UNIVERSITY OF OREGON

August 18, 1993

TO: **CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Maury Holland, Executive Director MJH

RE:
1. Final Legislative Update
2. Membership Changes
3. Coming Events

1. **Final Legislative Update.** If a legislative session can have a title, my suggestion would be "The Perils of Pauline" as far as the Council is concerned. But with the Governor's signature of HB 5045 (appropriating the Council's 1993-95 biennial budget) and expected signature of HB 2360 (altering the Council's operations in various non-essential ways), we appear to have survived months of turmoil and tribulation in remarkably good shape.

a. HB 2360 (the "Mannix Bill"). You probably recall that this bill, which had two hearings before House Judiciary, would in its original form have removed the Council's delegated power to promulgate ORCP amendments that become law unless statutorily overridden, and would have transformed it into an advisory body only. At the first of the hearings referred to, 2360 was supported by OTLA, the Oregon Bankers Association, and OADC. Very effective opposing testimony was presented by Laird Kirkpatrick and former Council member Larry Thorp. The OSB also expressed opposition, for which the Council has to thank the Board of Governors, especially Vice President Frank Alley, and Stephen C. Thompson, Chair of the OSB's Procedure and Practice Committee, as well as the members of that committee. In fact, Steve Thompson made heroic efforts in support of the Council during the entire period of the legislative session, including authoring a very strongly supportive article in the Bar Bulletin which you probably read.

Following a second hearing at which proponents of 2360 were heard, it appeared for awhile that this bill had become a dead letter, overshadowed by the question of whether the Council would

continue to get any state funding. At one point, Rep. Mannix indicated he was willing to compromise by making Council promulgations subject to being overridden by a one-house veto rather than by a fulldress statute. In fact, as further suggested in 1b. below, Rep. Mannix was prompted to sponsor 2360, not by disagreement with actions taken or not taken by the Council, but by serious concerns about what he appears to regard as excessive legislative delegation.

The version of 2360 that was finally passed and signed into law was amended to delete the provisions that would have made the Council advisory only and that would have nullified the Dec. '92 promulgations. However, at some point, it became clear that OTLA, and perhaps other concerned organizations, were insisting upon certain changes in the Council's governing statute as a condition of supporting, or at least no longer actively opposing, its continued funding. The changes incorporated into 2360 as enacted are as follows:

1. A 15-member supermajority vote will be required to promulgate ORCP amendments;

2. The present requirement that at least one of the twelve "practitioner" members appointed by the OSB BOG be a law teacher is removed (leaving the option of appointing one or more law teachers presumably open);

3. The present requirement that at least one public meeting during each biennium be held in each of Oregon's five congressional districts becomes merely an exhortation rather than mandatory, and

4. The full verbatim text of all tentatively adopted promulgations must be published to the Bar not less than thirty days prior to the meeting at which they are to be finally considered and voted upon.

Henry Kantor and I were informed about these amendments so that we could express opposition to them, for what that might have been worth. Both of us, however, made the judgment that, while objection might be taken to one or more of the changes, particularly the 30-day publication requirement, none of them was so objectionable as to warrant "kicking up a fuss" about under the circumstances of what seemed to us real jeopardy to the Council's continued existence and funding. Our response could best be described as prudent acquiescence, not positive support. The requirement of a fifteen-member supermajority might well be a

good idea, and the amendments regarding meeting places and the law professor member merely substitute discretion for compulsion. However, I believe both of us would have preferred to have had the thirty-day publication requirement dropped, because its effect will be to freeze the Council's flexibility about drafting of amendments under consideration as early as the October meeting prior to the legislative session, leaving open only the basic decision to promulgate or not until the December meeting. On the other hand, from the perspective of those who insisted upon this amendment, it is easy to see why knowing the precise language of proposed ORCP revisions, as opposed to merely their general thrust, might be deemed essential.

b. HB 5045 - Council Funding. From the outset it became clear that there was serious resistance, especially in the House, and most especially in Appropriations Committee A, to continued Council funding by state General Funds. This is what prompted the OSB initially to offer to provide 50% of the Council budget. It was on that basis that the Appropriations Committee initially reported the bill out favorably for a floor vote. The bill failed upon its third reading because the OSB determined that it could not provide the 50% funding. Unfortunately, this was misinterpreted by some legislators as reflecting a low priority or lack of support on the part of the Bar insofar as the Council is concerned.

The appropriation bill would almost certainly have died at this point, despite valiant efforts of Bob Oleson and others to keep it alive, but for the intervention of Speaker Campbell, who persuaded Rep. Minnis, Chair of Appropriations Committee A, to hold a hearing and work session, very late in the session, on a revised version of 5045. Some of you might regard Larry Campbell as an unlikely supporter of the Council. I believe that his willingness to consider the case for continued Council funding was due almost entirely to the fact that his son and chief of staff, Craig Campbell, is a recent graduate of the UO School of Law. Craig, during his time at the law school, gained an appreciation of the work of Fred Merrill and Gilma Henthorne, the importance of the ORCP, and the value of the Council's function. I am convinced that Craig's understanding and appreciation of the Council is what prompted the Speaker to take the time, though pressed by the weight of other, larger issues near the session's conclusion, to hear and consider the merits of the case, to be persuaded by those merits, and then act accordingly.

The subsequent hearing and work session before the Appropriations Committee on the revised 5045 were the toughest

moments of this session as far as the Council is concerned, and were the prelude to our closest call. Most committee members were not pleased to have this matter back before them, and were disconcerted by the OSB having, in their perception, bailed out of its previous undertaking. The revisions to HB 5045 were to the effect that the total Council budget would continue to be funded from state General Funds, as in the past, except that the $8,000 item for reimbursement of members' mileage and other expenses would be funded by the OSB. The latter was somehow arranged by Bob Oleson, who, incidentally, is the single individual most responsible for the Council's surviving this session. Taking nothing away from Steve Thompson, or from Henry or other Council members who provided critical help, the Council would not have made it without Bob's expert and unrelenting help from start to finish.

From the tenor of the committee members' comments, my sense was that the Appropriations Committee would not come close to voting out the bill with a do-pass recommendation, and that of course would have been the end of the line. The fact that the bill was finally voted out favorably by the narrowest of margins, 8-6, was due to a number of things that happened in rapid succession. First, and perhaps ironically in view of his sponsorship of HB 2360, Rep. Mannix took the lead in arguing that the Appropriations Committee should not effectively abolish the Council under the guise of defunding it. Sensing the degree of opposition to continued funding, he further stated that continued funding should be premised upon a budget note that would require the Council to prepare a report and recommendation regarding the future of the rules amending process, to be submitted to the Judiciary Committees of the two Houses not later than Sept. 1, 1994, as well as to the OSB and the Legislative Counsel. I do not yet know whether this budget note is appended to the bill as finally passed and signed. The Mannix budget note will presumably require that the Council's report and recommendations deal with matters of structure and process, in particular the Council's relationship to the legislature, funding, the role of the OSB, etc.

