the same transaction or occurrence, which is required in order to meet the standard of one or more common questions of law or fact, amounts of damages recoverable by each class member will normally differ and be individually determined following adjudication of defendant's liability to the class generally.

While the desirability of a claim form or "opt-in" provision is debatable in the case of consumer or common question class actions, that debate was resolved last biennium in favor of its retention. But no one knowledgeable about class actions has ever, as far as we are aware, maintained that such a provision makes any sense for other kinds of class actions. The most obvious example of where a claim form provision would be wholly inapt is a civil rights class action, wherein the predominant form of relief is injunctive or declaratory in favor of a class nebulously defined in terms of some shared group characteristic. This is the kind of class action envisioned by former subsection 32(B)(2). Although perhaps less obvious, we also believe that the claim form procedure mandated by subsections 32F(2) and (3) are also unnecessary and inappropriate for the kind of class action envisioned by former subsection 32B(1). In the latter the predominant form of relief might well money damages. But, almost

by definition, class members in this sort of class action are "persons needed for just adjudication" within the meaning of Rule 29. In other words, they are not claimants who could litigate their individual claims separately, without joinder of other claimants having claims that are legally related and interconnected in such a manner as to make them what used to be called either "necessary" or "indispensable" parties.

To fix this problem all that is needed is language that would adequately describe in substance, rather than by bare reference to 32B(3), which is still present in the rule but no longer describes a discrete category of class action, the kind of class action for which the Council last biennium decided that the claim form procedure should be retained. To accomplish this we propose the following amendments to subsections 32F(2) and (3) [language to be added in italics; language to be deleted in square brackets]:

> F(2) Prior to [the] final entry of [a] judgment against a defendant *in an action maintained under this rule wherein the predominant form of relief consists of damages awarded to some or all class members calculated from the harm or injury they are found severally to have sustained,* the court shall request members of the class to submit a statement . . . .
>
> F(3) Failure of a class member to file a statement required by the court *pursuant to subsection F(2) of this rule* will be grounds for [the] entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

As with any rules amendment, we should strive to attain the

greatest economy of words consistent with the clearest possible expression of intent. We trust that the full Council will find ways to improve upon the language proposed above. Incidentally, the bracketed articles have nothing to do with the specific problem at hand. Our thought was simply to clear out a bit of unnecessary verbiage.

CLASS ACTIONS
RULE 32

A. Requirement for class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

A.(1) The class is so numerous that joinder of all members is impracticable; ~~and~~

A.(2) There are questions of law or fact common to the class; ~~and~~

A.(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; ~~and~~

A.(4) The representative parties will fairly and adequately protect the interests of the class; and

A.(5) In an action for damages ~~under subsection (3) of section B of this rule~~, the representative parties have complied with the prelitigation notice provisions of section H of this rule.

B. Class action maintainable. An action may be maintained as a class action if the prerequisites of section A of this rule are satisfied, and in addition, the court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to this finding include:

B.(1) The extent to which the prosecution of separate actions by or against individual members of the class ~~would~~ create a risk of:

B.(1)(a) Inconsistent or varying adjudications with respect to ~~individual~~ members of the class which would establish incompatible standards of conduct for the party opposing the class; or

B.(1)(b) Adjudications with respect to ~~individual~~ members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; ~~or~~

B.(2) ~~The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final~~ The extent to which the relief sought would take the form of injunctive relief or corresponding declaratory relief with respect to the class as a whole; ~~or~~

B.(3) The ~~court finds that the~~ extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members~~, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include: (a)~~;

B.(4) tThe interest of members of the class in individually controlling the prosecution or defense of separate actions;

bB.(5) tThe extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

eB.(6) tThe desirability or undesirability of concentrating the litigation of the claims in the particular forum;

dB.(7) tThe difficulties likely to be encountered in the management of a class action that will be eliminated or significantly reduced if the controversy is adjudicated by other available means; and

eB.(8) wWhether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class~~; and (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal~~.

