

# COUNCIL ON COURT PROCEDURES

*Established by the Oregon Legislature in 1977*

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September 2, 1994

## HAND DELIVERED

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Honorable Bill Bradbury  
Senate President  
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Salem, OR 97310

Judge Sid Brockley  
Patricia Crain, Esq.  
William D. Cramer, Sr., Esq.  
Judge Mary J. Deits  
Judge Stephen L. Gallagher, Jr.  
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Honorable Larry L. Campbell  
Speaker of the House  
269 State Capitol  
Salem, OR 97310

Justice Susan P. Graber  
Bruce C. Hamlin, Esq.  
John E. Hart, Esq.  
Judge Nely L. Johnson  
Bernard Jolles, Esq.  
Judge John V. Kelly  
Rudy R. Lachenmeier, Esq.  
Judge Michael H. Marcus  
John H. McMillan  
Michael V. Phillips, Esq.  
Judge Milo Pope  
Judge Charles A. Sams  
Stephen J.R. Shepard, Esq.  
Nancy S. Tauman, Esq.

Re: Council on Court Procedures Response to Budget  
Note

Dear Mr. President and Mr. Speaker:

During the 1993 legislative session the Council on Court Procedures was funded for the 1993-95 biennium, subject to the following 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

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to the Emergency Board on these  
recommendations."

The purpose of this letter is to report on the action of the Council in response to the budget note.<sup>1</sup> As a result of discussions within the Council, and conferences with legislative and bar leaders, the Council reached the following conclusions: (1) not to recommend any changes in the substance or process of the Council; and (2) to report to the Emergency Board that the Oregon State Bar is not the appropriate entity to fund the Council.

#### Background

During the 1993 legislative session, the Council on Court Procedures was the subject of two instances of legislative action. Several substantive changes were made to the Council by virtue of 1993 Oregon Laws Chapter 772 (HB 2360). And, the Council was funded for the 1993-95 biennium (HB 5045).

HB 2360 began as a bill which would have made the Council's action advisory to the Legislative Assembly. In its final form, it made the following changes: (1) it eliminated a requirement that one of the members be primarily involved in the teaching of law; (2) it required a super majority (the affirmative vote of 15 members) to promulgate rules; (3) it advanced the date by which specific language of proposed promulgation, modification, or repeal must be published; and (4) it eliminated a requirement that hearings be held in each congressional district of the state.

The appropriation bill, HB 5045, came out of the Appropriations Committee A with a recommendation of continued Council funding: Fifty percent General Funds, fifty percent "Other Funds." House Appropriations Committee A apparently anticipated that half of the funding for the 1993-95 biennium would come from the Oregon State Bar. HB 5045 did not pass the first time that it was sent to the floor. In its final form, HB 5045 included the above referenced budget note, instead of a requirement of fifty percent "Other Funds."

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<sup>1</sup> That note was adopted by the House Appropriations Committee, and concurred in by the Senate Ways and Means Committee.

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### Historical Role of the Council on Court Procedures

The bill creating the Council in 1977 was sponsored in part and endorsed by the Oregon State Bar Practice and Procedure Committee and had broad support among members of the Oregon State Bar as well as the state judiciary. When the bill was heard in House Judiciary, it was supported by Judge Arno Denecke and Judge John C. Beatty, on behalf of the Oregon Judicial Conference, and by many others. The reasons behind the creation of a Council on Court Procedures were several: (1) a feeling that the legislature did not have the time nor inclination to take a comprehensive look at the rules of civil procedure; (2) the fact that the OSB Practice and Procedure Committee "never had a chance to take a comprehensive look at the whole problem, and the fact that tinkering with one part of the procedure code frequently affects another part;"<sup>2</sup> and (3) as a way of resolving where rule-making authority for the courts properly resided, that is, in the legislature or in the Supreme Court.<sup>3</sup> The enabling legislation passed by very substantial margins.

After the Council was created, it invested much work, hours of public hearings, meetings, and drafting, and ultimately promulgated the Oregon Rules of Civil Procedure, replacing the archaic century-old Deady Code and making Oregon court procedures much more streamlined and cost-effective. When the first set of rules was promulgated by the Council, it was the first time that the rules governing civil procedure in courts of this state had been comprehensively examined in this century. The interested players -- the Council, the Oregon State Bar, and the House and Senate Judiciary Committees -- gave those rules careful attention. The first set of 64 rules received weeks of hearings; the work of the Judiciary Committee was embodied in HB 3131, which consisted of 202 sections. Given that number, the reader might assume that there were a huge number of legislative changes to those 64 promulgated rules. However, only 25 of the rules were changed in any respect, and a number of the changes were minor.

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<sup>2</sup> Testimony of Judge Arno Denecke before House Committee on Judiciary on February 24, 1977.

<sup>3</sup> Consequently, the creation of the Council resolved separation of powers issues.

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A similar pattern was followed in 1981 when the legislature received the report of the Council including rules 65 through 85. Since then, the number of rules submitted to each legislative session and the number of legislative alterations as a percentage of those rules, has dropped off.

In the time that the Council has been in existence, it has accomplished some things that might have seemed impossible at the beginning: the merger of law and equity; the elimination of demurrers and pleas in abatement; rationalizing the process of pleading and proving attorney fees, as well as a host of other changes that have made the civil practice of law more straightforward. That stands in contrast to the situation before creation of the Council. Despite numerous appeals for broad-scale reform and updating of Oregon procedural rules that lagged far behind those of other states. The legislature quite understandably was not interested in summons, joinder of parties, interpleader, summary judgments, motions for new trial and JNOV, cost bills, and other technicalities of court procedures.

Unlike many other states, the Oregon Supreme Court did not have statutory rule-making power and individual members of the Court opposed proposals to grant it rule-making power. Thus, Oregon was left without any effective mechanism for modernizing its court procedures and revising rules that were causing unnecessary delay and injustice in litigation.

The role of the Council in recent times has been well defined in an opinion piece that appeared in the Oregon State Bar Bulletin:

"This structure was designed to give Oregon the best of both worlds. The council, composed mostly of trial lawyers and trial judges, used its expertise to hone the technical rules that govern the day-to-day conduct of litigation, while legislators made the final call on questions controversial enough to allow the constituents and interest groups to which they properly respond. This concentrated in the council primary responsibility for the comprehensive, continuing review of the ORCP as an integrated, evolving system of connected rules. Four-year terms allowed members

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an opportunity to develop an understanding of the ORCP that few trial lawyers, let alone legislators (even those on the judiciary committees) could match. Finally, the pace of the council's deliberations was designed to allow a more measured review than the often hectic atmosphere of legislative hearings and work sessions. The council's meeting schedule was intended to lend itself to in-depth consideration, with solicitation of public input from open meetings held across the state. The end result reflected the well-considered consensus of our foremost procedural experts."

Analysis of the Current Role of the  
Council on Court Procedures

The Council on Court Procedures continues to perform an important role in the adoption of Rules of Civil Procedure:

- ◆ The "Council on Court Procedures [is] able to review the Oregon laws relating to civil procedure and coordinate and study proposals concerning the Oregon laws relating to civil procedure advanced by all interested persons." ORS 1.725(4) (legislative finding).
- ◆ "Development of a system of continuing review of the Oregon laws relating to civil procedure, requires the creation of a Council on court procedures." ORS 1.725(3) (legislative finding; emphasis supplied).
- ◆ The difference in mission between the Council on Court Procedures and the Oregon State Bar Practice and Procedure Committee is reflected in the difference in membership of those bodies. The Council on Court Procedures is made up of ten judges drawn from the Circuit and District Court, Court of Appeals, and Supreme Court, twelve lawyers "active in civil trial practice" and "broadly representative of the trial bar," and one

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Stephen C. Thompson, "Death Knell to Reform?" Oregon State Bar Bulletin (May 1993). -

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public member. ORS 1.730(1). That membership reflects a strong desire on the part of the drafters to make sure that rules of civil procedure are workable for all of the participants. Similarly, the quality of the work product of the Council on Court Procedures is enhanced by the practice of that body to solicit input from a variety of sources, and to hold public hearings. For example, in the current interim, the Council on Court Procedures has considered a number of proposed changes to ORCP 55, dealing with subpoenas, which are designed to improve and clarify procedures for litigants and custodians of a variety of types of records obtained from non-parties in normal civil discovery. The Council on Court Procedures has received input from representatives of hospitals, many attorneys around the state, and the Oregon State Bar Practice and Procedure Committee. The result should be a comprehensive look at the rule, with the benefit of the experience of lawyers who issue subpoenas, judges who rule on motions for protective order, and institutions which must respond to subpoenas.

- ◆ Some observers of the Council on Court Procedures assume that the Council is involved in making rules for the benefit of lawyers. In fact, the Council on Court Procedures makes the rules which govern civil proceedings in the trial courts of this state. Those rules have as much or more impact on the individuals and corporations who are parties to the case, and the court system itself, as they have an impact on the lawyers who represent those parties. That point is aptly stated in the enabling legislation:

"Oregon laws relating to civil procedure designed for the benefit of litigants which meet the needs of the court system and the bar are necessary to ensure prompt and efficient administration of justice in the courts of the state." ORS 1.725(1) (legislative finding; emphasis supplied).

See also, ORCP 1B ("these rules shall be construed to secure the just, speedy, and inexpensive determination of every action."). The Council on Court Procedures, by its action, has an affect on the efficiency and expense to litigants and to the court system in administering civil justice. As a result, the Council on Court Procedures is

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serving the public's need, and not simply adopting "rules for lawyers."

- ◆ The Council on Court Procedures is made up of members who receive only compensation for expenses. It is staffed by a paid Executive Director and secretary. A copy of the Council on Court Procedures Budget Analysis for the 1991-93 biennium and estimated expenses for the 1993-95 biennium is enclosed. At least two points can be drawn from a review of the budget analysis. First, nearly all of the budget is devoted to staff involved in research, drafting, preparation of the minutes and comments which contribute to form the legislative history for the Oregon Rules of Civil Procedure, and other matters. Second, if the functions of the Council on Court Procedures were performed by another entity, for example the Legislative Assembly, those costs would simply be shifted. The Council on Court Procedures, as mentioned above, conducts numerous public meetings and also benefits from the work of its volunteer members, individually and in committees. If the Legislative Assembly were to take it upon itself to adopt all rules of civil procedure, it would either have to staff the judiciary committees appropriately and expect to hold more hearings<sup>5</sup> or it would have to pay to staff the Council on Court Procedures as a purely advisory group.
- ◆ We understand the Oregon State Bar to be supportive of the Council on Court Procedures. Nonetheless, the Oregon State Bar is not the appropriate entity to fund or manage the Council. The Oregon State Bar is a public corporation and an instrumentality of the judicial department. ORS 9.010(1). The Council on Court Procedures was created by the legislature and had important but limited rule-making authority delegated to it. This thoughtful compromise should be maintained and funded by the legislature. Advisory committees such as the Oregon State Bar's Practice and Procedure Committee play an important role, but cannot take the place of an independent Council, subject to legislative review.

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<sup>5</sup> In order to mirror the Council on Court Procedures' actions, the judiciary committees would have to hold hearings periodically to review the whole of the Oregon Rules of Civil Procedure. If they simply acted on particular bills introduced, they would not accomplish the same task.

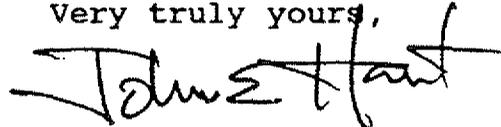
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Conclusion

The Council on Court Procedures does not recommend any changes in substance or process. Significant changes in the substance and process of the Council were made during the 1993 legislative session. The first rules promulgated by the modified Council on Court Procedures will be finished later this year. They will go into effect on January 1, 1996, unless the Legislative Assembly takes action to provide an earlier effective date, or amends repeals or supplements such rules.

The Council on Court Procedures deserves continued funding in order to carry out the important public function which it has been given under ORS 1.725 through 1.750. That funding should come from the Legislative Assembly.

Very truly yours,



John E. Hart, Chair

Enclosure

cc: Richard S. Springer, Esq.  
Del Parks, Jr., Esq.  
Judy Shipler Henry, Esq.  
Honorable Wallace P. Carson, Jr.

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bc: Mr. John H. McMillan  
Bob Oleson, Oregon State Bar  
Daniel L. Harris, Esq.  
Susan Evans Grabe, Oregon State Bar  
Professor Maurice J. Holland

**COUNCIL ON COURT PROCEDURES**

**BUDGET ANALYSIS**

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**PERSONAL SERVICES (1991-93 BIENNIUM)**

Appropriation for salary (includes E-Board adjustment of \$2,915 for cost-of-living allowance), Personnel Division assessments, PERS contributions, Social Security, workers' comp assessments, mass transit taxes, and flexible benefits (insurance)..... \$70,155

Estimated expenditures from July 1, 1991 through June 30, 1993:

Fred Merrill (last payment made to Merrill Estate): salary from July 1991 through April 1992..... \$ 9,733  
 OPE: Estimated Social Security and mass transit taxes (10 mos.)..... 900

Maury Holland: salary from May 1, 1992 through December 1992..... \$ 7,784  
 Salary from January 1993 through June 1993 6,015 13,799  
 OPE: Estimated Social Security and mass transit taxes, 14 mos. - \$1,260; payment to PERS from May 1, 1992 through December 1991 (\$166/mo. x 8 months - \$1,328; payment to PERS from January through June 1993 (\$180/mo. x 6 months - \$1,080)) - total estimated OPE..... 3,668

NOTE: A cost-of-living increase had been approved for the Executive Director as of January 1, 1992 and again on January 1, 1993. When the apportionment of salaries was made, it only included the COLA increase effective January 1, 1993. An adjustment would involve the following additional payments:

Merrill Estate..... 117  
 Maury Holland..... 417

Gilma Henthorne: salary - \$973/mo. from July 1991 through December 1991..... 5,838  
 salary - \$1,052/mo. from January 1992 through December 1992..... 12,624  
 salary - \$1,138/mo. from January 1993 through June 30, 1993..... 6,828 25,290  
 Gilma Henthorne: insurance cashback from July 1, 1991 through June 30, 1993 (this is the portion of insurance benefit which is not used for a premium)..... 1,910

Gilma Henthorne: PERS contributions, Social Security, Personnel Division assessment, workers' comp assessment, mass transit taxes, health and dental benefits from July 1, 1991 through June 30, 1993 (estimated)..... 11,800

TOTAL SALARY, OPE AND OTHER BENEFITS..... \$67,634

NOTE: <sup>1</sup>PERS contributions were not made for the late Fred Merrill, presumably because he was paid in the summer months rather than monthly. If contributions had been made, they would have totalled approximately \$1,700, making the total amount expended \$69,334 rather than \$67,634, a difference between the amount appropriated and the amount expended of \$821. PERS contributions are being made for Maury Holland because he is being paid monthly.