The other thing that happened was that Chairman Minnis called Bill Linden to the witness table to answer some questions about the value of the Council and whether the function it serves could be assigned elsewhere. Bob Oleson and I took the opportunity to accompany Bill in the hopes of getting our two cents in. Bill effectively testified that the Council has long done an important job well and that its function could not readily be taken over anywhere else. Bob Oleson cleared the air

about the earlier 50% funding effort the Bar had undertaken and reiterated its continued strong support for the Council in essentially its present form and for its being funded. He also informed the committee that the OSB would provide the $8,000 for members' reimbursable expenses. When my turn came, I observed, with my customary tact in dealing with legislators, that Oregon and the legislature were fortunate to have the Council to do this job, and that it should be regarded as cheap at any price! Bob Oleson was understandably worried about the ensuing House floor vote, which is why I sent out my FLASH fax to all of you. Whether because of what you did in response or otherwise, the floor vote was surprisingly comfortable, 42 ayes, 16 noes and 4 excused. Democrats and Republicans were almost equally divided on each side of the vote, so at least the Council does not seem to have become a partisan matter. Rep. Mannix, incidentally, carried the bill on the House floor. It was then voted out unanimously in Senate Ways & Means, and the vote in the Senate was 27 ayes, 0 noes, 3 excused, with Sen. Hannon carrying the bill.

In retrospect, several factors contributed to our difficulties in this session. First, there was the budget-cutting frenzy, engendered by Measure 5, which led to the defunding of many boards and commissions under the rubric of "cleaning out the attic." Secondly, there can be no doubt but that some of the organizations having most interest in the work of the Council and in the ORCP, notably OTLA and the Bankers Association, are less than pleased with the Council. Thirdly, it became clear that many legislators believe that the Council either is, or should be, just another OSB committee and therefore funded out of Bar dues. There is no question that, on the surface, we look very much like a Bar committee, a bunch of lawyers and judges meeting at Bar headquarters on Saturday mornings once a month to talk about "inside baseball." We understand that this perception is wrong, of course, but the difficulty about correcting it is that the more we emphasize that the Council performs a public, quasi-legislative function the cost of which should be borne by the taxpayers, the more the sensibilities of some legislators about what they deem undue delegation of lawmaking authority are aroused.

The fourth and final factor that contributed to the Council's difficulties is that I have become controversial. There are probably many reasons for this, but one apparently is that my comments in my first Legislative Update memo about curtailing or abolishing the civil jury became known to OTLA, and presumably others, and were interpreted as indicating that I

would exploit my position as Executive Director to advance that cause. To allay any possible concerns that you might have on this score, let me say that, although the Council recently expressed itself as favoring retention of the 12-person civil jury, my understanding is that it has very little to do or say about the civil jury since that is not a matter controlled by the ORCP. Additionally, and more to the point, while I personally have lots of opinions on procedural issues, some of which would probably please and others of which would doubtless displease OTLA, I fully understand that in my capacity as Executive Director, my overriding obligation is strict neutrality while supporting and assisting in the implementation of policy decisions made by the full Council. I have some reason to believe that Henry Kantor and Bernie Jolles, and possibly others, have given assurances of that understanding on my behalf to some of those who might have been concerned, for which I am most grateful.

2. **Membership Changes**. Now that there is no longer doubt about the Council's continued existence or its structure I have sent the customary letters to the Council's appointing authorities, to notify them of term expirations and the need to make appointments or reappointments. According to Gilma's information, which she is very meticulous about, the following summarizes term expirations technically effective 9/1/93:

Judicial Members

Justice Graber	First Term
Judge Durham	First Term
Judge Barron	Second Term
Judge Nely Johnson	First Term
Judge Snouffer	" "
Judge Welch*	" "

Public Member

Prof. Harter	Second Term

Practitioner (including one law teacher) Members

Mr. Bemis	First Term
Ms. Bischoff	" "
Mr. Hart	" "
Mr. Jolles	" "
Mr. Kantor	Second Term
Dean Kenagy	First Term
Mr. Kropp	" "
Mr. Marceau	Second Term

*Judge Welch's membership presumably terminated upon her elevation to the Circuit Court. Thus, I shall report this position vacancy to the Executive Committee of the District Judges Association.

If anyone shown above as among those whose term expires believes this information is inaccurate, please let me know right away (503-346-3834). The matter of term expirations is not as straightforward as might be thought, since some people are appointed to two-year rather than four-year terms, and some are appointed to fill out unexpired terms of others. If there is any issue about whether David Kenagy, who was appointed to complete my second, two-year term, succeeds to my ineligibility for reappointment, I shall gladly leave that to the BOG and will report his expired term as having been his first.

Those whose first terms are expiring are eligible to be reappointed; those whose second terms are expiring are not. I have heard informally that one or more members whose first terms are expiring do not desire reappointment, and also that one or more members whose terms are not expiring wish to resign from the Council. I would ask that anyone in either category communicate his or her decision directly to the appropriate appointing authority, and do so promptly in view of the need to get new members appointed as soon as possible. So that our files are complete, I would appreciate being copied on any communications of this kind.

3. **Coming Events**. Normally, the first meeting of the new biennial cycle takes place early in October. Given the prior uncertainties about the Council's status, and the consequent delay in notifying the appointing authorities of the need to make new appointments or reappointments, Henry and I have been concerned about how best to get the new biennial cycle underway promptly while still affording reasonable advance notice of the first meeting. Henry is completing his second term, which

expires September 1, 1993. He and John Hart, currently Vice Chair, have agreed that, effective on that date, John will function as Acting Chair. They have further agreed that the first meeting of the new biennial cycle will, as has sometimes been done in the past, take place in connection with the OSB Annual Meeting at the Eugene Hilton, specifically on Saturday morning, **October 9**, beginning at the customary time, 9:30 a.m., to adjourn not later than 1:00 p.m., and of course earlier if business permits. The most convenient meeting place would obviously be a suitable room at the Annual Meeting site, the Eugene Hilton, and I am now working with the OSB people in charge to see if that can be arranged at this late date. If no room is available at the Hilton, the likely alternative is the Faculty Lounge of the UO School of Law, about a half mile from the Hilton. Details will be confirmed in a formal meeting notice to all continuing members and to new appointees as soon as they are announced; that notice should go out within ten days or so. The full agenda, with attachments, will go out at least ten days prior to the meeting.