C. Determination by order whether class action to be maintained.

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether and with respect to what claims or issues it is to be so maintained and~~, in action pursuant to subsection (3) of section B of this rule, the court~~ shall find the facts specially and state separately its conclusions thereon. An order under

this section may be conditional, and may be altered or amended before the decision on the merits.

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

D. Dismissal or compromise of class actions; court approval required; when notice required. ~~A~~ Any action filed as a class action in which there has been no ruling under subsection C.(1) of this rule and any action ordered maintained as a class action shall not be voluntarily dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to some or all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise ~~to give any~~ of such compensation has been made. If the statute of limitations has run or may run

against the claim of any class member, the court may require appropriate notice.

E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument, including precertification determination of a motion made by any party pursuant to Rules 21 or 47 if the court concludes that such determination will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

E.(2) Requiring, for the protection of ~~the members of the class~~ class members or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all ~~of the~~ class members of any step in the action, ~~or~~ of the proposed extent of the judgment~~,~~, ~~or~~ of the opportunity of class members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses~~,~~ or otherwise to come into the action, or to be excluded from the class;

E.(3) Imposing conditions on the representative parties, class members, or ~~on~~ intervenors;

E.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and

that the action proceed accordingly; and

E.(5) Dealing with similar procedural matters.

F. Notice ~~required; content; statements of class members required; form; content; effect of failure to file required statement~~ and exclusion.

F.(1) When ordering that an action be maintained as a class action under this rule, the court shall direct that notice be given to some or all members of the class under subsection E.(2) of this rule, shall determine when and how this notice should be given and shall determine whether, when, how, and under what conditions putative members may elect to be excluded from the class. The matters pertinent to these determinations ordinarily include: (a) the nature of the controversy and the relief sought; (b) the extent and nature of any member's injury or liability; (c) the interest of the party opposing the class in securing a final resolution of the matters in controversy; (d) the inefficiency or impracticality of separately maintained actions to resolve the controversy; (e) the cost of notifying the members of the class; and (f) the possible prejudice to members to whom notice is not directed. When appropriate, exclusion may be conditioned on a prohibition against institution or maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separately maintained action of any judgment rendered in favor of the class from which exclusion is sought.

~~F.(1)(a) Following certification, in any class action~~

~~maintained under subsection (3) of section B of this rule, the court by order, after hearing, shall direct the giving of notice to the class.~~

~~F.(1)(b) The notice, based on the certification order and any amendment of the order, shall include:~~

~~F.(1)(b)(i) A general description of the action, including the relief sought, and the names and addresses of the representative parties;~~

~~F.(1)(b)(ii) A statement that the court will exclude any member of the class if such member so requests by a specified date;~~

~~F.(1)(b)(iii) A description of possible financial consequences on the class;~~

~~F.(1)(b)(iv) A general description of any counterclaim being asserted by or against the class, including the relief sought;~~

~~F.(1)(b)(v) A statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;~~

~~F.(1)(b)(vi) A statement that any member of the class may enter an appearance either personally or through counsel;~~

~~F.(1)(b)(vii) An address to which inquiries may be directed; and~~

~~F.(1)(b)(viii) Other information the court deems appropriate.~~

~~F.(1)(c) The order shall prescribe the manner of~~

~~notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.~~

~~F.(1)(d) Members of the class shall be given the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort.~~

~~F.(1)(e) For members of the class not given personal or mailed notice, the court shall provide a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. The means of notice may include notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups, or any other means reasonably calculated to provide notice to class members of the pendency of the action.~~

~~F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members. The court may also direct that separate and distinctive notice be included with a regular mailing by the defendant to the class members who are current customers or employees of the defendant.~~

~~F.(1)(g) The court may order, as an alternative to the~~

~~order and direction under paragraph (f) of this subsection, that a defendant who has a mailing list of class members, including those who are or were current customers or employees of the defendant, provide a copy of that list to the representative parties. The representative parties shall be required to pay the reasonable costs of generating, printing or duplicating the mailing list.~~

~~F.(1)(h) The court may order a defendant who has a list of former customers or employees to provide that list to the representative parties. The court may further order that a separate and distinctive notice be included with a regular mailing by the defendant to current customers or employees of the defendant.~~

F.(2) Prior to the final entry of a judgment against a defendant the court shall request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of

damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member who has filed a statement required by the court, assessable court costs, and an award of attorney fees, if any, as determined by the court.