Difference between appropriated amounts and estimated expenditures through the biennium..... +\$2,521

**EXPLANATION:**

Amount paid for salaries during 1991-93 biennium.....	\$49,356
Estimated OPE for Executive Director.....	\$4,568
Estimated OPE for Executive Assistant.....	\$11,800
Insurance cashback.....	\$1,910
Appropriation for <b>SERVICES AND SUPPLIES</b> (see separate itemization of expenditures in that category).....	\$12,799
<b>TOTAL APPROPRIATED BUDGET.....</b>	<b>\$82,954</b>

There is a projected deficit in **SERVICES AND SUPPLIES** of at least \$1,145 and possibly more if a capital outlay is made in June.

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<sup>1</sup>PERS contributions for the Executive Director for the 1993-95 biennium should be projected in the REQUESTED BUDGET amount.

**SERVICES AND SUPPLIES (1991-93 BIENNIUM)**

Appropriation.....		\$12,799
Itemization of expenditures (including projections):		
<b>TRAVEL EXPENSES:</b>		
Mileage, meals and lodging, and rental cars (travel costs average approximately \$600 per meeting).....	\$6,957	
Projected travel costs from February through June (this includes yet-to-be received reimbursement requests through December 1992, further meetings, and trips to Salem during legislative session).....	<u>600</u>	\$7,557
Photocopies (total of \$1,094 paid to UO Printing and Kinko's and reimbursement to Chair for copies made), plus amount owed to UO Law School from July 1, 1991 through June 30, 1993 (approximately \$600).....		1,694
Postage from July 1991 through June 30, 1993, approximately.....		784
Telecommunications.....		374
Insurance.....		710
Accounting.....		725
Recording costs (including court reporter).....		1,383
Coffee service and amount paid to UO Housing for coffee and lunches at 12-12-92 meeting.....		342
<sup>1</sup> Office supplies.....	<u>375</u>	<u>13,944</u>
<b>PROJECTED DEFICIT IN SERVICES AND SUPPLIES.....</b>		<b>-\$1,145</b>

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<sup>1</sup>The amount originally budgeted for office supplies for this biennium was \$150. Because of the voluminous amount of legislative history materials generated by the Council during the 1991-93 biennium, there will be an unanticipated expense for office supplies to prepare the materials for submission to Archives and all the county law libraries in the state who request the materials. This additional expense includes binders, file folders, and storage boxes. The Council office is also in desperate need of a four-door lateral file cabinet, which would cost somewhere between \$600 and \$800. The Council's expenditures will be reassessed in June when a final determination can be made regarding the purchase of a file cabinet.

**COUNCIL ON COURT PROCEDURES  
BUDGET PROJECTIONS  
1993-95 BIENNIUM**

Personal Services

The total amount for Personal Services shown in the 1993-95 MANDATED PLUS column of the BUDGET SUPPORT DOCUMENT prepared by the AUTOMATED BUDGET INFORMATION SYSTEM (ABIS) is \$74,928 and was arrived at automatically by ABIS. The amount of \$8,079 projected for PERS contributions appears to be slightly under-estimated (for the .50 FTE position and the .21 FTE position). The amount shown for flexible benefits (\$8,777) is an increase of \$2,201 over the 1991-93 budget (an increase in insurance rates must have been anticipated by ABIS). Please note that a reconciliation adjustment of \$4,288 was made in the 1991-93 budget (this action occurred at the hearing on the Council's budget hearing for the 1991-93 biennium).

Services and Supplies

The following is an itemization of estimated projected amounts in SERVICES AND SUPPLIES category for the 1993-95 biennium (please see total in 1993-95 REQUESTED BUDGET column on page 3 of the ABIS report):

Travel.....	\$8,000
Postage.....	748
Duplicating service.....	855
Rental of recording equipment and court reporter charges....	3,000
Office supplies.....	150
Telecommunications.....	352
<sup>1</sup> Insurance (property damage \$750, liability \$750).....	1,500
<sup>2</sup> Information Systems.....	19
<sup>3</sup> Personnel.....	31
<sup>4</sup> Budget.....	6,440
General Services service charge	231
Accounting charges.....	580
<sup>5</sup> Audit charges.....	<u>2,875</u>
 TOTAL	 \$24,781

<sup>1</sup>Amount obtained from Risk Management.

<sup>2</sup>Amount obtained from Budget & Management.

<sup>3</sup>Amount obtained from Budget & Management.

<sup>4</sup>Amount obtained from Budget & Management.

<sup>5</sup>Amount obtained from Audit Division.

3ISR100  
 JOGET STRUCTURE

EXECUTIVE DEPARTMENT BUDGET & MANAGEMENT DIVISION  
 AUTOMATED BUDGET INFORMATION SYSTEM (ABIS)

PREPARED 12/28/92 AT 19:58:31  
 MANDATED PLUS

	1989-91 ACTUAL	1991-93 APPROVED BUDGET	1991-93 BIENNIAL ESTIMATE	1993-95 REQUESTED BUDGET	1993-95 MANDATED PLUS	1993-95 ADOPTED BUDGET
<b>REVENUE CATEGORIES</b>						
<b>GENERAL FUND</b>						
120500 GENERAL FUND APPROPRIATION GENERAL	67,821	82,954	82,954	99,388	99,709	
TOTAL GENERAL FUND GENERAL	67,821	82,954	82,954	99,388	99,709	
<b>REVENUE TOTAL</b>						
TOTAL ALL REVENUES GENERAL	67,821	82,954	82,954	99,388	99,709	
<b>AVAILABLE REVENUES</b>						
TOTAL ALL FUNDS AVAILABLE FOR EXP GENERAL	67,821	82,954	82,954	99,388	99,709	
<b>EXPENDITURE CATEGORIES</b>						
<b>PERSONAL SERVICES</b>						
<b>SALARIES AND WAGES</b>						
911001 CLASS/UNCLASS SAL & PER DIEM GENERAL	44,476	54,427	50,314	53,472	53,472	
TOTAL SALARIES AND WAGES GENERAL	44,476	54,427	50,314	53,472	53,472	
<b>OTHER PAYROLL EXPENSES (OPE)</b>						
911501 PERSONNEL DIV ASSESSMENTS GENERAL	44	630	630			
911502 EMPLOYMENT RELATIONS BD ASMNTS GENERAL				54	54	
911503 WORKERS' COMP. INSUR (SAIF) GENERAL	107	175				
911504 PUBLIC EMPLOYEES' RETIRE CONT GENERAL	3,700	8,250	8,250	8,079	8,079	

AGENCY: 16700 COUNCIL ON COURT PROCEDURES

AGENCY-WIDE SUMMARY  
 DETAIL REVENUE, EXPENDITURE,  
 POSITION, AND FTE ACCOUNTS

BUDGET SUPPORT DOCUMENT

AGENCY  
 ABISR100  
 BUOSTR  
 MAND PLUS  
 FORM BPO1

BIENNIAL: 1993-95 PAGE 1

	1989-91 ACTUAL	1991-93 APPROVED BUDGET	1991-93 BIENNIAL ESTIMATE	1993-95 REQUESTED BUDGET	1993-95 MANDATED PLUS	1993-95 ADOPTED BUDGET
11505 SOCIAL SECURITY TAXES GENERAL	3,359	3,941	3,941	4,091	4,091	
11507 MEDICAL INSURANCE GENERAL	2,112					
11508 DENTAL INSURANCE GENERAL	264					
11509 MANAGEMENT SERVICE INSURANCES GENERAL	24					
115 WORKERS' COMP. ASSESS. (WCD) GENERAL	83	134	134	134	134	
11511 MASS TRANSIT TAX GENERAL	267	310	310		321	
11512 FLEXIBLE BENEFITS GENERAL		6,576	6,576	8,777	8,777	
OTAL OTHER PAYROLL EXPENSE GENERAL	9,960	20,016	19,841	21,135	21,456	
19600 RECONCILIATION ADJUSTMENTS GENERAL		-4,288				
OTAL PERSONAL SERVICES GENERAL	54,436	70,155	70,155	74,607	74,928	
SERVICES AND SUPPLIES						
120500 INSTATE TRAVEL GENERAL	8,692	6,612	6,612	8,000	8,000	
1215 OFFICE EXPENSES GENERAL	2,319	2,628	2,628	4,753	4,753	

AGENCY: 16700 COUNCIL ON COURT PROCEDURES

AGENCY-WIDE SUMMARY  
DETAIL REVENUE, EXPENDITURE,  
POSITION, AND FTE ACCOUNTS

BUDGET SUPPORT DOCUMENT

AGENCY  
ABISR100  
BUDSTR  
MAND PLUS  
FORM BPO1

BIENNIUM: 1993-95 PAGE 2

ABSR100  
BUDGET STRUCTURE

EXECUTIVE DEPARTMENT BUDGET & MANAGEMENT DIVISION  
AUTOMATED BUDGET INFORMATION SYSTEM (ABIS)

PREPARED 12/28/92 AT 19:58:31  
MANDATED PLUS

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	1989-91 ACTUAL	1991-93 APPROVED BUDGET	1991-93 BIENNIAL ESTIMATE	1993-95 REQUESTED BUDGET	1993-95 MANDATED PLUS	1993-95 ADOPTED BUDGET
1700 TELECOMMUNICATIONS GENERAL	242	329	329	352	352	
2000 STATE GOV. SERVICE CHARGES GENERAL	1,723	3,230	3,230	11,676	11,676	
3000 PUBLICITY AND PUBLICATIONS GENERAL	253					
TOTAL SERVICES AND SUPPLIES GENERAL	13,229	12,799	12,799	24,781	24,781	
TOTAL OUTLAY TOTAL COMBINED S&S AND C.O. GENERAL	13,229	12,799	12,799	24,781	24,781	
TOTAL EXPENDITURES TOTAL ALL EXPENDITURES GENERAL	67,665	82,954	82,954	99,388	99,709	
POSITION SUMMARIES						
93100 CLASS/UNCLASS POSITIONS POSITION	2	2	2	2	2	
TOTAL AUTHORIZED POSITIONS POSITION	2	2	2	2	2	
93500 CLASS/UNCLASS FTE POSITIONS FTE	0.70	0.71	0.71	0.71	0.71	
TOTAL AUTHORIZED FTE POSITIONS FTE	0.70	0.71	0.71	0.71	0.71	
VERYS AND ENDING BALANCES 1993... REVERSIONS GENERAL	-156					

AGENCY: 16700 COUNCIL ON COURT PROCEDURES

AGENCY-WIDE SUMMARY  
DETAIL REVENUE, EXPENDITURE,  
POSITION, AND FTE ACCOUNTS

BUDGET SUPPORT DOCUMENT

AGENCY  
ABSR100  
BUDSTR  
MAND PLUS  
FORM 8P01

BIENNIAL: 1993-95 PAGE 3

KEVIN L. MANNIX  
MARION COUNTY  
DISTRICT 32

REPLY TO ADDRESS INDICATED:

House of Representatives  
Salem, OR 97310  
2003 State Street  
Salem, OR 97301



COMMITTEES  
Member:  
Ways & Means  
Subcommittees:  
Human Resources  
Education  
Capitol Planning Commission

HOUSE OF REPRESENTATIVES  
SALEM, OREGON  
97310

March 16, 1994

Maurice J. Holland  
OREGON COUNCIL ON COURT PROCEDURES  
University of Oregon  
School of Law  
Eugene, OR 97403-1221

Dear Mr. Holland:

John McMillan has provided to me a photocopy of your January 18, 1994, letter to him which reviews some of the background on the development of Oregon's Council on Court Procedures.

Your letter is nicely written, and it is highly informative. It also provides a balanced perspective. I suggest that some form of this letter be provided to attorneys who are legislators and to all members of the Senate and House Judiciary Committees. In addition, some form of this letter ought to be provided to the members of the Joint Committee on Ways and Means (yes, I believe it will be resurrected) when your budget comes up next session.

When seen as an alternative to the federal model, the Council on Court Procedures begins to look more attractive. Also, I think the "super majority" reform implemented recently will do much to allay concerns about the process used by the Council on Court Procedures.

In any event, I am pleased that you chose to put your thoughts in writing in your letter to John McMillan, and I am pleased that John chose to share them with me.

Best regards.

Sincerely,

Kevin L. Mannix

mak  
cc John McMillan

*Acknowledge by phone note 3/18/94*

**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
<b>HOUSE COMMITTEE ADJUSTMENTS</b>					
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 Grubis*

Reviewed By

*Joe Acuff*

# House Bill 5045

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Budget and Management Division, Executive Department)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Appropriates money from General Fund to Council on Court Procedures for biennial expenses.  
Declares emergency, effective July 1, 1993.

## A BILL FOR AN ACT

- 1  
2 Relating to the financial administration of the Council on Court Procedures; appropriating money;  
3 and declaring an emergency.  
4 **Be It Enacted by the People of the State of Oregon:**  
5 **SECTION 1. There is appropriated to the Council on Court Procedures, for the biennium**  
6 **beginning July 1, 1993, out of the General Fund, the amount of \$99,709.**  
7 **SECTION 2. This Act being necessary for the immediate preservation of the public peace,**  
8 **health and safety, an emergency is declared to exist, and this Act takes effect July 1, 1993.**  
9
- 

**Note: For budget, see 1993-95 Biennial Budget, Page K-3**

**NOTE:** Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in boldfaced type.

## HOUSE AMENDMENTS TO HOUSE BILL 5045

By COMMITTEE ON APPROPRIATIONS "A"

May 11

1 In line 2 of the printed bill, after the second semicolon insert "limiting expenditures;".

2 In line 6, delete "\$99,709" and insert "\$47,379".

3 After line 6 insert:

4 "SECTION 2. Notwithstanding any other law, there is established for the biennium be-  
5 ginning July 1, 1993, as the maximum limit for the payment of expenses from fees, moneys  
6 or other revenues including Miscellaneous Receipts, excluding federal funds, collected or re-  
7 ceived by the Council on Court Procedures, the sum of \$47,380.

8 "SECTION 3. The Council on Court Procedures is authorized to accept gifts, grants and  
9 donations from any source for expenditure to carry out the duties, functions and powers of  
10 the council."