Henry will convene the October 9 meeting in his capacity as "Chair Emeritus," contrived for the occasion. One of his responsibilities as outgoing Chair is, after due consultation with the membership, to nominate a slate of new officers. On the basis of that consultation, Henry plans to nominate John Hart to be the new Chair and Mike Phillips to be the new Vice Chair. He has not told me whom he will nominate to succeed Lafe Harter as Treasurer, an officer required by the bylaws, but with no real duties, since all fiscal and budgetary matters pertaining to the Council are handled in Salem, with Gilma keeping track of things here. As far as I know, the past practice has been to elect new officers by motion to declare nominations closed following the outgoing Chair's announcement of his slate. However, Henry wants it known that the floor will be open to additional nominations if any member wishes to make any. The newly elected Chair will then preside for the balance of the meeting.

In addition to election of new officers, the October 9 meeting will presumably take up a number of items that have become customary: review of the recent legislative session, review of matters held over from the last biennial cycle, review of any communications received since the last meeting, preliminary discussion of matters relating to the ORCP that should be considered during this biennium, including their relative priorities, possible appointment by the Chair of subcommittees to begin focusing upon proposed rules amendments and other matters, and an effort to agree upon a schedule of

future meeting dates. In light of the "close call" and turbulence experienced by the Council throughout the past legislative session, Henry and John have agreed that a considerable portion of the October 9 meeting should be reserved for a full and frank discussion of the factors at work and some of the lessons that might be learned. This discussion would be less useful were it confined to Council members, so I have been directed to make special efforts to arrange for the attendance and participation in this portion of the meeting of Bill Linden, Bob Oleson, Steve Thompson, Rep. Mannix and perhaps other legislators who have expressed concerns about the Council, as well as representatives of such organizations as OTLA, OADC, and the Oregon Bankers Association. Since this will of course be a public meeting, former Council members require no invitation, but I hope they will feel especially welcome to attend and participate in this discussion. So that these "guests" will not be tied up all morning, my assumption, pending consultation with Henry and John, is that this special discussion portion of the meeting will be scheduled as the first agenda item following election of new officers.

UNIVERSITY OF OREGON

September 9, 1993

TO: CHAIRS (Acting and Emeritus) AND MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland, Executive Director

N O T I C E O F M E E T I N G

The Council will hold its first meeting of the 1993-95 biennium in conjunction with the OSB 1993 Annual Meeting on:

SATURDAY, OCTOBER 9, 1993
(commencing at 9:30 a.m.)

at

EUGENE HILTON HOTEL
Thornton Wilder Room (Main Floor)
66 East Sixth Avenue
Eugene, Oregon

Hotel/motel rooms are still available at the following:

Eugene Hilton (1-800-937-660):	$70 (single) $80 (double)
New Oregon (1-503-683-3669):	$54 (single) $72 (double)
Red Lion (1-503-342-5201):	$62 (single) $72 (double)

AGENDA TO FOLLOW.

COUNCIL ON COURT PROCEDURES

SCHOOL OF LAW • EUGENE, OREGON 97403-1221 • TELEPHONE (503) 346-3990
(503) 346-3834
FAX (503) 346-1564

An Equal Opportunity, Affirmative Action Institution

October 8, 1993

To: Chair and Members, Council on Court Procedures

From: Maury Holland, Executive Director

Re: 10/9/93 Briefing Memo

I. Agenda Item 6 - 1993 Legislative Session

a. The most important legislation affecting the Council from the '93 session was HB 2360 as amended, which amended the Council's authorizing legislation, ORS 1.725 - 1.750, in the following respects: i. to require a vote of 15 members to promulgate an ORCP amendment instead of 12 members as in the past; ii. to require that the full verbatim text of any ORCP amendment considered for promulgation be published or distributed to all members of the bar at least 30 days prior to the meeting at which such amendment is finally voted upon; iii. to remove the requirement that one of the 12 Council members appointed by the OSB Board of Governors be a law teacher; and iv. to urge rather than require the Council to hold at least one public meeting in each biennial cycle in each of Oregon's five Congressional districts. (Copy of HB 2360 as amended, and of ORS 1.725 - 1.750 as thereby amended, distributed at meeting.)

b. HB 5045 as amended appropriated the Council's 1993-95 biennial budget. Appended to the official report of the House Appropriations Committee's action on this bill is 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 to the Emergency Board on these recommendations.

The proponent of this budget note was Rep. Kevin Mannix, who hoped to be able to attend the special discussion portion of this meeting, but is unable to do so. In a letter to me dated Oct. 4 '93 he explained what he had in mind as follows:

> You may recall that I drafted the budget note in such a fashion that a simple review of operations and re-

commendations as to the future course ought to be sufficient to satisfy the budget note. We do not need any fancy studies with lots of staff time and lots of paperwork. A discussion by the Council, followed by a report summarizing its recommendations, ought to suffice. If any questions develop about this, I will be happy to assist.

c. None of the ORCP amendments promulgated by the Council at its Dec. 12, 1992 meeting were affected by legislation passed in the 1993 session. The following bills were introduced, but not enacted, that would have affected the indicated promulgated ORCP amendment: SB 253, Section 7 C; SB 727, Sections 32 A, B, C, D, E, F, G, H and M; SB 215, Section 39 C.

d. The following legislation was enacted in the 1993 session that amends the indicated sections of the ORCP (copies distributed at meeting): SB 251, Section 70 A; SB 257, Sections 4 K and 78 C; HB 2476, Sections 55 H and 68 C. These amendments are reportedly effective Nov. 3, 1993.

II. Agenda Item 7 - Matters Held Over from 1991-93 Biennium

a. ORCP 55 H - Hospital Records. No final action was taken on several proposals to amend Rule 55, in particular Section 55 H, to deal with some perceived problems relating to subpoenas of hospital records. Chair Henry Kantor appointed a task force to consider these proposals, with John Hart as chair, and David Kenagy and Larry Wobbrock as members. This task force reported that it had not had sufficient opportunity to examine all aspects of this issue or canvass the views of all who had expressed an interest in it.

b. ORCP 32 F. In the wake of the Council's amendments to this rule in Dec. '92, effective Jan. 1 '94, some clarifying surgical repair is needed. Existing F(2) and F(3), together and read literally, impose the controversial "claim form" limitation (it is actually more of an "opt in" procedure) on all types of class actions, including the injunctive/declaratory judgment type maintainable under 32 B(2). The latter is not advocated even by the most adamant defenders of requiring claim forms in B(3) class actions. The language of present F(1)(a) speaks only of B(3) class actions. Although F(1)(a) does not explicitly qualify or pertain to the claim form provisions of F(2) and (3), the general understanding of class action practitioners is that it does.