F.(3) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

F.(4) ~~Except as otherwise provided in this subsection, the~~ Plaintiffs shall bear ~~the expense~~ costs of ~~notification~~ any notice ordered prior to a determination of liability. The court may, ~~if justice requires~~ however, order that ~~the~~ defendant bear ~~the expense of notification~~ all or a specified part of the costs of any notice ~~to the current customers or employees of the defendant~~ included with a regular mailing by ~~the~~ defendant to its current customers or employees. The court may hold a ~~preliminary~~ hearing to determine how the costs of such notice shall be apportioned.

* * * * *

G. Commencement or maintenance of class actions regarding particular issues; ~~division of class;~~ subclasses. When appropriate~~:~~ ~~G.(1)~~ An action may be brought or ordered maintained as a class action with respect to particular claims or issues~~;~~ or ~~G.(2) a class may be divided into subclasses and each~~

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October 28, 1993

NOV 01 1993

Mr. Dennis Hubel
Oregon State Bar
Chairman, Procedures & Practice
Committee
1201 N.W. Wall Street, #300
Bend, OR 97701

Mr. Maury Holland
Executive Director of Counsel
and Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Dear Mr. Hubel and Mr. Holland:

Our firm recently has had two incidents that suggest the need for a new rule. In each case, our office received a true copy of a pleading, with copy of the proof of service on us. In each case, we subsequently learned that the documents served on us were not actually filed with the court. In one case, we learned of the non-filing when the trial court administrator issued a notice of dismissal under UTCR 7.

We propose that ORCP 9C be amended by adding a new sentence at the end of the first complete sentence as follows: "The person serving the paper shall certify to the party being served as to the date and means by which the paper was filed, and shall further certify that the appropriate filing fee, if any, was duly paid." This certification is consistent with the certificate of service required for appellate practice. The certification will not add any material burden to practitioners.

Please consider this proposal as you deem appropriate.

Sincerely,

JOHNSTON & ROOT, P.C.

Ronald Allen Johnston

RAJ:krm

Attachment C-1

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November 18, 1993

Ronald A. Johnston
JOHNSTON & ROOT, P.C.
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Dear Mr. Johnston:

I passed along your letter of October 28, 1993 to the Procedure & Practice Committee for discussion at their November 13 meeting. The preliminary feeling of the committee is that this is an isolated problem, which is most easily solved by counsel involved in the particular case when the problem arises. Therefore, the committee was not interested in pursuing an ORCP change based on our understanding of the nature of the problem.

If you feel that this is inappropriate, please do not hesitate to call me to explain in more detail the nature of the problem involved for reconsideration by the full committee.

Thank you for your correspondence.

Very truly yours,

Dennis James Hubel

DJH:kjn

cc: Dan Harris
Susan Grabe (for circulation to the full committee)

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Attachment C-2

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November 24, 1993

Mr. John Hart, Chair
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Re: Telephone Testimony of Witnesses During Trial

Dear John, Bill and Mic:

Perhaps more than any other members of the Council, the three of you will appreciate the importance of the issue raised by this letter. Bob Keating and I recently tried a medical malpractice case against each other in Judge Steve Tiktin's courtroom in Bend. The case settled after five days of trial, just before the judge was to rule on the issue I raise in this letter. I know that Judge Tiktin would be willing to give you his views, if the Council decides to pursue this matter.