11 In line 7, delete "2" and insert "4".

12

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A-Engrossed  
**House Bill 5045**

Ordered by the House May 11  
Including House Amendments dated May 11

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Budget and Management Division, Executive Department)

**SUMMARY**

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Appropriates money from General Fund to Council on Court Procedures for biennial expenses.  
**Limits biennial expenditures from fees, moneys or other revenues including Miscellaneous Receipts, excluding federal funds, collected or received by council.**  
Declares emergency, effective July 1, 1993.

**A BILL FOR AN ACT**

1  
2 Relating to the financial administration of the Council on Court Procedures; appropriating money;  
3 limiting expenditures; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. There is appropriated to the Council on Court Procedures, for the biennium**  
6 **beginning July 1, 1993, out of the General Fund, the amount of \$47,379.**

7 **SECTION 2. Notwithstanding any other law, there is established for the biennium begin-**  
8 **ning July 1, 1993, as the maximum limit for the payment of expenses from fees, moneys or**  
9 **other revenues including Miscellaneous Receipts, excluding federal funds, collected or re-**  
10 **ceived by the Council on Court Procedures, the sum of \$47,380.**

11 **SECTION 3. The Council on Court Procedures is authorized to accept gifts, grants and**  
12 **donations from any source for expenditure to carry out the duties, functions and powers of**  
13 **the council.**

14 **SECTION 4. This Act being necessary for the immediate preservation of the public peace,**  
15 **health and safety, an emergency is declared to exist, and this Act takes effect July 1, 1993.**

16

**Note: For budget, see 1993-95 Biennial Budget, Page K-3**

**NOTE:** Matter in boldfaced type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in boldfaced type.

**HOUSE AMENDMENTS TO  
A-ENGROSSED HOUSE BILL 5045**

By COMMITTEE ON APPROPRIATIONS "A"

July 15

1 In line 6 of the printed A-engrossed bill, delete "\$47,379" and insert "\$86,759".

2 In line 10, delete "\$47,380" and insert "\$8,000".

3

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# COUNCIL ON COURT PROCEDURES

*Established by the Oregon Legislature in 1977*

John E. Hart  
Chair

University of Oregon  
School of Law  
Eugene, Oregon 97403-1221  
Telephone: (503) 346-3990  
Facsimile: (503) 346-1564

Maurice J. Holland  
Executive Director

Michael V. Phillips  
Vice Chair

Gilma J. Henthorne  
Executive Assistant

*J. Michael Alexander, Esq.*

*Marianne Bottini, Esq.*

*Judge Sid Brockley*

*Patrica Crain, Esq.*

*William D. Cramer, Sr., Esq.*

*Judge Robert D. Durham*

*William A. Gaylord, Esq.*

*Justice Susan P. Graber*

*Bruce C. Hamlin, Esq.*

*John E. Hart, Esq.*

*Judge Nely L. Johnson*

*Bernard Jolles, Esq.*

*Judge John V. Kelly*

*Rudy R. Lachenmeier, Esq.*

*Judge Michael H. Marcus*

*Judge Robert B. McConville*

*John H. McMillan*

*Michael V. Phillips, Esq.*

*Judge Milo Pope*

*Judge Charles A. Sams*

*Stephen J.R. Shepard, Esq.*

*Nancy S. Tauman, Esq.*

*Judge Janice R. Wilson*

January 18, 1994

Mr. John H. McMillan  
2280 Timothy Drive NW  
Salem, OR 97304

Dear Mr. McMillan:

Since I did not have an opportunity at the Jan. 15 Council meeting to respond to your Jan. 8 letter, let me do so now.

I am not surprised to learn that your New Jersey friend had never heard of anything quite like the Council on Court Procedures. According to a study published ten years ago by the American Judicature Society, no other American jurisdiction assigns the rules-amending process to any entity quite like the Council. By sheer coincidence, I have been appointed director of an updating study to canvass what has occurred over the past ten years. Without even having begun the research I am nonetheless reasonably sure that, whatever else might have happened over the past decade, nothing closely resembling the Council has come into existence.

The historical factors that prompted the Legislative Assembly in 1977 to create the Council are not without interest. Until the Council was established and authorized to adopt a comprehensive set of civil rules for the trial courts, the authority to enact such rules in statutory form was jealously guarded by the Legislature. This process, both in Oregon and many other states, dated from about the middle of the 19th century, when, as you know, there occurred a vaguely Jacksonian, populist revolt against lawmaking by judges apart from purely decisional law. In fact, even as to decisional or common law, there was a broad movement to reduce the law-making power of judges by attempting to codify the entirety of the

law, similar to what exists in the civil law nations of Europe and to what was done in California, which is not really a common law jurisdiction.

When Oregon entered the Union, something called the "Field Code," emanating from New York State and authored primarily by a famous lawyer of the time, David Dudley Field (brother of U.S. Supreme Court Justice Stephen Field) was sweeping the country. The first Oregon Legislative Assembly delegated to the renowned Judge Mathew Deady, and two others whose names escape me, the task of formulating a code of civil procedure for the new state. The work they produced is generally known as the "Deady Code," although recent historical research suggests that Deady did not take a leading role among the three "commissioners." The Deady Code did not, however, become law until it was enacted in statutory form by the Legislature. Although broadly patterned on the Field Code, the Deady Code did not provide for the merger of law and equity, an unexplained omission that bedeviled civil practice in Oregon for decades, until merger was finally achieved under the ORCP.

This is how matters stood from the 1860's until the 1970's. Over the years the Legislature frequently amended the original Deady Code. But with the passing of time, Oregon lawyers and judges became increasingly dissatisfied with the quality of the Legislature's work in this area. It became the Bar's perception that the relatively short biennial legislative sessions did not afford adequate time for careful consideration of procedural reforms and innovations, especially when this task had to compete against legislative business having much greater political visibility and salience. Reform of civil procedure always tends to have a miniscule constituency. The Bar complained that few legislators had the time, interest, or expert knowledge necessary to make sound decisions about so technically arcane a matter as civil procedure, at least in most of its aspects. As early as the 1930's, leading lawyers and judges in Oregon were calling for reform, not only in the substance of the rules, but even more urgently in the process by which rules changes were made.

Also as early as the 1930's the widely asserted inadequacy of legislative control over adoption and amendment of civil rules was gaining heightened expression throughout the nation. This was, of course, the era of the New Deal, when liberals and progressives were moving away from their traditional, populist aversion to government by experts and towards a considerable measure of belief in the superiority of lawmaking, or at least limited rule-making restricted in scope to certain areas where technical expertise came to be regarded as more important than direct popular accountability. Thus the proliferation of administrative agencies, many having rule-making power in such areas as regulation of broadcasting and power distribution. Pertinent to the process of adopting and amending civil rules was the enactment by Congress in 1934 of the Rules Enabling Act, authorizing for the first time the U.S. Supreme Court to promulgate rules of civil procedure for the U.S. District Courts. Congress did not surrender all control of this process, since any rules adopted or as amended by the Supreme Court were subject to suspension of effectiveness by resolution of either House.

This federal model, of civil practice rule-making by the highest court of the jurisdiction, subject to some degree of reserved legislative power to override or suspend, was widely copied among the states following World War II. Many state legislatures conferred upon their respective supreme courts more or less the same rule-making authority as Congress had conferred upon the U.S. Supreme Court, almost always subject to some form of legislative veto.

The interesting question is why Oregon did not follow suit, since the Bench and Bar of this state appear to have been just as dissatisfied, both with the increasingly anachronistic statutory rules descended from the Deady Code and with the legislatively dominated process by which such rules were supposed to be updated, as were those of many other states that followed the federal model. My understanding is that, during at least some of the time leading up instead to the creation of the Council you were not only here on the scene, but were editing a major newspaper. Thus, you might well know a great deal more than I about why the federal model never "flew" in Oregon, and why the expedient of utilizing what turned out to be the Council was chosen instead. I have been told by some who were involved in lobbying the Legislature to create the Council, or who were members of the first Council, that the reason was that a significant segment of the Bar feared that, were rule-making power delegated to the Oregon Supreme Court, that Court would almost certainly simply adopt the Federal Rules of Civil Procedure with adaptations only of nomenclature. That was indeed precisely what had been done by the supreme courts of several states after their legislatures had fallen into line with the federal model.

At the risk of generalizing too broadly, the Federal Rules of Civil Procedure have tended to be admired by the "elite" bar (e.g., large, corporate law firms, etc.), by most law professors, and probably by most federal judges, but have been viewed skeptically, if not antagonistically, by what might be described as "small town" or "county seat" practitioners.

There seem to be a number of reasons for this "grass roots" antipathy toward the Federal Rules. One is that on-going amendments to them are drafted by what is often perceived as a small, elite and self-selected coterie of New York/D.C./Phila. lawyers, most of whom give the appearance of having been tapped at Yale for Scull & Bones or having wanted to be, plus some favored professors from the leading law school faculties. These, together with a sprinkling of federal and state appellate judges, comprise the Advisory Committees that actually draft rules amendments, with the Justices of the Supreme Court, in whose name they are promulgated, playing only a pro forma role. In recent years, therefore, Congress has been more interventionist than previously, suspending or amending many amendments following Supreme Court promulgation.

There are other reasons for resistance to the Federal Rules, which existed back when the Council was created and which persist among many Oregon lawyers, especially older ones, to the present as far as I can tell. One of these is that they provide for very "liberal," elaborate, and therefore

expensive pre-trial discovery. This might seem like a good thing to some theorists on the Yale or Harvard law faculties, or to partners in firms that do not have to worry much about high litigation costs, but the legion of small practitioners, who typically represent "the little guy," often on a contingent fee basis, tends to take a different view of broad discovery. Additionally, the Federal Rules contemplate a rather dominant role for trial judges, by giving them large amounts of nearly unreviewable discretion and considerable power to control juries, including setting aside or directing their verdicts under circumstances where most states, including Oregon, would not allow them to do so.

All of this is by way of rather lengthy historical preface as to why the Council was created. Its creation ended over a hundred years of reliance upon the Legislature to keep the trial court civil rules up to snuff, reliance that was increasingly seen as being misplaced, but at the same time avoided handing the job to the Oregon Supreme Court. I have heard it said that some of the Justices themselves at the time discreetly lobbied against delegation of rule-making and amending authority to the Oregon Supreme Court, partly because of concerns that this might violate the Oregon Constitution's strict provisions regarding separation of powers, and partly because they feared that having such authority would risk the Court's periodically getting itself in hot water with the Bar or with the Legislature.

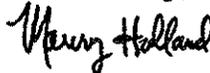
Whatever the historical background might have been, my admittedly biased view is that the Legislature did precisely the right thing back in 1977 when it set up the Council. My reasons for believing this are that the Council is dominated by trial judges and trial lawyers, who are the true experts on trial court procedure. The Council also has two appellate court judges, and that seems to be enough for that admittedly valuable perspective to get factored into the mix. It has always seemed to me a weakness of the federal model that Supreme Court Justices are responsible for making rules for trial courts. Many Justices have had little trial court experience, either as judges or attorneys, and whatever meager experience they might have had is not current, or even recent in most cases.

It has been sometimes proposed that the Council could be transformed into an Advisory Committee on Trial Court Rules to the Oregon Supreme Court, somewhat along the lines of the federal model. That, however, would naturally require legislation, and would possibly reignite the opposition that surfaced back in the 1970's when it appeared for a time that Oregon might move in that direction. Such an arrangement would have several disadvantages as compared with the Council in its present incarnation. One is that, if the Council were merely a committee advisory to the Oregon Supreme Court, the role of the Justices would necessarily be either pro forma, like the federal model where the Justices of the U.S. Supreme Court rarely second-guess the work of their Advisory Committee, or their role would be substantial, in which case the judgment of those more currently expert, the Council members who are either trial judges or trial lawyers, would be vitiated by the judgment of those less expert.

Another disadvantage is that it would risk putting the Oregon Supreme Court into direct confrontation, from time to time, with the Legislature. That would be so because I cannot imagine the Legislature enacting any arrangement that would place rule-making totally beyond its reach. Of course, the Legislature can, and often has, overridden some amendments promulgated by the Council. But that does not involve an inter-branch confrontation, since the Council understands that it is a creature of the Legislature and operates by its sufferance. There is nothing really objectionable about the Council being subordinate to the Legislature, but subordinating the Oregon Supreme Court to the Legislature in this manner would, I believe, strike many people as contrary to the spirit, if not the letter, of the Oregon Constitution. While Council members might occasionally regret the Legislature's sometimes overriding their best judgment regarding ORCP amendments, everyone understands that this is politically unavoidable, since neither Oregon nor any other American jurisdiction would likely delegate total and final rule-making authority to a body the majority of whose members are private citizens and therefore not either appointed or elected to public office, with the accountability and legitimation that is supposed to ensure. In fact, while I am no authority on Oregon constitutional law, my guess is that, were the Council reconfigured so as to be subject to review and override by the Oregon Supreme Court rather than by the Legislature, its work product would run a serious risk of being invalidated on the ground of impermissible delegation or alienation of inherently legislative power. This might be a point worth pursuing by some serious scholarly research. Should your subcommittee decide that this should indeed be pursued, we have on the UO School of Law faculty someone who is an acknowledged authority on Oregon constitutional law.

This is been a rather long response to your short letter, and possibly tells you far more than you really wanted to know or much that you already knew. However, I hope that it will be of some slight help to you in your efforts as a member of the subcommittee on the future of the Council. Since it might be of modest interest to other Council members, I have decided to provide them with copies for information.

Cordially,



Maurice J. Holland  
Executive Director

cc: Chair and Members,  
Council on Court Procedures

File

John H. McMillan  
2280 Timothy Dr. NW  
Salem, Oregon 97304  
503-588-2114  
Jan. 8, 1994

Mr. Maurice J. Holland  
Executive Director  
Council on Court Procedures  
University of Oregon Law School  
Eugene, Oregon 97403-1221

Dear Mr. Holland:

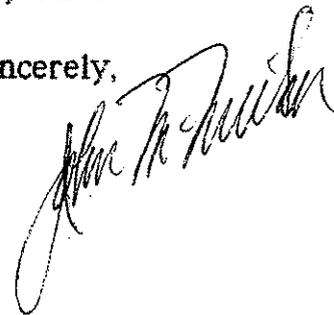
It's early days, I suspect, for you to despair of funding for 1995-1997.

One issue, perhaps, is whether the council is unique among the states. A close friend, a New Jersey Supreme Court justice, said he had never heard of such an institution. He had thought all states depended for rules of civil procedure on the federal code, on state supreme courts, or on bar committees.