The new 32 F(1), as promulgated Dec. 12, 1992, inadvertently increases the possibility of confusion. In line with the amendment to 32 B that abolished the traditional tripartite classification of class actions, the new 32 F(1) is necessarily not limited to B(2) class actions, which will no longer exist as a discrete category. As preposterous as it would be to require return of claim forms and limiting the effectiveness of judgments in civil rights and other analogous injunctive class actions, a judge, pressed by a party to do so, would find it difficult to decline. The revised 32 F(1) should continue to apply to all class actions generally, but suitable language should be grafted onto 32 F(2) and (3) to make clear that the claim form, opt in procedure applies only to class actions in which the sole or predominant relief consists of money damage awards to individual class members. Since any clarifying fix the Council might devise would not become effective until Jan. 1, 1996, there might be some discussion with our judicial members about whether anything might be done to avoid problems during the period Jan. 1 '94 to Jan. 1 '96.

III. Agenda Item 8 - Recent Correspondence. No recent correspondence has been received at this office suggesting possible ORCP amendments or asking the Council to consider anything.

ORS 1.725-.750 as amended by HB 2360
(Language added in bold; language deleted enclosed in square brackets)

1.725 Legislative findings. The Legislative Assembly finds that:

(1) Oregon law relating to civil procedure designed for the benefit of litigants which meet the needs of the court system and the bar are necessary to assure prompt and efficient administration of justice in the courts of the state.

(2) No coordinated system of continuing review of the Oregon laws relating to civil procedure now exists.

(3) Development of a system of continuing review of the Oregon laws relating to civil procedure requires the creation of a Council on Court Procedures.

(4) A Council on Court Procedures will be 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.

1.730 Council on Court Procedures; membership; terms; meetings; expenses of members. (1) There is created a Council on Court Procedures consisting of:

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

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

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

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

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

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

(2)(a) A quorum of the council shall be constituted by a majority of the members of the council, **and an affirmative vote by a majority of the council is required for action by the council on all matters other than promulgation of rules under ORS 1.735.** An affirmative vote of **fifteen members** [a majority] of the council shall be required to promulgate rules pursuant to ORS 1.735.

(b) The Council shall adopt rules of procedure and shall choose, from among its membership, annually, a chairman to preside over the meetings of the council.

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

(b) In addition to the requirements imposed by paragraph (a) of this subsection, with respect to the public hearings required by ORS 1.740 and with respect to any meeting at which final action will be taken on the promulgation, modification or repeal of a rule under ORS 1.735, the council shall cause to be published or distributed to all members of the bar, at least two weeks before such hearing or meeting, a notice which shall include the time and place and a description of the substance of the agenda of the hearing or meeting;

(c) The Council shall make available upon request a copy of any rule which its proposes to promulgate, modify or repeal.

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

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

1.735 Rules of procedure; limitation on scope and substance; submission of rules to Legislative Assembly.

(1) The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The rules thus adopted and any amendments which may be adopted from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each regular session and shall go into effect on January 1 following the close of that session unless the Legislative Assembly shall provide an earlier

effective date. The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.

ORS 1.725-.750 as Amended by HB 2360, cont'd.

(2) A promulgation, amendment or repeal of a rule by the council is invalid and does not become effective unless the exact language o the proposed promulgation, modification or repeal is published or distributed to all members of the bar at least 30 days before the meeting at which final action is taken on the promulgation, modification or repeal.

1.740. Employment of staff; council hearing requirements. In the exercise of its power under ORS 1.735, the council:

(1) May employ or contract with any person or persons, as the council considers necessary, to assist the council; and

(2) Shall **endeavor to** hold at least one public hearing in each of the congressional districts of the state during the period between regular legislative sessions.

1.745. Laws on civil pleading, practice and procedure deemed rules of court until changed. All provisions of law relating to pleading, practice and procedure, including provisions relating to form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in courts of this state are deemed to be rules of court and remain in effect as such until and except to the extent they are modified, superseded or repealed by rules which become effective under ORS 1.735.

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

A-Engrossed
House Bill 2360

Ordered by the House July 12
Including House Amendments dated July 12

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession 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.

[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.]

Requires affirmative vote by majority of Council on Court Procedures on matters other than rules. Requires affirmative vote by 15 members of council to promulgate rules. Requires notice to members of Oregon State Bar by council 30 days before meeting of council at which final action on rule will be taken.

A BILL FOR AN ACT

Relating to Oregon Rules of Civil Procedure; amending ORS 1.730, 1.735 and 1.740.

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

SECTION 1. ORS 1.730 is amended to read:

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

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

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

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

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

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

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

(2)(a) A quorum of the council shall be constituted by a majority of the members of the council, **and an affirmative vote by a majority of the council is required for action by the council on all matters other than promulgation of rules under ORS 1.735.** An affirmative vote of [*a majority*] **fifteen members** of the council shall be required to promulgate rules pursuant to ORS 1.735.

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.

Chapter 18 Session Laws 90 days after adj

sections affected by chapter 740, Oregon Laws 1983, chapter 565, Oregon Laws 1985, chapter 158, Oregon Laws 1987, [*and*] chapter 171, Oregon Laws 1989, chapter 67, Oregon Laws 1991, [*and*] chapter 927, Oregon Laws 1991, and this 1993 Act except insofar as the amendments thereto or repeals thereof specifically require.

SECTION 2. ORS 8.852 is added to and made a part of ORS 8.670 to 8.850.

Note: Expands series to include statute enacted in 1991.

SECTION 3. ORCP 55 H. is amended to read:

H. Hospital records.

H.(1) Hospital. As used in this section, unless the context requires otherwise, "hospital" means a health care facility defined in ORS 442.015 [*(13)*] (14)(a) through (d) and licensed under ORS 441.015 through 441.097 and community health programs established under ORS 430.610 through 430.700.

H.(2) Mode of compliance. Hospital records may be obtained by subpoena duces tecum as provided in this section; if disclosure of such records is restricted by law, the requirements of such law must be met.

H.(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than 14 days prior to service of the subpoena on the hospital.

H.(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H.(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D. of this rule.

H.(3) Affidavit of custodian of records.

H.(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H.(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H.(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H.(4) Personal attendance of custodian of records may be required.

H.(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H.(5) Tender and payment of fees. Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

Note: Corrects subsection reference.

SECTION 4. ORCP 68 C. is amended to read:

C. Award of and entry of judgment for attorney fees and costs and disbursements.

C.(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) Such items are claimed as damages arising prior to the action: or

C.(1)(b) Such items are granted by order, rather than entered as part of a judgment.

C.(2)(a) Alleging right to attorney fees. A party seeking attorney fees shall allege the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is alleged as provided in this subsection.

C.(2)(b) If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be alleged in such motion, in similar form to the allegations required in a pleading.

C.(2)(c) A party shall not be required to allege a right to a specific amount of attorney fees. An allegation that a party is entitled to "reasonable attorney fees" is sufficient.

C.(2)(d) Any allegation of a right to attorney fees in a pleading or motion shall be deemed denied and no responsive pleading shall be necessary. The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain. Any objections to the form or specificity of allegation of the facts, statute, or rule which provides a basis for the award of fees shall be waived if not alleged prior to trial or hearing.