The, issue was this: I on behalf of the plaintiff, and Bob Keating, on behalf of the defendant doctor, each presented one of the two leading experts in the world on the disease at issue, primary pulmonary hypertension. My expert, Dr. Lewis Rubin from the University of Maryland, flew to Bend from Baltimore on Wednesday, November 3, traveling approximately eight hours with a brief stopover in Indianapolis, change of planes in San

Attachment D-1

Francisco, and a late arrival without his garment bag in Bend. Then he had to hang around all day on Thursday while we picked the jury and made opening statements. He finally got to testify live before the jury for approximately two hours beginning at 3:30 p.m. He was, I think Bob will admit, extremely impressive and knowledgeable. Immediately after his testimony, we raced him to the Redmond airport so that he could catch a plane back to Portland, where stayed overnight in a hotel, because he had to fly out early the next morning for Atlanta where he was presenting three papers at the annual meeting of the American Heart Association.

On the fourth day of trial, on Wednesday, November 10, Bob Keating called his counter-expert, the co-author with Dr. Rubin of the main reference work on primary pulmonary hypertension, another very impressive and knowledgeable expert doctor from the University of Illinois, Dr. Stuart Rich. Although he and Dr. Rubin agreed on most points, Dr. Rich raised two points which were not covered in Dr. Rubin's testimony, either on direct or cross, and to which I felt I had to have Dr. Rubin respond to in order get a fair result in the case.

To give you the import of the matter, my client, who was sitting beside me, was expected to die within 3 - 12 months by all the experts who testified, unless she had a lung transplant. The main issue of causation was whether or not she would have responded to drug therapy if the defendant doctor had read an x-ray report seven years earlier that diagnosed her disease. Her disease went undiagnosed for seven years, during which time she worsened considerably. She was an extremely attractive plaintiff from a long-time and well respected family in the Bend area, going up against a local doctor who was also very well respected. It was clearly an important case.

The trial was going to conclude on Friday morning. Thursday, November 11 was a court holiday. I phoned Dr. Rubin, and learned there was no way I could get him to come back out live to testify on Friday. He had patients flying in from all over the world to Baltimore, and other commitments, and so forth. He was willing and able to testify either live by telephone over a speaker in the courtroom on Friday morning (the courtroom was so equipped), or by perpetuation deposition on Thursday. Bob Keating objected to either approach, and Judge Tiktin initially ruled that he had no discretion to permit live testimony during trial over such an objection, under the case of Pope v. Benefit Trust Life, 494 P2d 420 (1972)(enclosed) and under the 1993 statute allowing telephone testimony in trials by the court without a jury.

I argued that that case did not apply to this situation, that we should be able to at least take a perpetuation deposition for rebuttal under ORCP 39I, and that Keating had waived his objection to such testimony by telephone in rebuttal because I had mentioned it off the record in front of the judge a couple of days earlier and Keating had not objected.

The judge did order Bob to attend a telephone deposition of the proffered rebuttal testimony on Thursday morning, which was done. The case settled that afternoon, so the judge never got to rule as to whether I could read the testimony to the jury, or play the audiotape.

We prepared a short brief on this issue, which we were going to submit to the judge on Friday morning, a copy of which is also enclosed.

During the perpetuation telephone deposition, I elicited testimony from Dr. Rubin about the difficulty, in fact, impossibility, of getting him to come back out for live rebuttal testimony. A copy of the rebuttal deposition is also enclosed.

I think in this situation a party should have the absolute right to have the witness testify either live by telephone in the courtroom, or by telephonic deposition. The jury has already seen the demeanor of the witness and sized him up. The expense and time involved in getting such an important expert witness to return for 20 minutes of testimony to a remote part of the country is outrageously high, and in many cases, such as in my own, a worthy claimant simply cannot do it.

The broader issue of when telephonic testimony should be allowed other than in rebuttal situations where the witness has already appeared, is more complex, but I think in the case of an expert witness who has already appeared live before the jury, such rebuttal testimony by telephone should be permitted as a matter of right.

I am certain that any federal judge would have permitted such testimony, and Judge Tiktin would have permitted it if he believed he had authority to do so.

Don't you agree that this is something that Council on Court Procedures should take up?

Yours truly,

WILLIAMS & TROUTWINE, P.C.

Michael L. Williams

MLW/co
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Enclosures

Attachment D-4