If the council is a uniquely Oregon institution, the case for continued funding would be easier to make.

Perhaps you can tell me Jan. 15 if it's unique or simply unusual.

Sincerely,

A handwritten signature in cursive script, appearing to read "John H. McMillan".

November 22, 1993

TO: SUBCOMMITTEE ON THE COUNCIL'S MISSION:

Bruce Hamlin  
John McMillan  
Janice Wilson

FROM: <sup>M.J.H.</sup> Maury Holland, Executive Director

Enclosed are:

- 1) Materials reflecting some of the turmoil the Council encountered during the 1993 legislative session
- 2) An analysis of expenditures during the 1991-93 biennium and projected expenditures for the 1993-95 biennium, together with other material relating to travel expenses and legislative history materials

With respect to the budget, please note (on page 4) the \$6,440 amount obtained from the Executive Department's Budget & Management (BAM) Division. This amount (or any amount, for that matter) had never been assessed in other biennia. Gilma is going to contact BAM again and attempt to convince them of the unfairness of such an assessment (she was told that all agencies would be assessed the same amount, regardless of whether the budget was small (\$90,000+) or \$100,000,000).

As Bruce may recall, Gilma and I were "laid off" effective June 30, 1993 due to the uncertainty of funding but were reinstated the second week in August (with salaries retroactive to July 1). At the time of the layoff, the Judicial Department informed us that they were required by law to pay Gilma for her unused vacation time (approximately \$3,000). This was an unforeseen expenditure but was "covered" because of the University of Oregon's contribution toward one-half of Gilma's insurance benefits. Those contributions are not readily discernible on the ABIS report because the Judicial Department tells us that the UO's contribution should not be included in budget projections. Every three months the UO forwards a check to our office which we then endorse and forward to the Fiscal Services Division in the Office of the State Court Administrator, with the instruction that the amount of the check is to be treated as a reduction of insurance expense on the Council's

budget. The Council's budget for the 1993-95 biennium is thus "to the good" by the amount of one-half of the insurance contributions by the UO.

We have just given twenty-three county law libraries the opportunity to purchase (from the printer) five volumes (1,964 pages) of legislative history materials pertaining to the 1991-93 biennium. We thought it might be helpful for Mr. McMillan, and Judge Wilson if she so requests, to have these volumes in order to have a better understanding of what is entailed in the rule promulgation process (Bruce, of course, has copies of all of these materials). However, the reproduction cost per set (of five volumes) is \$163. Before sending these to you, we have to re-evaluate our copying costs. Recently a notice appeared in the Bar Bulletin to the effect that copies of the December 12, 1992 promulgated amendments can be obtained by calling our office, 346-3990, and the phone has been ringing off the hook ever since that publication. If the calls continue, our copying costs could get out of hand.

Hope the enclosed material is helpful.

Encs.

P.S. FROM GILMA:

There is still \$1100+ remaining to spend in the Council's budget for the 1991-93 biennium. Technically there is a deadline for submission of bills for a biennium that has ended, but some legitimate bills have trickled in. Henry Kantor, former Chair of the Council, has requested reimbursement of some expenses which he has incurred over a two-year period, such as billings for telephone and fax messages, copies, etc. We have been given the "okay" by the Judicial Department for such reimbursement if the bills are adequately documented. We were not able to purchase a file cabinet because it would have had to have been ordered prior to July 1, 1993, and we did not believe the Council's office would be in existence after July 1st. Professor Holland does not wish to pursue the COLA increase retroactive to January 1992 (rather than May 1992). Any monies remaining in an agency's budget will automatically revert to the General Fund.

(FURNISHED TO LEGISLATORS DURING 1993 LEGISLATIVE SESSION)

## Section I.

### 1993-95 MISSION

The Oregon Council on Court Procedures was established by Chapter 890, Oregon Laws, 1977. That enabling legislation is codified as ORS 1.725 through 1.750. The authority, functioning, and membership of the Council is as established by law. The Council is charged with the responsibility of providing a coordinated system of continuing review of the Oregon laws relating to civil procedure and with studying proposals concerning the Oregon laws relating to civil procedure advanced by all interested persons. The Council promulgated the Oregon Rules of Civil Procedure (ORCP), and continues to fulfill its responsibilities by providing continuing review, promulgating amendments to the ORCP, and commenting on bills submitted for legislative amendments of the ORCP. The Council submits its report to the Legislative Assembly at the beginning of each regular session.

## Section II.

### PROGRAM DESCRIPTION

The Council on Court Procedures was created by the 1977 Legislature to develop a system of continuing review of laws relating to civil procedure. The Council has 23 members consisting of judges, attorneys, and a public representative. It has an Executive Committee comprised of a Chair, Vice-Chair, and Secretary-Treasurer. The Council studies and reviews proposed amendments, comments, and suggestions from members of the Bar and public relating to the Oregon Rules of Civil Procedure. Because of the complexity of the matters presented for consideration, special subcommittees are appointed to study those matters. The Council meets every month concerning agenda items before the commencement of the legislative session. A public meeting is held in each of the five congressional districts. The promulgated rules and amendments governing pleading, practice, and procedure are presented to the Legislative Assembly at the

beginning of each regular session.

Section III.

REVENUE

The Council receives a General Fund appropriation.

Section IV.

RECOMMENDED EXPENDITURES

The members of the Council serve without compensation but are entitled to reimbursement for expenses incurred. Council members donated in excess of 1000 hours of time to the Council during the last biennium. The Council is staffed with an Executive Director (a .21 FTE position) and with an Executive Assistant (a .50 FTE position).

Council expenditures, beyond staff salaries, provide funds for travel-related expenses, insurance costs, audit charges, accounting, supplies, postage, telephone, and other charges of an administrative nature. Office space and some administrative expenses are provided to the Council by the University of Oregon School of Law.

TESTIMONY OF PROFESSOR LAIRD KIRKPATRICK  
OF THE UNIVERSITY OF OREGON LAW SCHOOL  
IN OPPOSITION TO HB 2360  
BEFORE SUBCOMMITTEE ON CIVIL LAW AND JUDICIAL ADMINISTRATION  
OREGON HOUSE OF REPRESENTATIVES  
STATE CAPITAL 357  
WEDNESDAY, MARCH 17, 1993

Members of the Subcommittee, I respectfully offer the following statement in opposition to HB 2360. I served as Chair of the Procedure and Practice Committee of the Oregon State Bar at the time the Council on Court Procedures was originally considered and ultimately established. The bill creating the Council was sponsored in part and endorsed by our Committee and had broad support among members of the State Bar as well as the state judiciary. After the Council was created, I was appointed to it and served a four-year term as a member of the original Council on Court Procedures. After much work, hours of public hearings, meetings, and drafting, our group ultimately developed and promulgated the Oregon Rules of Civil Procedure, replacing the archaic century-old Deady Code and making Oregon court procedures much more streamlined and cost-effective.

I believe the bill you are considering today would be a major set-back to the progress that has been made in modernizing Oregon's court procedures and reducing the cost of litigation to our citizens. At the risk of dating myself, perhaps I could share some history regarding the status of procedural reform prior to the creation of the Council. Despite numerous appeals for broad-scale reform and updating of Oregon procedural rules that lagged far behind those of other states, the Legislature quite understandably was not particularly interested in summons, demurrers, joinder of parties, interpleader, summary judgments, motions N.O.V., cost bills, and other technicalities of court procedure. Unlike many other state supreme courts, the Oregon Supreme Court did not have statutory rule-making power and individual members of the Court opposed proposals to grant it rule-making power. Thus Oregon was left without any effective mechanism for modernizing its court procedures and revising rules that were causing unnecessary expense, delay and injustice in litigation.

The Procedure and Practice Committee of the State Bar attempted to fill the gap and drafted a number of proposed amendments to the Oregon Civil Procedure Code. In the early 1970s, as a result of much effort by members of the Committee and the interest of a few lawyer-members of the Legislature, some of these bills were passed leading to significant improvements. But it soon became clear that piecemeal reform was not effective. A step forward in the law in one area could have unanticipated consequences in other areas, creating new problems and complexities that would have to be addressed. A consensus emerged that only a comprehensive revision of the Civil Procedure Code could give Oregon an integrated, functional set of court

rules suitable for litigation in the twentieth-century. A Council consisting of ten judges appointed by their respective courts, twelve trial lawyers appointed by the Board of Bar Governors, and a public member appointed by the Supreme Court was thought to be the most effective means of obtaining this comprehensive review and revision that was so desperately needed.

I believe that by any objective measure the work of the Council since its creation has been an extraordinary and underrated success. The Council resisted the easy route of simply adopting the Federal Rules of Civil Procedure in their entirety. Instead, the Council studied not only the Federal Rules but the very best procedural codes from other states. The Council attempted to draft the most suitable procedural rules for Oregon, adopting the most sound and successful rules from other jurisdictions, preserving the best from prior Oregon practice, and blending them together into a cohesive whole. Much of the credit for this success goes to the late Professor Fredric Merrill, who served as Executive Director of the Council during this critical drafting period and for many years thereafter.

As I understand it, the legislation being considered today is not intended to challenge the successful work of the Council. It does not eliminate the Council, but simply deprives it of rule-making authority. In my view, however, this bill if passed would cut the heart out of what has made the Council a success. It would turn the Council into simply another advisory body, like the Bar's Procedure and Practice Committee. If this legislation passes, Oregon would return to where we were twenty years -- and for the entire century before that -- with no effective mechanism to keep our court procedures up to date.

There is abundant evidence from past history in this state that court procedures cannot be effectively kept up to date through the normal legislative processes. The issues are simply too technical and obscure to command the attention of a legislative body that must struggle with the major policy issues of the day, such as taxation, crime policy, public education, and protection of the environment. I am not in any way questioning the Legislature's paramount authority in the field of legislation, but citizens have every right to expect that in the brief periods of time available in these biennial sessions that legislators will devote the bulk of their attention to these larger policy issues. The legislature's ultimate authority over rules of civil procedure is fully preserved through the existing structure which allows the legislature to block, amend or repeal any rule or Council proposal with which it disagrees.

Oregon's experience is not unique. In every one of 48 other states (with the exception of Nebraska), the development and updating of court procedures is removed from the normal legislative process. In most jurisdictions, rule-making is done

by the state's highest court and in the federal system by the United States Supreme Court. Yet this model is deceptive. As a practical matter, the actual drafting of court rules in these other jurisdictions is done by committees of judges and trial lawyers very much like our Council on Court Procedures. Technically the work of these "advisory" committees is transmitted to the jurisdiction's highest court for official promulgation, but the court's role is generally pro forma. It is rare for the appellate court to make any significant substantive change in a rule after it has been carefully crafted by the designated committee. Moreover, appellate courts often defer to trial judges regarding the most appropriate rules of trial procedure, because trial judges are on the front lines and face these issues on a daily basis. (This fact is also reflected in the Council membership, where 8 of the 10 judicial members are circuit or district judges). If HB 2360 were to pass, Oregon would be adopting a model of rule-making for courts that has been rejected by virtually every one of our sister states as well as by Congress.

Rather than preserving the extraordinary volunteer effort that the Oregon Council on Court Procedures represents, I believe HB 2360 would sound its death knell. Would a purely "advisory" Council be able to devote the research and drafting time required for preparation of comprehensive, sound, and progressive rules of procedure? Would it make sense for a purely "advisory" Council to hold extensive public hearings on proposed rules or amendments that might never even be considered by the legislature? Would the state's most capable trial lawyers and judges be willing to devote such enormous amounts of time to a Council that is purely advisory? Why spend years of sacrificed Saturdays at public meetings and hearings and subcommittee meetings to develop proposals that have no official force?

At a time when there is great public concern about litigation costs, I believe this state needs a mechanism to keep its court procedures modern, efficient and adapted to the latest technology. Passage of HB 2360 would destroy that mechanism and allow Oregon court procedures to again become outdated, thereby imposing unnecessary increased costs on the citizens of this state. Requiring court procedures to be a matter for the general legislative process would be a step backward, putting Oregon on a path that is counter to the overwhelming direction of procedural reform in this country for the past fifty years. I fear its enactment could only pave the way for a return by Oregon to a procedural era that is best permanently consigned to the dustbin of legal history.

Attachment: Kirkpatrick, Procedural Reform in Oregon, 56 Or. L. Rev. 539 (1977) (tracing history of reform efforts prior to establishment of Council on Court Procedures).

**FIRST DRAFT OF SUGGESTED PREPARED  
TESTIMONY OF HARDY MYERS IN  
OPPOSITION TO HB 2360 BEFORE  
SUBCOMMITTEE ON CIVIL LAW AND  
JUDICIAL ADMINISTRATION OF JUDICIARY  
COMMITTEE OF OREGON HOUSE OF REPRESENTATIVES, STATE CAPITOL 357, WEDNES-  
DAY, MARCH 17, 1993 ( Draft prepared by  
Maury Holland, 3/8/93 for review by Mr. Myers)**

NOTE: It turned out that Mr. Myers did not testify because  
of a conflict of interest.

With the utmost respect for its sponsor, I wish to offer the following statement in opposition to this proposed legislation, HB 2360. The combined perspectives from which this statement is made is that of a former Representative, {Member/Chair of this Committee?}, and Speaker of the House; of one who was a member of the Bar committee which carefully considered all other alternatives before recommending to the 1977 Legislative Assembly giving the Council on Court Procedures what I shall call subordinate lawmaking as opposed to merely advisory power; and finally, that of a practicing litigator able from that vantage point to appraise the Council's performance over the intervening fifteen years of its operation.

Before speaking in more specific terms, let me state at the outset that everything I have observed as a practitioner about the performance of the Council since its inception, and about the quality of its work product, the Oregon Rules of Civil Procedure (ORCP), has only served to reinforce my confidence that our thoroughly debated decision back in 1977 to recommend that the Council be given limited and subordinate lawmaking authority,

subject of course to final authority of the Legislative Assembly, was a sound one, one that has well served the best interest of this State and its ability to administer civil justice fairly and efficiently. In the latter connection, Oregon courts compare very favorably with those of other states in terms of moving and clearing cases on its docket, and I believe the ORCP can fairly claim some of the credit for this.