C.(3) Proof. The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

C.(4) Procedure for seeking attorney fees or costs and disbursements. The procedure for seeking attorney fees or costs and disbursements shall be as follows:

C.(4)(a) Filing and serving statement of attorney fees and costs and disbursements. A party seeking attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment pursuant to Rule 67:

C.(4)(a)(i) File with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C.; and

C.(4)(a)(ii) Serve, in accordance with Rule 9 B., a copy of the statement on all parties who are not in default for failure to appear.

C.(4)(b) Objections. A party may object to a statement seeking attorney fees or costs and disbursements or any part thereof by written objections to the statement. The objections shall be served within 14 days after service on the objecting party of a copy of the statement. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C.(4)(c) Hearing on objections.

C.(4)(c)(i) If objections are filed in accordance with paragraph C.(4)(b) of this rule, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements and by the objections. The parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C.(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. No findings of fact or conclusions of law shall be necessary.

C.(4)(d) No timely objections. If objections are not timely filed the court may award attorney fees or costs and disbursements sought in the statement.

C.(5) Judgment concerning attorney fees or costs and disbursements.

C.(5)(a) As part of judgment. When all issues regarding attorney fees or costs and disbursements have been determined before a judgment pursuant to Rule 67 is entered, the court shall include any award or denial of attorney fees or costs and disbursements in that judgment.

C.(5)(b) By supplemental judgment; notice. When any issue regarding attorney fees or costs and disbursements has not been determined before a judgment pursuant to Rule 67 is entered, any award or denial of attorney fees or costs and disbursements shall be made by a separate supplemental judgment. The supplemental judgment shall be filed and entered and notice shall be given to the parties in the same manner as provided in Rule 70 B.(1).

C.(6) Avoidance of multiple collection of attorney fees and costs and disbursements.

C.(6)(a) Separate judgments for separate claims. Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B., the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C.(6)(b) Separate judgments for the same claim. When there are separate judgments entered for

one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B. separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

Note: Adds paragraph designation omitted by Council on Court Procedures.

SECTION 5. ORS 12.117 is amended to read:

12.117. (1) Notwithstanding ORS 12.110, 12.115 or 12.160, an action based on conduct that constitutes child abuse or conduct knowingly allowing, permitting or encouraging child abuse accruing while the person who is entitled to bring the action is under 18 years of age shall be commenced not more than six years after that person attains 18 years of age, or if the injured person has not discovered the injury or the causal connection between the injury and the child abuse, nor in the exercise of reasonable care should have discovered the injury or the causal connection between the injury and the child abuse, not more than three years from the date the injured person discovers or in the exercise of reasonable care should have discovered the injury or the causal connection between the child abuse and the injury, whichever period is longer. However, in no event may an action based on conduct that constitutes child abuse or conduct knowingly allowing, permitting or encouraging child abuse accruing while the person who is entitled to bring the action is [*within*] under 18 years of age be commenced after that person attains 40 years of age.

(2) As used in subsection (1) of this section, "child abuse" means any of the following:

(a) Intentional conduct by an adult that results in:

(A) Any physical injury to a child; or

(B) Any mental injury to a child which results in observable and substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child;

(b) Sexual abuse of a child, including but not limited to rape, sodomy, sexual abuse, unlawful sexual penetration and incest, as those acts are defined in ORS chapter 163; or

(c) Sexual exploitation of a child, including but not limited to:

(A) Conduct constituting violation of ORS 163.435 and any other conduct which allows, employs, authorizes, permits, induces or encourages a child to engage in the performing for people to observe or the photographing, filming, tape recording or other exhibition which, in whole or in part, depicts sexual conduct or contact; and

(B) Allowing, permitting, encouraging or hiring a child to engage in prostitution, as defined in ORS chapter 167.

(3) Nothing in this section creates a new cause of action or enlarges any existing cause of action.

Note: Conforms syntax.

SECTION 6. **ORS 25.287 is enacted in lieu of ORS 25.285. ORS 25.287 is added to and made a part of ORS 25.270 to 25.280.**

Note: Statute passed in 1991 is enacted in lieu of repealed section.

SECTION 7. ORS 29.139 is amended to read:

29.139. This section establishes provisions that apply to writs of garnishment issued by an attorney under ORS 29.137. The following apply as described:

(1) All the following apply to the issuance of the writ:

Chapter 533 90 days after adjournment

of the juvenile court under [*ORS 419.476 (1)(a)*] **section 149 (1) of this 1993 Act.**

(2) "Administrator" means the administrator of the Children's Services Division.

(3) "Case management" means activities aimed at linking adjudicated juveniles with the social service and corrections systems, coordinating services delivered to juveniles, assessing the needs of juveniles and obtaining those services. Case management includes the responsibility for parole decisions to be made by participating juvenile departments.

(4) "Community juvenile justice program" means a community-based or community-oriented program that provides services to juvenile offenders or services to persons charged with an act of delinquency. Community juvenile corrections programs may make available employment, educational, mental health, drug or alcohol abuse or counseling services, and may include housing or supervision.

(5) "Division" means the Children's Services Division of the Department of Human Resources.

(6) "Juvenile justice system" means the organizational structure or network aimed at serving adjudicated juveniles.

(7) "Juvenile Corrections Council" means the council established in section 20, **chapter 670, Oregon Laws 1991** [*of this Act*].

SECTION 364. ORCP 4 K. is amended to read:

K. Certain marital and domestic relations actions.

K.(1) In any action to determine a question of status instituted under ORS Chapter 106 or 107 when the plaintiff is a resident of or domiciled in this state.

K.(2) In any action to enforce personal obligations arising under ORS Chapter 106 or 107, if the parties to a marriage have concurrently maintained the same or separate residences or domiciles within this state for a period of six months, notwithstanding departure from this state and acquisition of a residence or domicile in another state or country before filing of such action; but if an action to enforce personal obligations arising under ORS Chapter 106 or 107 is not commenced within one year following the date upon which the party who left the state acquired a residence or domicile in another state or country, no jurisdiction is conferred by this subsection in any such action.

K.(3) In any proceeding to establish paternity under ORS Chapters 109[,] or 110, [*or 419,*] or any action for declaration of paternity where the primary purpose of the action is to establish responsibility for child support, when the act of sexual intercourse which resulted in the birth of the child is alleged to have taken place in this state.

SECTION 365. ORCP 78 C. is amended to read:

C. Application. Section B. of this rule does not apply to an order or judgment for the payment of money, except orders and judgments for the payment of sums ordered pursuant to ORS 107.095 and 107.105 (1)(i), and money for support, maintenance, nurture, education, or attorney fees, in:

C.(1) Actions for dissolution or annulment of marriage or separation from bed and board.

C.(2) Proceedings upon support orders entered under ORS chapter 108, 109[,] or 110, [*or 419 and*] ORS 416.400 to 416.470 **or section 121 or 256 of this 1993 Act.**

SECTION 366. ORS 25.020 is amended to read:

25.020. (1)(a) After October 1, 1981, when any court decrees, orders or modifies any preexisting order for support of any person under ORS chapter 107, 108, 109, 110[,] or 416 or [*419*] **section 121 or 256 of this 1993 Act,** or when any such order exists, the obligor shall make payment thereof to the Department of Human Resources when the obligee is receiving general or public assistance, as defined by ORS 411.010, or care, support or services pursuant to ORS 418.015, and for a period of

 If gov signed effective Jan 1

of this subsection may be exercised at the time of annulment, dissolution or separation, or at any later time while the obligation continues.

(4) Upon motion of either party, the court shall order a party to renew a life insurance policy allowed to lapse for any reason during the pendency of the suit.

(5) A party who is the beneficiary of any policy under this section upon which the other party is obligated to pay premiums, is entitled, in the event of default by the paying party, to pay the premiums on the policy and to obtain judgment for reimbursement of any money so expended. A default in the payment of premiums by the party obligated by the decree or order is a contempt of the court.

(6) Life insurance retained or purchased by an obligor under subsection (1) or (2) of this section for the purpose of protecting the support, pension or retirement plan obligation shall not be reduced by loans or any other means of reduction until the obligation has been fulfilled. The obligee or the attorney of the obligee shall cause a certified copy of the decree to be delivered to the life insurance company or companies. If the obligee or the attorney of the obligee delivers a true copy of the decree to the life insurance company or companies, identifying the policies involved and requesting such notification under this section, the company or companies shall notify the obligee, as beneficiary of the insurance policy, whenever the policyholder takes any action that will change the beneficiary or reduce the benefits of the policy. Either party may request notification by the insurer when premium payments have not been made. If the obligor is ordered to provide for and maintain life insurance, the obligor shall provide to the obligee a true copy of the policy. The obligor shall also provide to the obligee written notice of any action that will reduce the benefits or change the designation of the beneficiaries under the policy.

SECTION 6. ORCP 70 A. is amended to read:

A. Form. Every judgment shall be in writing plainly titled as a judgment and set forth in a separate document. A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof.

A.(1) Content. No particular form of words is required, but every judgment shall:

A.(1)(a) Specify clearly the party or parties in whose favor it is given and against whom it is given and the relief granted or other determination of the action.

A.(1)(b) Be signed by the court or judge rendering such judgment or, in the case of judgment entered pursuant to Rule 69 B.(1), by the clerk.

A.(2)(a) Money judgment; contents. Money judgments are judgments that require the payment of money, including judgments for the payment of costs or attorney fees. The requirements of this subsection are not jurisdictional for purposes of appellate review. Money judgments shall include all of the following:

A.(2)(a)(i) The names of the judgment creditor and the creditor's attorney.

A.(2)(a)(ii) The name of the judgment debtor.

A.(2)(a)(iii) The amount of the judgment.

A.(2)(a)(iv) The interest owed to the date of the judgment, either as a specific amount or as accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals.

A.(2)(a)(v) Post-judgment interest accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate

on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals.

A.(2)(a)(vi) For judgments that accrue on a periodic basis, any accrued arrearages, required further payments per period and accrual dates.

A.(2)(a)(vii) If the judgment awards costs and disbursements or attorney fees, that they are awarded and any specific amounts awarded. This subparagraph does not require inclusion of specific amounts where such will be determined later under Rule 68 C.

A.(2)(b) Form. To comply with the requirements of paragraph A.(2)(a) of this rule, the requirements in that paragraph must be presented in a manner that complies with all of the following:

A.(2)(b)(i) The requirements must be presented in a separate, discrete section immediately above the judge's signature if the judgment contains more provisions than just the requirements of paragraph A.(2)(a) of this rule.

A.(2)(b)(ii) The separate section must be clearly labeled at its beginning as a money judgment. **If the money judgment includes a child support obligation, the label must so indicate.**

A.(2)(b)(iii) The separate section must contain no other provisions except what is specifically required by this rule for judgments and, if applicable, by ORS 24.290 for the payment of money.

A.(2)(b)(iv) The requirements under paragraph A.(2)(a) of this rule must be presented in the same order as set forth in that paragraph.

A.(3) If the proposed judgment does not comply with the requirements in subsections A.(1) and (2) of this rule, it shall not be signed by the judge. If the judge signs the judgment, it shall be entered in the register whether or not it complies with the requirements in subsections A.(1) and (2) of this rule.

SECTION 7. ORS 109.119 is amended to read:

109.119. (1) Any person including but not limited to a foster parent, stepparent, grandparent or relative by blood or marriage who has established emotional ties creating a child-parent relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement, guardianship or wardship of that child, or if no such proceedings are pending, may petition the court for the county in which the minor child resides for an order providing for custody or placement of the child or visitation rights or other generally recognized rights of a parent or person in loco parentis. If the court determines that custody, guardianship, right of visitation, or other generally recognized right of a parent or person in loco parentis, is appropriate in the case, the court shall grant such custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child. The court may determine temporary custody of the child under this section pending a final order.

(2) In addition to the rights granted under subsection (1) of this section, a stepparent with a child-parent relationship, as defined in subsection (4) of this section, who is a party in a dissolution proceeding may petition the court having jurisdiction for custody or visitation or may petition the court for the county in which the minor child resides for adoption of the child. The stepparent may also file for post decree modification of a decree relating to child custody.

(3) A motion for intervention may be denied or a petition may be dismissed on the motion of any party or on the court's own motion if the petition does not state a prima facie case of emotional ties creating a child-parent relationship or does not allege facts that the intervention is in the best interests of the child.

(4) As used in this section "child-parent relationship" means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section,

and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding three years.

(5) Notwithstanding subsection (1) of this section, a person who has maintained an ongoing personal relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality may petition the court having jurisdiction over the custody, placement, guardianship or wardship of that child, or if no such proceedings are pending, may petition the court for the county in which the minor child resides, for an order providing for reasonable visitation rights. If the court determines from clear and convincing evidence that visitation is in the best interests of the child and is otherwise appropriate in the case, the court shall grant visitation to the person having the relationship described in this subsection.

(6) In a custody dispute between the natural parent of a child and a person who has been allowed to intervene in a proceeding concerning the child under subsection (1) of this section, there is a rebuttable presumption in favor of granting custody to the natural parent if the child was placed in the care of the intervenor due to the natural parent's inability or unwillingness to care for the child. The presumption created by this subsection may be rebutted only upon clear and convincing evidence that placement with the intervenor is in the best interests of the child.

SECTION 8. Section 2 of this Act and the amendments to ORS 18.360 and ORCP 70 A. by sections 1 and 6 of this Act become operative on January 1, 1994.