To acknowledge that the ORCP, including amendments promulgated by the Council, have the force of law unless affirmatively overridden by this body does not necessarily lead one to the conclusion that they are kind of law that should only be made, or is best made by this body. I say this despite the fact that I would not for a moment deny that, both by reason of democratic accountability and constitutional power, the Legislative Assembly has both ultimate responsibility for all issues of public policy and paramount authority touching all matters of legislative concern. Further, I do not question that judicial practice and procedure, whether civil or criminal, is well within any informed definition of public policy as well as assuredly being of legislative concern.

The fundamental point I wish to make in opposing this bill is that a legislature does not necessarily best discharge its ultimate responsibility for making sound public policy choices, or for that matter most securely preserve its

paramount authority in the field of legislation, by treating all the different kinds of legislation with which it must deal as though they were of the same character or by insisting that, despite their differences, all of them must conform to the same processes of enactment. This seems to me to be particularly the case with a citizen-legislature of the kind Oregon has, which, as you scarcely need to be reminded, must crowd resolution of an ever-increasing number of issues that are both extraordinarily complex and of utmost importance to every citizen of this state into relatively short biennial sessions.

Let me try to be a bit more specific. American legislative practice and tradition differentiate between what, for want of a better term, might be called general legislation in contrast to specialized legislation. General legislation deals with matters of larger public policy, such as taxation or criminal law, concerning which the electorate, your constituents, have informed opinions, and which many, if not all voters, take into account in choosing their elected representatives. Citizens have every right to expect that, in the brief periods of time available for your deliberations, including committee hearings and working sessions, you as their elected representatives will take full responsibility for grappling with those larger policy issues that are grist for the mill for <sup>of the</sup> ordinary or general legislative process. By that I mean the familiar

process, of which this hearing is a part, whereby proposed legislation is introduced by a Representative or Senator, referred to the relevant committees whose members hear public testimony and carefully consider it, and then becomes law only if affirmatively voted upon in both chambers and signed by the Governor. This process by which general legislation is generated is often a lengthy and exhausting one, one that is rightly highly visible to the public, significant portions of which usually have strong opinions about its preferred outcomes.

In contrast to what I have characterized as general legislation, there is well known to American constitutional law and legislative practice another kind of legislation that, again for want of a better term, I would refer to as specialized legislation. Specialized legislation most often functions in areas that, while they require codification rather than reliance upon decisional law, do not involve issues of larger public policy about which the electorate, or any numerically significant segment of it, have informed opinions. These are areas where the issues, though important and frequently difficult, are, to say the least, unlikely to be taken into account by any significant number of voters when deciding which legislative candidates to vote for, or when appraising the performance of those for whom they have voted. I would ask you members of this subcommittee if any of you can recall the

last time one of your constituents has pressed you about where you stand on joinder of claims and parties or relation-back of amendments to complaints.

Additional, related characteristics of specialized legislation are that it tends to deal with matters of rather specialized expertise and also tends to regulate activity in very narrow contexts, rather than being brought to bear on the day-to-day lives of citizens generally. These are two important reasons why the subject matter of specialized legislation seldom, if ever, become matters of broad popular concern or political debate, although it certainly can become the focus of very intense lobbying by narrow special interests. Both of these characteristics are certainly true of rules of civil practice such as the ORCP. These are addressed to and affect directly trial judges and trial lawyers, plus the occasional pro se litigant. I would be surprised if even one non-lawyer Oregonian in a thousand is aware that the ORCP exist, much less knows what matters they regulate or what they provide in one or another regard. Even among the roughly 10,000 Oregonians who are lawyers, I would doubt whether more than one quarter of them are sufficiently involved with the trial of civil cases on a regular basis as to claim either a keen interest in, or expert knowledge of the ORCP. The fact of the matter is that this state's true experts on rules of civil practice are its trial lawyers and trial judges, who

constitute the overwhelmingly predominant element of the Council's membership.

Lest I appear unduly elitist or heedless of the importance of democratic accountability, let me repeat my opening acknowledgement that the ORCP are a form of legislation and surely do implicate considerations of public policy, if for no other reason<sup>than</sup> that all citizens of Oregon, not just its trial judges and lawyers, and whether or not they have informed opinions about them, have an important stake in these rules because they bear upon the capacity of this state to administer civil justice fairly and efficiently. That is why I would strongly object if the Council were given the final word concerning the ORCP, and would probably even oppose what is done in some other states where the supreme court has the final word, with no legislative role whatsoever. The principal reason I oppose this bill is because I strongly continue to believe that the present allocation and structuring of authority as between the Council and the Legislative Assembly most successfully balances and accomodates the competing claims of specialized expertise against democratic accountability. When the Council promulgates a rules amendment that is subsequently brought to your attention as being wrongheaded or as embodying bad public policy, you are fully able to override it. But in order to preserve this essential ultimate authority, you are not required

routinely to divert time and energy from the vital larger issues of public policy which only you as the people's elected representatives can legitimately deal with, by having to take the initiative to deliberate about, and draft, each and every updating amendment that the ORCP quite frequently and consistently stand in need of.

In case it was not entirely clear what I had in mind by specialized legislation, let me attempt to clarify the point by reminding you that the most familiar examples are the rules and regulations promulgated by administrative agencies in the exercise of their delegated or subordinate legislative authority. As with rules of civil practice, rules and regulations promulgated by administrative agencies possess the defining hallmarks of specialized legislation I mentioned earlier. There are that they typically operate in fairly narrowly defined contexts, not in the everyday lives of citizens generally; they implicate a considerable degree of specialized knowledge and expertise not widely shared among citizens or even among the majority of elected legislators themselves; and they frequently focus upon areas requiring rather constant revisions and adjustments, especially in myriad matters of technical detail. An important reason for delegating this subordinate form of specialized legislative authority is that the changes and adjustments that are persistently needed characteristically do not loom large enough in the political consciousness of

the electorate to claim the requisite attention of elected legislators, certainly not if this required them to take the initiative and act affirmatively in order to process them into law. Something like that seems to have happened in Oregon prior to creation of the Council, where a terribly outmoded, legislatively enacted version of the so-called Field Code was allowed to persist in this state long after that system had been jettisoned in almost all other states in favor of modernized, integrated sets of practice rules along the lines of the ORCP or the Federal Rules of Civil Procedure. A nagging worry I have about HB 2360 is that the advisory role it would leave in place for the Council would seldom provide a sufficient spur to the Legislative Assembly to act affirmatively, year in, year out, in the consistent, incremental fashion that procedural reform requires. Anyone can lobby or advise the Legislature; countless numbers of groups and organizations do. Thus my fear is that, were HB 2360 enacted, it would not be long before the Council is reduced to just another lobbyist organization.

In conclusion and before responding to any questions you might have, I want to emphasize that a quick survey done at my request on how other American jurisdictions, including the federal courts as well as those of other states, shows that whereas at one time most states dealt with civil practice rules as a matter of what I have called general

legislation, meaning that they were enacted like other statutes, today all other American jurisdictions, with the possible exception of Nebraska where there has been a tug of war between the legislature and supreme court over rules of court, deal with civil practice rules predominantly as a matter of specialized legislation. I say "predominantly," because as with the federal courts and the Federal Rules of Civil Procedure, the existence of a few statutes pertaining to judicial procedure seems to be an entirely benign inevitability. The most common pattern is that civil practice rules and ongoing amendments thereto are promulgated by a court, usually by the highest court of the state, or by the Supreme Court of the United States in the case of the federal jurisdiction. In most other states, as in the federal courts, rules of practice and procedure are promulgated by the judiciary, subject to some form of affirmative legislative disapproval, whether by means of an ordinary statutory enactment or by some form of joint resolution adopted by ordinary or super majorities in either or both chambers.

Some of you might be thinking to yourselves at this point - what has all this have to do with Oregon, where the ORCP amendments are not promulgated by the Supreme Court or any other court? Please do not be distracted by this, because it has no relevance to the pros and cons of HB 2360. First, the difference between Oregon, where

rules amendments are promulgated by the Council, and most other states, where they are promulgated by a court, is far less than meets the eye. In most other states, rules amendments are indeed nominally, and as a formal matter, promulgated by a court, usually the highest court of the jurisdiction, but most of the real decisionmaking, analysis, drafting and other heavy lifting actually takes place in some form of rules advisory committee or commission composed of judges and practitioners - in short, entities closely resembling our Council. Secondly, and even more to the point, HB 2360 is not about shifting the rules amending authority from the Council to the Oregon Supreme Court. Rather, HB 2360 has as its sole purpose shifting the rules amendment process from the domain of specialized legislation to that of general legislation, flatly contrary to the overwhelming trend of procedural reform in this country over the past fifty or so years.

Despite the wide variation in details, the important point seems to me to be that today, indeed for some considerable period of time now, no other American jurisdiction <sup>except Nebraska</sup> treats civil practice rules in the manner of ordinary or general legislation. Oregon was among the last states to cease dealing with civil practice in that manner, by means of a statutory code. If any of you doubt how fragmented, obsolete and otherwise unsatisfactory the so-called Deady Code had become well before the

Legislature was at last persuaded to substitute the ORCP and Council, I would refer you to Prof. Laird Kirkpatrick's excellent article on that subject, "Procedural Reform in Oregon," 56 OR. L. R. 539 (1977 ). In the final analysis, the concern that most prompts me to oppose HB 2360 so unequivocally is that I fear its enactment could only pave the way for a return by Oregon to a procedural era that is best permanently consigned to the dustbin of legal history.

COUNCIL ON COURT PROCEDURES

Staff Memorandum

RE: Constitutionality of ORS 1.725-.750

The Council on Court Procedures was established by the 1977 Legislative Assembly. Oregon Laws 1977, Ch. 890. Membership on the Council consists of 10 judges (one Supreme Court justice, one Court of Appeals judge, six Circuit Court judges, and two District Court judges), 12 attorneys, and one public member. ORS 1.730. The judges are appointed by the Supreme Court, the Court of Appeals, the Executive Committee of the Circuit Judges Association, and the Executive Committee of the District Judges Association; the attorneys are appointed by the Board of Governors of the Oregon State Bar;<sup>1</sup> and the public member is appointed by the Supreme Court. ORS 1.730.

The statute provides that the Council ". . . shall promulgate rules governing pleading, practice, and procedure in all civil proceedings of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant." The rules authorized, however, do not include rules of evidence or rules of appellate procedure. Any rules promulgated must be submitted to the legislative assembly at the beginning of each regular session and go into effect 90 days after the close of that session. The legislature "may, by statute, amend, repeal or supplement any of the rules." ORS 1.735. The legislation also states that all laws relating to pleading, practice, and procedure in civil proceedings are deemed to be rules of court and remain in effect as such until "modified, superseded or repealed by rules which become effective under ORS 1.735." ORS 1.745.

There is a strong presumption that the action of the 1977 Legislature is constitutional.<sup>2</sup> In any case, the matter was considered before the legislation was enacted. The Governor's Commission on Judicial Reform

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1. The statute requires (a) that at least two of the attorneys be from each of the four Congressional districts in the state; (b) that the appointments include, but not be limited to, appointments from members of the bar active in civil trial practice so that lawyer members be broadly representative of the trial bar; (c) and one lawyer appointed be a person who by profession is involved in legal teaching or research. ORS 1.730(1)(e).

2. Admin. Vets Affairs v. U.S. Nat. Bank, 191 Or 203, 229 P2d 276 (1951); Miles v. Veatch, 189 Or 506, 220 P2d 511, 221 P2d 905 (1950); Marr v. Fisher, 182 Or 383, 187 P2d 966 (1947); Woodward v. Pearson, 165 Or 40, 103 P2d 737 (1940); Anderson v. Thomas, 144 Or 572, 26 P2d 60 (1933).

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had previously considered the question and concluded that the promulgation of procedural rules by a council of lawyers and judges established by the legislature would be constitutional.<sup>3</sup> The Governor's counsel carefully considered the question of constitutionality before recommending that the Governor sign the Bill. An Attorney General's opinion was requested by the Governor's counsel. Although never formally issued, the opinion draft, written by W. Michael Gillette, Solicitor General, concluded that the questioned procedure was constitutional.<sup>4</sup>

The promulgation of Rules of Procedure by the Council on Court Procedures subject to the control of the legislature is an effective and responsible method of regulating Rules of Civil Procedure. The 1977 Legislature found that there was a need for a coordinated system of continuing review of Oregon laws relating to civil procedure which was not being met by the existing approach of statutory enactments relating to civil procedure; it further determined that creation of the Council on Court Procedures was necessary to develop a system of continuing review of Oregon laws of civil procedure. ORS 1.725. The creation of the Council to make Rules of Civil Procedure, while innovative, was not entirely unique. There is an enormous diversity in rule making in different jurisdictions. The details of the rule making process in any jurisdiction is the result of development of a practical approach to secure the most effective court procedures.<sup>5</sup> Some rule making power relating to civil procedure is vested in some body other than the legislature in at least 44 states and in the federal system.<sup>6</sup> In California rule making power is vested in a Judicial Council consisting of representatives of various courts.<sup>7</sup> In New York it is the Judicial Conference which makes rules subject to legislature veto.<sup>8</sup> In almost all states and the federal system Advisory Commissions and Judicial Councils are involved in the rule making process.

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3. Kirkpatrick, Procedural Reform in Oregon, 56 Or.L.Rev. 539, 565 (1977).

4. Id.

5. Weinstein, Reform of Court Rule Making Procedures 18, Ohio State University Press (1977).

6. See Summary in: American Judicature Society, A Study of Procedural Rule Making Power in the United States (1973).

7. Cal. Const., Art. VI, § 1(a).

8. N.Y. Jud. Law, §§ 212(5) and 229(3). Also, in England the Rules of Civil Procedure are made by a Rules Committee which includes judges, barristers, and solicitors. Judicature Act of 1925, Sec. 99(4).

9. Weinstein, supra note 5, at pp. 85-86.

The vesting of rule-making power in a Council consisting of various judges and lawyers representing different elements of the judiciary and bar is in line with the current suggestions relating to development of effective procedural rule making. In 1973 the ABA Commission on Standards of Judicial Administration changed from recommending rule making power in the highest court in a jurisdiction to a recommendation that rule making power be vested either in the court or a rule making body comprised of lawyers, judges, legal scholars, and representatives of the legislature.<sup>10</sup> Problems encountered by the U.S. Supreme Court in recent rule-making activities have led commentators to suggest that rule making should be vested in some other body comprised of other judges and lawyers.<sup>11</sup> It is pointed out that: (a) the Supreme Court is too busy to actually make rules; (b) it is inappropriate to have the same body make procedural rules and then pass on their validity when challenged; and (3) legislative review of rules adopted by the highest court creates unseemly conflict between the Supreme Court and Congress.<sup>12</sup> All these problems arguably would exist in Oregon and caused the 1977 Legislature to develop a rule making procedure that would avoid them.