Hse adopted CC Report - Repassed

CONFERENCE COMMITTEE AMENDMENTS TO B-ENGROSSED HOUSE BILL 2976

July 31

Amended Summary

Provides that judgment resulting from unpaid child support is valid for 25 years from date child support judgment is entered. [*Extends judgment that has been renewed for additional 10-year period prior to effective date of this Act to be valid for 25 years.*] **Allows certain judgment entered prior to January 1, 1994, to be renewed for 10-year period by ex parte order.** Modifies provisions for extension period.

Takes effect January 1, 1994.

[*Declares emergency, effective on passage.*]

Speaker Campbell:

Your Conference Committee to whom was referred B-engrossed House Bill 2976, having had the same under consideration, respectfully reports it back with the recommendation that the House concur in the Senate amendments dated July 15 and that the bill be amended as follows and repassed.

On page 1 of the printed B-engrossed bill, line 2, after "amending" delete the rest of the line and delete line 3 and insert "ORS 7.040, 18.360, 107.126 and ORCP 70 A; and prescribing an effective date.".

In line 8, delete "before, on or".

In line 10, delete "in the register of the circuit court".

In line 11, after the period delete the rest of the line and delete lines 12 through 19 and insert:

"(2) A judgment that results from an unpaid child support obligation under a child support judgment entered before the effective date of this 1993 Act, and any docketed or recorded lien thereof, may be renewed for a 10-year period as provided in ORS 18.360. The court may enter an ex parte order renewing the judgment. This subsection does not authorize the renewal of a judgment that has expired before the effective date of this 1993 Act.

"(3) The entry of a child support judgment before the effective date of this 1993 Act creates a continuing personal obligation of the obligor that is enforceable for 25 years after the date of entry. Except for the remedy of foreclosure against real property for which a judgment lien must exist, all other remedies for collection of unpaid child support under the personal obligation, including but not limited to garnishment, execution against personal property, wage withholding, set off or government offset program, is available under the child support judgment. This subsection does not authorize the renewal of a judgment that has expired before the effective date of this 1993 Act.".

In line 20, delete "(3)" and insert "(4)".

On page 3, delete lines 4 and 5 and insert:

"**SECTION 5.** ORS 7.040 is amended to read:

"7.040. (1) The judgment docket is a record wherein the clerk or court administrator shall docket judgments for the payment of money and such other judgments and decrees as specifically provided by statute. The judgment docket shall contain the following:

"(a) For other than judgments for the payment of money, the judgment docket shall contain the

information specifically required by the statute requiring the information to be docketed or by court order or rule.

"(b) For judgments for the payment of money, the judgment docket shall contain the following information:

"(A) Judgment debtor.

"(B) Judgment creditor.

"(C) Amount of judgment **and whether the judgment is a child support judgment subject to the provisions of section 2 of this 1993 Act.**

"(D) Date of entry in register.

"(E) When docketed.

"(F) Date of appeal.

"(G) Decision on appeal.

"(H) Any execution or garnishment issued by the court and the return on any execution or garnishment.

"(I) Satisfaction, when entered.

"(J) Other such information as may be deemed necessary by court order or court rule.

"(2) The judgment docket shall be maintained only during the duration of an enforceable judgment or until such time as a full satisfaction of judgment is entered.

"(3) Notwithstanding subsection (1)(b) of this section, a clerk is not liable for failure to docket a judgment or to enter specific information on the judgment docket where the judgment for the payment of money is required to but does not comply with ORCP 70 A.(2).

"(4) The clerk is not liable for any entering of information in the judgment docket that reflects information actually contained in a judgment or decree whether or not the information in the judgment or decree is correct or properly presented.

"SECTION 6. ORS 18.360 is amended to read:

"18.360. Whenever, after the entry of a judgment, a period of 10 years elapses, the judgment and any docketed or recorded lien thereof shall expire. However, before the expiration of 10 years the circuit or district court for the county in which the judgment originally was entered, on motion, may renew the judgment and cause a [*new entry and docketing*] **notation in the register and the judgment docket indicating the renewal** of the judgment to be made. The renewed judgment and any lien thereof expire 10 years after entry of the renewed judgment. If the judgment is renewed, the judgment creditor or the agent of the judgment creditor, may cause to be recorded in the County Clerk Lien Record of any other county in this state a certified copy of the renewed judgment of a lien record abstract. Execution may issue upon the renewed judgment until the judgment expires or is fully satisfied.

"SECTION 7. ORS 107.126 is amended to read:

"107.126. (1) No order or decree for the future payment of money in gross or in installments, entered under ORS 107.095 or 107.105, shall continue to be a lien on real property for a period of more than 10 years from the date of such order or decree unless it is renewed as provided in ORS 18.360.

"**(2) Notwithstanding subsection (1) of this section, any child support judgment subject to section 2 of this 1993 Act that is entered and docketed on or after the effective date of this 1993 Act shall continue to be a lien on real property for a period of 25 years from the date the child support judgment is entered and docketed.**

"SECTION 8. **This Act takes effect on January 1, 1994.**".

If Gov. signed effect Jan 1.

B-Engrossed
House Bill 2976

Ordered by the Senate July 15
Including House Amendments dated April 26 and Senate Amendments dated July 15

Introduced and printed pursuant to House Rule 13.01

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.

Provides that judgment resulting from unpaid child support is valid for [*20*] 25 years from date child support judgment is entered. [*Allows certain judgment entered prior to January 1, 1994, to be renewed for 10-year period by ex parte order.*] **Extends judgment that has been renewed for additional 10-year period prior to effective date of this Act to be valid for 25 years. Modifies provisions for extension period.**

[*Takes effect January 1, 1994.*]

Delcares emergency, effective on passage.

A BILL FOR AN ACT

Relating to domestic relations; creating new provisions; amending ORCP 70 A; and declaring an emergency.

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

SECTION 1. Sections 2 and 4 of this Act are added to and made a part of ORS chapter 25.

SECTION 2. (1) Notwithstanding ORS 18.360 and 107.126, any judgment that results from an unpaid child support obligation under a child support judgment entered before, on or after the effective date of this 1993 Act, and any docketed or recorded lien thereof, expires 25 years after entry of the child support judgment in the register of the circuit court. The judgment and any docketed or recorded lien thereof may not be renewed. This section does not revive a judgment that has expired prior to the effective date of this 1993 Act.

(2) If a judgment resulting from an unpaid child support obligation was renewed pursuant to ORS 18.360 before the effective date of this 1993 Act and if the 10-year renewal period would expire before the 25-year expiration period created by subsection (1) of this section, the judgment continues to be valid for the 25-year period, but, during the period of time after what would have been the expiration date of the renewal period and the expiration date of the 25-year period, the lien of the judgment is subordinate to any lien that was recorded before the effective date of this 1993 Act.