Finally, it should be pointed out that the Council was designed to be a body that makes rules responsive to the needs of this State. In addition to the safeguards imposed by the representative nature of the Council and the legislative review before rules become effective: (a) the Council is required to comply with the Oregon open meetings law, ORS 1.730(3)(a); (b) the Council must adopt rules of procedure, ORS 1.730(3)(b); (c) the Council must give notice to all members of the bar of any meeting where final action is to be taken to promulgate rules, including the substance of the agenda, and also must make copies of proposed rules available on request, ORS 1.735(3)(b); and (d) the Council must hold at least one public hearing in each Congressional district between regular legislative sessions. ORS 1.740(2). The rules submitted to this legislature were promulgated in compliance with all of these requirements.

In summary, the legislation establishing the Council on Court Procedures is an innovative, effective, and responsible procedure established by the legislature to develop Rules of Civil Procedure for Oregon courts. It is clearly a constitutionally valid exercise of governmental authority.

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10. See ABA, Standards Relating to Court Administration, Tentative Draft, §§ 130 and 131 (1973). The final draft adopted by the House of Delegates in 1974 preserves this approach.

11. Lesnick, The Federal Rule Making Process: A Time for Re-Examination, 61 A.B.A.J. 579 (1975); Weinstein, supra note 5, pp. 89-118.

12. Weinstein, supra note 5, pp. 102-104.

COUNCIL ON COURT PROCEDURES

Staff Memorandum

QUESTION:

DOES STATUTE GRANTING POWER TO MAKE RULES OF PLEADING PRACTICE AND PROCEDURE FOR CIVIL CASES TO COUNCIL ON COURT PROCEDURES VIOLATE OREGON CONSTITUTIONAL PROVISIONS PROHIBITING DELEGATION OF LEGISLATIVE POWER? OR.CONST. art. I, section 21, and art IV, section 1.

ANSWER:

NO.

BASIS:

Most of the cases in other jurisdictions involving constitutionality of statutes specifically vesting procedural rule making power in the judiciary have considered the question of delegation of legislative power. (See cases cited in memorandum, "Judicial Rule Making Power - Source and Constitutional Challenge", 2/1/79). In all cases the courts have concluded that no violation of constitutional prohibitions against delegation of legislative power exist because the power to make rules of procedure is inherently a judicial power. The inherent power is subject to control by the legislature, but legislation granting rule making power is not a delegation of a legislative power.

A typical example of these opinions is found in State ex rel. Foster-Wyman Lumber Co. v. Superior Court, 148 Wash 1, 267 P 770 (1928):

"Assuming the right of the Legislature to make rules for the court, and acknowledging its continued action in that respect, it does not follow that such action is a legislative function. Not all acts performed by a Legislature are strictly legislative in character. A failure to recognize this distinction often gives rise to the belief that one of our law-making bodies has abdicated its duty, and attempted to transfer its legislative mantle to the shoulders of another body, not legislative, thereby subverting the purpose of its creation and denying the people of the commonwealth the right to have the laws which govern them enacted by their duly chosen representatives."

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"We think it follows that the Legislature, although formerly functioning in this state as the source of rules of practice and procedure in the courts, did not, in so doing, perform an act exclusively legislative, and may, if it so desires, transfer that power to the courts without such act being a delegation of legislative power." 267 P at 771-773

The power to make Rules of Civil Procedure is clearly a judiciary power in Oregon. This was recognized as early as 1871 in Carney v. Barnett, 4 Or 171 (1871). In Coyote G. and S. M. Co. v. Ruble, 9 Or 121 (1881), the court said:

"Without the aid of any statutory regulation, it has been repeatedly decided that every court of record possesses the inherent power to establish and enforce rules for regulating the practice before it, not repugnant to any constitutional or legislative enactments. 'Under our system,' says Justice McArthur, in Carney v. Barrett, 'all courts have certain inherent powers, to be exercised for the purpose of methodically disposing of all cases brought before them. (4 Oregon, 471) They can establish such rules in relation to the details of business as shall best serve this purpose, having proper regard for the rights of the parties litigant, as guaranteed and recognized by the constitution and the laws.'"

"It may, then, be safely affirmed, in the absence of any legislative authority, that the supreme court has the inherent right to prescribe rules for the orderly conduct of its business not contrary to law. But if this were questionable, the authority of 'every court of justice to provide for the orderly conduct of proceedings before it,' is expressly conferred by the statute. (Civil Code, sec. 884, sub. 3.):" 9 Or at 122

The supreme court has never retreated from this position. See State v. Blount, 200 Or 35, 75, 264 P2d 419 (1953).<sup>1</sup> Although the court has on occasion declined to exercise rule making power, it has never said the judiciary does not have inherent power to make rules of practice and procedure. See American Timber and Trading v. First National Bank, 263 Or 1, 10, 500 P2d 1204 (1972).

As early as 1852, and prior to the enactment of any statutes conferring rule making power, both the supreme and circuit courts were promulgating rules. See DeZendorf, Survey of the Administration of Justice in the State of Oregon, 5 Bar Bulletin 100 (1939). The statutes conferring rule making power

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1. See also State v. Birchard, 35 Or 484, 59 P 464 (1899); Zeuske v. Zeuske, 55 Or 65, 103 P 648 (1909). For a detailed discussion of the historical basis of rule making power as an inherent judicial power and the Oregon judiciary, see: Report of the Committee on Judicial Administration, 5 Bar Bulletin 15 (1939).

(ORS 1.160 - general, 1.002, 2.120, and 2.130 - supreme court, 2.560 - court of appeals, 3.220 and 3.880 - circuit courts, 46.280 - district courts, and 305.425 - tax court) have been held simply declaratory of an inherent power. Francis v. Mutual Life, 61 Or 141, 14 P 921 (1912). None of these statutes has been challenged as a delegation of legislative power.

A specific Oregon statute that gave a court the power to prescribe manner of serving notice upon defendant in a proceeding relating to a drainage district assessment was upheld against a challenge based upon an unconstitutional delegation of legislative power in Drainage District No. 7 v. Bernhands, 89 Or 531, 549, 174 P 167 (1918). The court relied upon general authorities holding that legislation directing a court to provide procedural rules was not a delegation of legislative power because the rule making power was inherently judicial. The Oregon court has also held that a statute directing the supreme court to codify, publish, and distribute the Oregon statutes was not a delegation of legislative power because the court already had the power to do this. Woodward v. Pearson, 165 Or 40, 46, 103 P2d 737 (1940).<sup>2</sup>

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2. See also Moore v. Packwood, 5 Or 325 (1874), and O'Kelly v. Territory of Oregon, 1 Or 51 (1853), upholding statutes directing courts to set their own terms against challenges that this delegated legislative power. In the O'Kelly case the court said, ". . .in one view of the subject, the appointment of a time is as much an incident of the judicial authority as an emanation of legislative power." 1 Or at 53.

*Table of ORCP Promulgations and Amendments by  
the Council on Court Procedures and the Legislative Assembly*

Prepared 3/8/93 by Maury Holland from Merrill's OREGON RULES OF CIVIL PROCEDURE:  
1992 HANDBOOK (Butterworths)

P = promulgated. C = Council on Court Procedures By First Year of Biennial Cycle. L =  
Legislative Assembly by Year of Session. \*\*Rules, sections and subsections of ORCP revised by  
amendment, deletion or addition.

<u>Rule</u>	<u>78 C</u>	<u>79 L</u>	<u>80 C</u>	<u>81 L</u>	<u>82 C</u>	<u>83 L</u>
1	P	C, D**		Change Num.		
2	P					
3	P					
4	P	K (3)	M			
5	P					
6	P					
7	P	A, D, F	D	D, F	D	C
8	P					
9	P	B, D	B		B	
10	P		C			
11 (Res'd.)						
12	P					
13	P	B				
14	P					
15	P	A				
16	P					B
17	P					
18	P					
19	P					
20	P					
21	P	F, G (2)	F			

<u>Rule</u>	<u>78 C</u>	<u>79 L</u>	<u>80 C</u>	<u>81 L</u>	<u>82 C</u>	<u>83 L</u>
22	P	D	A (2)		C (1)	
23	P		B, D, E			
24	P	B				
25	-----	P				
26	P	A				
27	P	A, B				
28	P					
29	P	D				
30	P					
31	P					
32	P		A, B, F G, H, M N, O	A, B, F H, N, O		H (2)
33	P			B		
34	P			D		
35 (Rev'd)						
36	P	B	B			
37	P					
38	P	B (2)				
39	P	F (2)	F(1), (3)			
40	P				A, E	
41	P					
42 (Rev'd)						
43	P					
44	P	A, E				
45	P	A, B				
46	P		A, D			
47	P				E	
48 (Rev'd)						
49 (Rev'd)						

<u>Rule</u>	<u>78C</u>	<u>79L</u>	<u>80C</u>	<u>81L</u>	<u>82C</u>	<u>83L</u>
50	P					
51	P					
52	P		A			
53	P					
54	P	A, B, D	E			
55	P	A, C	D, F		D (3)	D(3)
56	P					
57	P	C, F				
58	P					
59	P	B	C	B		
60	P		60			
61	P					
62	P					
63	P	D, E			A	
64	P	B (5)	F, G			
65			P			
66			P			
67			P			
68			P	A, B		
69			P	B		
70			P			
71			P			
72			P			
73			P			
74			{Rev'd}			
75			{Rev'd}			
76			{Rev'd}			
77			{Rev'd}			
78			P			

Rule

80C

81L

82C

83L

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P			
P	C, F		
P	B, C		
P	D		
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P			

<u>Rule</u>	<u>84 C</u>	<u>85 L</u>	<u>86 C</u>	<u>87 L</u>	<u>88 C</u>	<u>89 L</u>
1						
2						
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4					E (1), (2)	
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9			D			C, F
10					A	
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16			B			
17			17		Gram. Rev.	
18					B	
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21					G (4)	
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<u>Rule</u>	<u>84C</u>	<u>85L</u>	<u>86C</u>	<u>87L</u>	<u>88C</u>	<u>89L</u>
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44			C		C, E	A, C, D
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47	C					
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55	A (5)		H (2)		H (2)	E (1)
56						

<u>Rule</u>	<u>84c</u>	<u>85L</u>	<u>86c</u>	<u>87L</u>	<u>88C</u>	<u>89L</u>
57		A, B, C, D				
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69			B, C		A	
70					A	
71						A
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76		C				
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78			C			
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80					F (3)	
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83				E		
84				A, C, D		
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Rule

90 C

91 L

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JAN 21 1993  
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# House Bill 2360

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Representative Kevin Mannix)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Requires that Oregon Rules of Civil Procedure may only be enacted, amended, repealed or supplemented by law enacted by Legislative Assembly. Deletes provisions that allow rule promulgated by Council on Court Procedures to become effective unless Legislative Assembly repeals or modifies promulgated rule. Specifies that rules submitted to Sixty-seventh Legislative Assembly by Council on Court Procedures are not effective unless enacted by law.

### A BILL FOR AN ACT

1  
2 Relating to Oregon Rules of Civil Procedure; creating new provisions; amending ORS 1.730, 1.735,  
3 1.750, 174.580 and 174.590 and ORCP 1 D.; and repealing ORS 1.745.

4 Be It Enacted by the People of the State of Oregon:

5 **SECTION 1.** The Oregon Rules of Civil Procedure may only be enacted, amended, repealed  
6 or supplemented by law enacted by the Legislative Assembly.

7 **SECTION 2.** ORS 1.730 is amended to read:

8 1.730. (1) There is created a Council on Court Procedures consisting of:

9 (a) One judge of the Supreme Court, chosen by the Supreme Court;

10 (b) One judge of the Court of Appeals, chosen by the Court of Appeals;

11 (c) Six judges of the circuit court, chosen by the Executive Committee of the Circuit Judges  
12 Association;

13 (d) Two judges of the district court, chosen by the Executive Committee of the District Judges  
14 Association;

15 (e) Twelve members of the Oregon State Bar, at least two of whom shall be from each of the  
16 congressional districts of the state, appointed by the Board of Governors of the Oregon State Bar.  
17 The Board of Governors, in making the appointments referred to in this section, shall include but  
18 not be limited to appointments from members of the bar active in civil trial practice, to the end that  
19 the lawyer members of the council shall be broadly representative of the trial bar. The Board of  
20 Governors shall include at least one person who by profession is involved in legal teaching or re-  
21 search; and

22 (f) One public member, chosen by the Supreme Court.

23 (2)(a) A quorum of the council shall be constituted by a majority of the members of the council.  
24 An affirmative vote of a majority of the council shall be required to [*promulgate*] propose rules  
25 [*pursuant to ORS 1.735*].

26 (b) The council shall [*adopt*] propose rules of procedure and shall choose, from among its  
27 membership, annually, a chairman to preside over the meetings of the council.

28 (3)(a) All meetings of the council shall be held in compliance with the provisions of ORS 192.610  
29 to 192.690.

30 (b) In addition to the requirements imposed by paragraph (a) of this subsection, with respect to

NOTE: Matter in boldfaced type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.  
New sections are in boldfaced type

1 the public hearings required by ORS 1.740 and with respect to any meeting at which final action  
2 will be taken on the [*promulgation.*] proposal for enactment, modification or repeal of a rule [*under*  
3 *ORS 1.735*], the council shall cause to be published or distributed to all members of the bar, at least  
4 two weeks before such hearing or meeting, a notice which shall include the time and place and a  
5 description of the substance of the agenda of the hearing or meeting.

6 (c) The council shall make available upon request a copy of any rule which it proposes [*to*  
7 *promulgate, modify or repeal*] for enactment, modification or repeal.

8 (4) Members of the Council on Court Procedures shall serve for terms of four years and shall  
9 be eligible for reappointment to one additional term, provided that, where an appointing authority  
10 has more than one vacancy to fill, the length of the initial term shall be fixed at either two or four  
11 years by that authority to accomplish staggered expiration dates of the terms to be filled. Vacancies  
12 occurring shall be filled by the appointing authority for the unexpired term.

13 (5) Members of the Council on Court Procedures shall not receive compensation for their ser-  
14 vices but may receive actual and necessary travel or other expenses incurred in the performance  
15 of their official duties as members of the council, as provided in ORS 292.210 to 292.288.

16 SECTION 3. ORS 1.735 is amended to read:

17 1.735. The Council on Court Procedures shall [*promulgate*] propose rules governing pleading,  
18 practice and procedure, including rules governing form and service of summons and process and  
19 personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not  
20 abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this sec-  
21 tion do not include rules of evidence and rules of appellate procedure. The [*rules thus adopted*]  
22 proposed rules and any amendments which may be [*adopted*] proposed from time to time, together  
23 with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly  
24 at the beginning of each regular session [*and shall go into effect on January 1 following the close of*  
25 *that session unless the Legislative Assembly shall provide an earlier effective date*]. [*The Legislative*  
26 *Assembly may, by statute, amend, repeal or supplement any of the rules.*]

27 SECTION 4. ORS 1.750 is amended to read:

28 1.750. The Legislative Counsel shall cause the rules which [*have become effective under ORS*  
29 *1.735, as they may be*] are enacted, amended, repealed or supplemented by the Legislative Assembly,  
30 to be arranged, indexed, printed, published and annotated in the Oregon Revised Statutes.

31 SECTION 5. ORS 174.580 is amended to read:

32 174.580. (1) [*As used in the statute laws of this state, including provisions of law deemed to be*  
33 *rules of court as provided in ORS 1.745, "Oregon Rules of Civil Procedure" means the rules adopted,*  
34 *amended or supplemented as provided in ORS 1.735.*] As used in the statute laws of this state,  
35 "Oregon Rules of Civil Procedure" means those enactments of the legislature that are ar-  
36 ranged, indexed, printed, published and annotated by the Legislative Counsel under the pro-  
37 visions of ORS 1.750.

38 (2) In citing a specific rule of the Oregon Rules of Civil Procedure, the designation "ORCP  
39 (number of rule)" may be used. For example, Rule 7, section D., subsection (3), paragraph (a), sub-  
40 paragraph (i), may be cited as ORCP 7 D.(3)(a)(i).

41 SECTION 6. ORS 174.590 is amended to read:

42 174.590. References in the statute laws of this state[, *including provisions of law deemed to be*  
43 *rules of court as provided in ORS 1.745,*], including references in the Oregon Rules of Civil  
44 Procedure, in effect on or after January 1, 1980, to actions, actions at law, proceedings at law,  
45 suits, suits in equity, proceedings in equity, judgments or decrees are not intended and shall not be

1 construed to retain procedural distinctions between actions at law and suits in equity abolished by  
2 ORCP 2.

3 SECTION 7. ORCP 1 D. is amended to read:

4 D. "Rule" defined and local rules. References to "these rules" shall include Oregon Rules of  
5 Civil Procedure numbered 1 through 85. General references to "rule" or "rules" shall mean only rule  
6 or rules of pleading, practice and procedure [*established by ORS 1.745,*] enacted by the Legislative  
7 Assembly and arranged, indexed, printed, published and annotated by the Legislative Counsel  
8 under the provisions of ORS 1.750 or promulgated under ORS 1.006, [1.735,] 2.130 and 305.425,  
9 unless otherwise defined or limited. These rules do not preclude a court in which they apply from  
10 regulating pleading, practice and procedure in any manner not inconsistent with these rules.

11 SECTION 8. (1) The Oregon Rules of Civil Procedure in effect on the effective date of this  
12 Act are not affected by this Act.

13 (2) Any rules or amendments submitted to the Sixty-seventh Legislative Assembly by the  
14 Council on Court Procedures under the provisions of ORS 1.735 (1991 Edition) do not become  
15 effective unless those rules or amendments are enacted by the Sixty-seventh Legislative  
16 Assembly.

17 SECTION 9. ORS 1.745 is repealed.  
18

---

LANE  
 POWELL  
 SPEARS  
 LUBERSKY

Bruce C. Hamlin  
 (503) 778-2158

March 16, 1993

**TRANSMITTED VIA FACSIMILE**

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 Professional  
 Corporations*

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 900 SW Fifth Avenue, Suite 2300  
 Portland, OR 97204

Re: OSB Council on Court Procedures

Dear Hardy:

I am in receipt of Maury Holland's letter to you of March 9, with enclosures. While Maury was writing a draft for you, I was reviewing the legislative history of HB 2316 -- the 1977 bill which created the Council on Court Procedures. As a result of that review, I have a few observations which may be helpful to you in preparing your testimony for Wednesday's hearing.

First, when the bill received a hearing in house judiciary, it was supported by Judge Arno Denecke and Judge John C. Beatty, on behalf of the Oregon Judicial Conference, and by Professor Laird Kirpatrick. Those witnesses were well qualified to support the bill. Judge Beatty, for example, served on a committee of the Judicial Conference which recommended a Council on Court Procedures as early as 1974. (As you may know, the matter was submitted to the 1975 and 1977 legislatures.)

The reasons behind the creation of a Council on Court Procedures were several: (1) a feeling that the legislature did not have the time nor inclination to take a comprehensive look at the rules of civil procedure; (2) the fact that the OSB Practice and Procedure Committee "never had a chance to take a comprehensive look at the whole problem, and the fact that tinkering with one part of the procedure code frequently affects another part;"<sup>2</sup> and (3) the fact that the Oregon

---

<sup>2</sup> Testimony of Judge Arno Denecke before House Committee on Judiciary on February 24, 1977.

Orange, AK  
 Los Angeles, CA  
 Mount Vernon, WA  
 Olympia, WA  
 Portland, OR  
 Seattle, WA  
 London, England  
 Tokyo, Japan

Hardy Myers, Esq.  
March 16, 1993  
Page 2

Supreme Court was suspected of trying to grab the rule-making power and adopt the Federal Rules of Civil Procedure. That history is reflected in a February 6, 1979 memo (enclosed) which Judge Beatty prepared in support of the first set of rules adopted by the Council on Court Procedure.

Second, HB 2316 passed by very substantial margins, 51-3 in the House, and 25-5 in the Senate. The Governor's counsel considered the question of constitutionality before recommending that the Governor sign the bill. That matter is referred to in the staff memorandum which was submitted to the Senate Judiciary Committee in 1979. Maury provided you with a copy of that memo. To my knowledge, there has never been an argument advanced that the Council on Court Procedures amounts to an unconstitutional delegation.

When the first set of rules was promulgated by the Council on Court Procedures, it was the first time that the rules governing civil procedure courts of this state had been comprehensively examined in this century. The interested players -- the Council, the Oregon State Bar, and the House and Senate committees -- gave those rules careful attention. By way of illustration, I have enclosed a copy of a resolution adopted by the Board of Governors at the commencement of that session of the legislature.

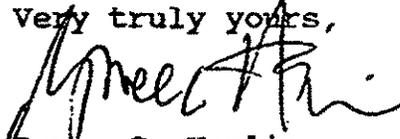
The first set of 64 rules received weeks of hearings; the work of the Judiciary Committee was embodied in HB 3131, which consisted of 202 sections. Given that number, you might assume that there were a huge number of legislative changes to those 64 rules. However, only 25 of the rules were changed in any respect, and a number of the changes were minor.

A similar pattern was followed in 1981 when the legislature received the report of the Council including rules 65 through 85. Since then, the number of rules submitted to each legislative session, and the number of legislative alterations as a percentage of those rules, has dropped off.

In the time that the Council has been in existence, it has accomplished some things that must have seemed impossible at the beginning: the merger of law and equity; the elimination of demurrers and pleas in abatement; rationalizing the process

Hardy Myers, Esq.  
March 16, 1993  
Page 3

of pleading and proving attorney fees; as well as a host of other changes that have made the civil practice of law more straight forward.

Very truly yours,  
  
Bruce C. Hamlin

cc(via fax): Henry Kantor, Esq.  
Maury Holland, Esq.

J:\CL1\BCH\121069CH.LTR

Exhibit C  
House-Senate Jud. Comm.  
2/6/79 - 5 page  
Judge Beatty for the  
Judicial Conference

M E M O R A N D U M

TO: Senate and House  
Committees on the Judiciary

February 6, 1979

RE: In Support of the Council on Court  
Procedure: Proposed Rules of Civil Procedure

\*\*\*\*\*

1. The Council on Court Procedure was established by HB 2316 in the 1977 Legislative Session. It incorporated a successful four-year effort by the Judicial Conference and the Oregon State Bar to develop a workable mechanism to provide continuous review and modernization of civil procedure in the state judicial system. The purpose was and remains twofold: to provide more efficient handling of civil litigation and to avoid the costly piecemeal legislative process of dealing with civil procedure. The Council statute creates a balanced Council on Civil Procedure composed of judges and lawyers and a public member. The Council is charged with responsibility for promulgating rules governing pleading, practice and procedure which must be submitted to each legislative session and which go into effect 90 days after the close of each session unless amended or repealed by statutory enactment that session. The Legislature likewise retains the power to amend or repeal by statutory enactment any rules previously adopted and in effect at the time of its action.

2. Piecemeal legislative enactment does not provide comprehensive review of civil procedure as a whole and tends to introduce changes which impair the effective functioning of the courts. Example: The many procedural amendments adopted in recent sessions, including expanded joinder of parties and causes of action, class actions, third-party practice, and claims for indemnity, converted simple lawsuits into complex cases with multiple parties and multiple claims which are far more difficult for courts to handle. Comparable provisions were not enacted giving trial courts power to handle such complex litigation or to present it in an intelligible manner to a jury. Insufficient attention was paid to the impact of procedural changes upon other statutory requirements concerning the conduct of trial and judicial manpower. Members of the judiciary committees will be keenly aware of how hard it is to deal with an entire scheme of legislation on a piecemeal basis.

3. The only other realistic alternative to the Council approach is to vest procedural rulemaking power in the Supreme Court. This method has now been adopted by 33 states, and is obviously a reasonable approach. However, the Judicial Conference and the Judicial Reform Commission which reported to the 1975 Legislative Assembly, believed that the Procedural Council which preserves a legislative role while relieving the Legislature of responsibility for continuous meticulous study of the entire

process, is as good and perhaps a better approach than exclusive judicial rulemaking, provided the Legislature allows the method to function. Rulemaking, either in the Supreme Court or in a Procedural Council, is a substantial improvement over piecemeal enactment because both provide a systematic, rational continuous review of civil procedure. However, in this state, the bench and the bar--who have direct responsibility for making civil litigation work--agreed that the Council approach is a satisfactory compromise. It had the support of those who have in the past favored judicial rulemaking, as well as those who have in the past opposed it.

4. I enclose herewith copy of the Report of the Practice and Procedure Committee of the Judicial Conference in 1974, marked Exhibit A, which explains the basic concept in greater detail and which also sets forth the manner in which the proposal was developed by a committee of the Conference which included members of the Bar, which was broadly representative of both. That report was accepted by the entire Judicial Conference, which then endorsed the measure which became law in 1977. Judicial members of the Council include Judge Dale, the Vice Chairman, who served on the Conference committee which developed the statute.

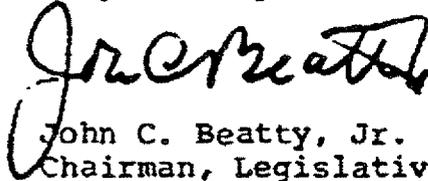
5. Insofar as the constitutionality of the Council is concerned, we would simply point out that we are satisfied that the power to make rules of civil procedure is inherently judicial at common law. Legislative intervention in the form

of enacted codes since the middle 19th Century has obscured that fact. A large majority of the states have revested that power solely in their courts. We see no constitutional problem in allowing that power to be exercised by a Council composed of judges and lawyers who are both by statute officers of the court and part of the judicial branch, nor do we see any constitutional problem in giving the legislative branch the power to override a rule enacted by the Council. The roles of both branches in establishing civil procedure are traditionally constitutional.

6. The Council during the first biennium of its existence has organized itself, conducted extensive hearings and promulgated rules covering roughly one-half of its jurisdiction. The product is workmanlike and represents a rational, pragmatic approach to civil procedure. The conflicting interests of the plaintiff and defense sides of the Bar have been accommodated, and the interest of the judiciary in rules of civil procedure which enable the trial courts to function efficiently have been fully represented. The Judicial Conference strongly supports the Council, and urges these committees to review the Council's product with the thought in mind that its work product should be permitted to stand the test of experience without extensive change which would interfere with the orderly process

undertaken so far successfully.

Respectfully submitted,



John C. Beatty, Jr.  
Chairman, Legislative Committee  
Judicial Conference

JCB/ser

Enclosure

cc: Hon. Arno Dcnecke, Chief Justice  
Hon. Herbert Schwab, Chief Judge  
Hon. Jason Boe, President of the Senate  
Hon. Hardy Myers, Speaker of the House  
Executive and Legislative Committees,  
Judicial Conference (without exhibits)

ts

t

*Keith  
Burns*

*H. P. 10  
1-19-79*

**EXHIBIT B**  
**HOUSE-SENATE JUDL**  
*2/6/79 - 2 pages*

OREGON STATE BAR BOARD OF GOVERNORS

RESOLUTION

January 19, 1979

The 1977 Oregon State Legislature created a Council on Court Procedures which has met in the interim period, and has produced a comprehensive report dated December 2, 1978, containing a comprehensive revision of the Oregon law relating to the procedure and practice of law.

*whole*

The organic act creating the Council on Court Procedures provides, in substance, that the report of the Council on Court Procedures dated December 2, 1978, will become law, unless amended, repealed or revised by state legislature. The organic law further provides that the report of the Council on Court Procedures shall become law 90 days after the close of the 1979 session of the Legislature, unless that session of the Legislature otherwise directs.

*JA*

The Oregon State Bar Board of Governors believes that this procedure for enacting laws is unique, and further believes that the changes proposed are comprehensive, and for both of these reasons, it is the consensus of the Board of Governors that it would be premature for the Board of Governors to take a position in favor of, or in opposition to the report of the Council on Court Procedures as a whole.

The Oregon State Bar Board of Governors has been advised

That the Judiciary Committee of the 1979 session of the Oregon Legislature is going to undertake a detailed, comprehensive study of the report of the Council on Court Procedures, and it is the will of the Oregon State Bar Board of Governors that the resources of the Oregon State Bar and its public affairs subcommittee, and its legislative personnel, take all appropriate steps to assist the staff and members of the Legislative Judiciary Committee in conducting the review and study of the report on the Council of Court Procedures.

The Oregon State Bar Board of Governors recognizes the possibility that as the comprehensive review and the study of the report on the Council of Court Procedures proceeds, that the Oregon State Bar Board of Governors, acting through its public affairs subcommittee, may deem it advisable to take positions before the Legislature and its committees in support of, or opposition to, the entire report of the Council on Court Procedures, or specific portions thereof.

**COUNCIL ON COURT PROCEDURES**

**BUDGET ANALYSIS**

**CONTENTS**

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Estimated expenditures in SERVICES AND SUPPLIES (1993-95 biennium).....	4
BUDGET STRUCTURE report prepared by AUTOMATED BUDGET INFORMATION SYSTEM (ABIS).....	5

**PERSONAL SERVICES (1991-93 BIENNIUM)**

Appropriation for salary (includes E-Board adjustment of \$2,915 for cost-of-living allowance), Personnel Division assessments, PERS contributions, Social Security, workers' comp assessments, mass transit taxes, and flexible benefits (insurance)..... \$70,155

Estimated expenditures from July 1, 1991 through June 30, 1993:

Fred Merrill (last payment made to Merrill Estate): salary from July 1991 through April 1992..... \$ 9,733  
 OPE: Estimated Social Security and mass transit taxes (10 mos.)..... 900

Maury Holland: salary from May 1, 1992 through December 1992..... \$ 7,784  
 Salary from January 1993 through June 1993 6,015 13,799  
 OPE: Estimated Social Security and mass transit taxes, 14 mos. - \$1,260; payment to PERS from May 1, 1992 through December 1991 (\$166/mo. x 8 months - \$1,328; payment to PERS from January through June 1993 (\$180/mo. x 6 months - \$1,080)) - total estimated OPE..... 3,668

NOTE: A cost-of-living increase had been approved for the Executive Director as of January 1, 1992 and again on January 1, 1993. When the apportionment of salaries was made, it only included the COLA increase effective January 1, 1993. An adjustment would involve the following additional payments:

Merrill Estate..... 117  
 Maury Holland..... 417

Gilma Henthorne: salary - \$973/mo. from July 1991 through December 1991..... 5,838  
 salary - \$1,052/mo. from January 1992 through December 1992..... 12,624  
 salary - \$1,138/mo. from January 1993 through June 30, 1993..... 6,828 25,290  
 Gilma Henthorne: insurance cashback from July 1, 1991 through June 30, 1993 (this is the portion of insurance benefit which is not used for a premium)..... 1,910

Gilma Henthorne: PERS contributions, Social Security, Personnel Division assessment, workers' comp assessment, mass transit taxes, health and dental benefits from July 1, 1991 through June 30, 1993 (estimated)..... 11,800

TOTAL SALARY, OPE AND OTHER BENEFITS..... \$67,634

NOTE: <sup>1</sup>PERS contributions were not made for the late Fred Merrill, presumably because he was paid in the summer months rather than monthly. If contributions had been made, they would have totalled approximately \$1,700, making the total amount expended \$69,334 rather than \$67,634, a difference between the amount appropriated and the amount expended of \$821. PERS contributions are being made for Maury Holland because he is being paid monthly.

Difference between appropriated amounts and estimated expenditures through the biennium..... +\$2,521

**EXPLANATION:**

Amount paid for salaries during 1991-93 biennium..... \$49,356  
 Estimated OPE for Executive Director..... \$4,568  
 Estimated OPE for Executive Assistant..... \$11,800  
 Insurance cashback..... \$1,910  
 Appropriation for **SERVICES AND SUPPLIES** (see separate itemization of expenditures in that category)..... \$12,799  
 TOTAL APPROPRIATED BUDGET..... \$82,954

There is a projected deficit in **SERVICES AND SUPPLIES** of at least \$1,145 and possibly more if a capital outlay is made in June.

---

<sup>1</sup>PERS contributions for the Executive Director for the 1993-95 biennium should be projected in the REQUESTED BUDGET amount.

**SERVICES AND SUPPLIES (1991-93 BIENNIUM)**

Appropriation.....		\$12,799
Itemization of expenditures (including projections):		
TRAVEL EXPENSES:		
Mileage, meals and lodging, and rental cars (travel costs average approximately \$600 per meeting).....	\$6,957	
Projected travel costs from February through June (this includes yet-to-be received reimbursement requests through December 1992, further meetings, and trips to Salem during legislative session).....	<u>600</u>	\$7,557
Photocopies (total of \$1,094 paid to UO Printing and Kinko's and reimbursement to Chair for copies made), plus amount owed to UO Law School from July 1, 1991 through June 30, 1993 (approximately \$600).....		1,694
Postage from July 1991 through June 30, 1993, approximately.....		784
Telecommunications.....		374
Insurance.....		710
Accounting.....		725
Recording costs (including court reporter).....		1,383
Coffee service and amount paid to UO Housing for coffee and lunches at 12-12-92 meeting.....		342
<sup>1</sup> Office supplies.....	<u>375</u>	<u>13,944</u>
PROJECTED DEFICIT IN SERVICES AND SUPPLIES.....		-\$1,145

---

<sup>1</sup>The amount originally budgeted for office supplies for this biennium was \$150. Because of the voluminous amount of legislative history materials generated by the Council during the 1991-93 biennium, there will be an unanticipated expense for office supplies to prepare the materials for submission to Archives and all the county law libraries in the state who request the materials. This additional expense includes binders, file folders, and storage boxes. The Council office is also in desperate need of a four-door lateral file cabinet, which would cost somewhere between \$600 and \$800. The Council's expenditures will be reassessed in June when a final determination can be made regarding the purchase of a file cabinet.

**COUNCIL ON COURT PROCEDURES  
BUDGET PROJECTIONS  
1993-95 BIENNIUM**

Personal Services

The total amount for Personal Services shown in the 1993-95 MANDATED PLUS column of the BUDGET SUPPORT DOCUMENT prepared by the AUTOMATED BUDGET INFORMATION SYSTEM (ABIS) is \$74,928 and was arrived at automatically by ABIS. The amount of \$8,079 projected for PERS contributions appears to be slightly under-estimated (for the .50 FTE position and the .21 FTE position). The amount shown for flexible benefits (\$8,777) is an increase of \$2,201 over the 1991-93 budget (an increase in insurance rates must have been anticipated by ABIS). Please note that a reconciliation adjustment of \$4,288 was made in the 1991-93 budget (this action occurred at the hearing on the Council's budget hearing for the 1991-93 biennium).

Services and Supplies

The following is an itemization of estimated projected amounts in SERVICES AND SUPPLIES category for the 1993-95 biennium (please see total in 1993-95 REQUESTED BUDGET column on page 3 of the ABIS report):

Travel.....	\$8,000
Postage.....	748
Duplicating service.....	855
Rental of recording equipment and court reporter charges....	3,000
Office supplies.....	150
Telecommunications.....	352
<sup>1</sup> Insurance (property damage \$750, liability \$750).....	1,500
<sup>2</sup> Information Systems.....	19
<sup>3</sup> Personnel.....	31
<sup>4</sup> Budget.....	6,440
General Services service charge	231
Accounting charges.....	580
<sup>5</sup> Audit charges.....	<u>2,875</u>
 TOTAL	 \$24,781

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<sup>1</sup>Amount obtained from Risk Management.

<sup>2</sup>Amount obtained from Budget & Management.

<sup>3</sup>Amount obtained from Budget & Management.

<sup>4</sup>Amount obtained from Budget & Management.

<sup>5</sup>Amount obtained from Audit Division.

ABISR100  
BUDGET STRUCTURE

EXECUTIVE DEPARTMENT BUDGET & MANAGEMENT DIVISION  
AUTOMATED BUDGET INFORMATION SYSTEM (ABIS)

PREPARED 12/28/92 AT 19:58:31  
MANDATED PLUS

	1989-91 ACTUAL	1991-93 APPROVED BUDGET	1991-93 BIENNIAL ESTIMATE	1993-95 REQUESTED BUDGET	1993-95 MANDATED PLUS	1993-95 ADOPTED BUDGET
REVENUE CATEGORIES						
GENERAL FUND						
820500 GENERAL FUND APPROPRIATION GENERAL	67,821	82,954	82,954	99,388	99,709	
TOTAL GENERAL FUND GENERAL	67,821	82,954	82,954	99,388	99,709	
REVENUE TOTAL						
TOTAL ALL REVENUES GENERAL	67,821	82,954	82,954	99,388	99,709	
AVAILABLE REVENUES						
TOTAL ALL FUNDS AVAILABLE FOR EXP GENERAL	67,821	82,954	82,954	99,388	99,709	
EXPENDITURE CATEGORIES						
PERSONAL SERVICES						
SALARIES AND WAGES						
911001 CLASS/UNCLASS SAL & PER DIEM GENERAL	44,476	54,427	50,314	53,472	53,472	
TOTAL SALARIES AND WAGES GENERAL	44,476	54,427	50,314	53,472	53,472	
OTHER PAYROLL EXPENSES (OPE)						
911501 PERSONNEL DIV ASSESSMENTS GENERAL	44	630	630			
911502 EMPLOYMENT RELATIONS BD ASMNTS GENERAL				54	54	
911503 WORKERS' COMP. INSUR (SAIF) GENERAL	107	175				
911504 PUBLIC EMPLOYEES' RETIRE CONT GENERAL	3,700	8,250	8,250	8,079	8,079	

AGENCY: 16700 COUNCIL ON COURT PROCEDURES

AGENCY-WIDE SUMMARY  
DETAIL REVENUE, EXPENDITURE,  
POSITION, AND FTE ACCOUNTS

BUDGET SUPPORT DOCUMENT

AGENCY  
ABISR100  
BUDSTR  
MAND PLUS  
FORM BP01

BIENNIUM: 1993-95 PAGE 1

	1989-91 ACTUAL	1991-93 APPROVED BUDGET	1991-93 BIENNIAL ESTIMATE	1993-95 REQUESTED BUDGET	1993-95 MANDATED PLUS	1993-95 ADOPTED BUDGET
911505 SOCIAL SECURITY TAXES GENERAL	3,359	3,941	3,941	4,091	4,091	
911507 MEDICAL INSURANCE GENERAL	2,112					
911508 DENTAL INSURANCE GENERAL	264					
911509 MANAGEMENT SERVICE INSURANCES GENERAL	24					
911510 WORKERS' COMP. ASSESS. (WCD) GENERAL	83	134	134	134	134	
911511 MASS TRANSIT TAX GENERAL	267	310	310		321	
911512 FLEXIBLE BENEFITS GENERAL		6,576	6,576	8,777	8,777	
TOTAL OTHER PAYROLL EXPENSE GENERAL	9,960	20,016	19,841	21,135	21,456	
919600 RECONCILIATION ADJUSTMENTS GENERAL		-4,288				
TOTAL PERSONAL SERVICES GENERAL	54,436	70,155	70,155	74,607	74,928	
SERVICES AND SUPPLIES						
920500 INSTATE TRAVEL GENERAL	8,692	6,612	6,612	8,000	8,000	
921500 OFFICE EXPENSES GENERAL	2,319	2,628	2,628	4,753	4,753	

AGENCY: 16700 COUNCIL ON COURT PROCEDURES

AGENCY-WIDE SUMMARY  
DETAIL REVENUE, EXPENDITURE,  
POSITION, AND FTE ACCOUNTS

BUDGET SUPPORT DOCUMENT

AGENCY  
ABISR100  
BUDSTR  
MAND PLUS  
FORM BP01

BIENNIUM: 1993-95 PAGE 2

		1989-91 ACTUAL	1991-93 APPROVED BUDGET	1991-93 BIENNIAL ESTIMATE	1993-95 REQUESTED BUDGET	1993-95 MANDATED PLUS	1993-95 ADOPTED BUDGET
21700	TELECOMMUNICATIONS GENERAL	242	329	329	352	352	
22000	STATE GOV. SERVICE CHARGES GENERAL	1,723	3,230	3,230	11,676	11,676	
23000	PUBLICITY AND PUBLICATIONS GENERAL	253					
TOTAL	SERVICES AND SUPPLIES GENERAL	13,229	12,799	12,799	24,781	24,781	
CAPITAL OUTLAY							
TOTAL	COMBINED S&S AND C.O. GENERAL	13,229	12,799	12,799	24,781	24,781	
TOTAL EXPENDITURES							
TOTAL	ALL EXPENDITURES GENERAL	67,665	82,954	82,954	99,388	99,709	
POSITION SUMMARIES							
993100	CLASS/UNCLASS POSITIONS POSITION	2	2	2	2	2	
TOTAL	AUTHORIZED POSITIONS POSITION	2	2	2	2	2	
993500	CLASS/UNCLASS FTE POSITIONS FTE	0.70	0.71	0.71	0.71	0.71	
TOTAL	AUTHORIZED FTE POSITIONS FTE	0.70	0.71	0.71	0.71	0.71	
REVERSIONS AND ENDING BALANCES							
999310	REVERSIONS GENERAL	-156					

AGENCY: 16700 COUNCIL ON COURT PROCEDURES

AGENCY-WIDE SUMMARY  
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BUDGET SUPPORT DOCUMENT

AGENCY  
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BIENNIUM: 1993-95 PAGE 3

*As I told Dixie, I will be absent Aug. 13.  
We expect to be back in Oregon Sept. 6.*

*JHM*  
John H. McMillan  
2280 Timothy Dr. NW  
Salem, OR 97304  
503-588-2114  
July 20, 1994

Mr. Bruce C. Hamlin  
Lane, Powell, Spears, Lubersky  
800 Pacific Building  
520 Yamhill Street  
Portland, OR 97204

Dear Bruce,

After you left on Saturday, the Council on Court Procedures agreed to consider Aug. 13 the amendments to ORCP 55 proposed to the Legislature by the Oregon State Bar's Procedures and Practices Committee. Assuming the council's consideration goes forward in an orderly and timely fashion, this matter seems to me excellent fodder for lobbying to retain state funding of the council.

My sense is that lay members of the Legislature think the council is simply an adjunct of the bar and wonder why the state should pay to do the bar's work.

In this case, it seems clear to me, the council will be reviewing the bar's work on behalf of the Legislature, carrying out the role the Legislature saw for the council when creating the council in 1977.

In his Jan. 18 essay on the origins of the council, Mr. Holland wrote, "the council is dominated by trial judges and trial lawyers, who are the true experts on trial court procedure." Are the members of the bar committee that drew up the amendments to ORCP equally expert?

It may be, of course, that all the amendments are appropriate. If some are not, however, the case for the council would be further strengthened -- as long as the issues can be framed in language that lay legislators can grasp quickly.

I'm vague on what sort of report is wanted from us Aug. 13 on the council's future. I won't be at that meeting because my wife and I leave that day for a vacation in Michigan. I'll be here until then.

Sincerely,

cc Mr. Holland