(3) As used in this section:

(a) "Child support judgment" means the underlying judgment, decree or order that creates a child support obligation.

(b) "Judgment" means the judgment that results from an obligor's failure to make a periodic child support installment payment.

SECTION 3. ORCP 70 A. is amended to read:

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.

A. Form. Every judgment shall be in writing plainly titled as a judgment and set forth in a separate document. A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof.

A.(1) Content. No particular form of words is required, but every judgment shall:

A.(1)(a) Specify clearly the party or parties in whose favor it is given and against whom it is given and the relief granted or other determination of the action.

A.(1)(b) Be signed by the court or judge rendering such judgment or, in the case of judgment entered pursuant to Rule 69 B.(1), by the clerk.

A.(2)(a) Money judgment; contents. Money judgments are judgments that require the payment of money, including judgments for the payment of costs or attorney fees. The requirements of this subsection are not jurisdictional for purposes of appellate review. Money judgments shall include all of the following:

A.(2)(a)(i) The names of the judgment creditor and the creditor's attorney.

A.(2)(a)(ii) The name of the judgment debtor.

A.(2)(a)(iii) The amount of the judgment.

A.(2)(a)(iv) The interest owed to the date of the judgment, either as a specific amount or as accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals.

A.(2)(a)(v) Post-judgment interest accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals.

A.(2)(a)(vi) For judgments that accrue on a periodic basis, any accrued arrearages, required further payments per period and accrual dates.

A.(2)(a)(vii) If the judgment awards costs and disbursements or attorney fees, that they are awarded and any specific amounts awarded. This subparagraph does not require inclusion of specific amounts where such will be determined later under Rule 68 C.

A.(2)(b) Form. To comply with the requirements of paragraph A.(2)(a) of this rule, the requirements in that paragraph must be presented in a manner that complies with all of the following:

A.(2)(b)(i) The requirements must be presented in a separate, discrete section immediately above the judge's signature if the judgment contains more provisions than just the requirements of paragraph A.(2)(a) of this rule.

A.(2)(b)(ii) The separate section must be clearly labeled at its beginning as a money judgment. **On or after the effective date of this 1993 Act, if the money judgment includes a child support obligation, the label must so indicate.**

A.(2)(b)(iii) The separate section must contain no other provisions except what is specifically required by this rule for judgments and, if applicable, by ORS 24.290 for the payment of money.

A.(2)(b)(iv) The requirements under paragraph A.(2)(a) of this rule must be presented in the same order as set forth in that paragraph.

A.(3) If the proposed judgment does not comply with the requirements in subsections A.(1) and (2) of this rule, it shall not be signed by the judge. If the judge signs the judgment, it shall be entered in the register whether or not it complies with the requirements in subsections A.(1) and (2) of this rule.

SECTION 4. The provisions of this 1993 Act that apply specifically to child support judgments do not apply to any portion of the judgment that deals with matters other than child support.

SECTION 5. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

May 28, 1994

To: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

From: Maury Holland, Executive Director M.J.H.

Re: Possible New Item for Consideration

Mr. Russell S. Abrams telephoned me to call my attention to what he regards as a possible problem with the ORCP, specifically subsection 82 A(6), with a request that I inform you of his concern so that the Council might take any action it thinks advisable.

Mr. Abrams was recently involved in some litigation at the trial court level wherein the trial judge apparently believed it is doubtful and therefore arguable whether Rule 82, taken as a whole, makes the giving of a bond or other security mandatory for the valid issuance of a temporary restraining order or preliminary injunction. In the attached per curiam opinion in In re Tamblyn, 298 Or 620, 695 P2d 902 (1985)(see attachment), the Oregon Supreme Court emphatically held that, not only is security mandatory, subject to the two exceptions provided in 82 A(1)(b)(i) and (ii), but also that any tro or preliminary injunction issued without it is therefore void, not merely voidable. (This seems to me a doubly unfortunate decision, but that is beside the point for present purposes.)

Mr. Abrams pointed out to me that in its Tamblyn opinion the Court made no mention of the provision of 82 A(6) to the effect that a "a court may waive, . . . any security or bond provided by these rules, ..." It seems to have been the at least arguable inconsistency between the broad holding in Tamblyn and the waiver provision of A(6) that gave rise to the uncertainty in the litigation in which Mr. Abrams was involved

The Council obviously cannot do anything about the Tamblyn decision, even were it to disagree with it, unless it is persuaded to amend the mandatory language of A(1)(a) on which that decision relied, by making giving security discretionary. My guess is that such an amendment would be so radical a departure from long-established practice, both in Oregon and every other U.S. jurisdiction about which I am aware, that the Council would not wish even to consider it. However, even if that drastic corrective is put aside, the question raised by Mr. Abrams seems to me to be a real one. That question appears to me to be whether there is some tension between the mandatory language of A(1)(a) as exclusively relied upon by the Tamblyn court, and the discretionary authority apparently provided by A(6) to "waive" this otherwise obligatory requirement.

It might be that this tension, to the extent it exists, is adequately resolved by the appearance of the word "Modification" in the heading of A(6). This subsection sensiblv authorizes

trial judges, after having required posting of security, to modify it subsequently "upon an ex parte showing of good cause and on such terms as may be just and equitable." Since it was rendered in the collateral context of attorney discipline, the Tamblyn opinion did not recite the trial court proceedings in the underlying action in much detail, but it appears from that opinion that the trial judge flatly refused to order the giving of any security from the outset. In any event he did not modify any initial or previous security requirement. But what if this aspect of Tamblyn were to be presented for review, presumably by mandamus in the Supreme Court? Would a tro or preliminary injunction issued where the trial judge "waived" the giving of any security from the outset be held void for that reason, even assuming that, contrary to what appears to have happened in Tamblyn, he or she had made an adequate statement of reasons on the record? Does a trial judge who is prepared to dispense with any security and state good reasons for doing so, first have to order the giving of security, and then one hour or one day later, order that it be waived, so as to avoid literal violation of the Tamblyn holding? Put another way, does a trial judge, who clearly has discretionary authority to waive, as well as limit or reduce, security after having initially ordered it, similarly have discretion, for good and sufficient reasons, to dispense with it ab initio? If not, why not? Finally,is this issue sufficiently doubtful and does it arise with sufficient frequency in trial courts to be worth consideration on the Council's part at the present time?

Federal courts, incidentally, have had considerable trouble with the security requirement in the context of tro's and preliminary injunctions. FRCP 65(c) includes the same mandatory language as ORCP A(1)(a). Despite this, and despite the further fact that FRCP 65 contains no provision for waiver or other modification comparable to ORCP 82 A(6), some U.S.Courts of Appeals have held that district courts have discretionary authority to dispense entirely with the giving of security in what are regarded as appropriate circumstances. Some of the opinions reaching this result have done so by interpreting the phrase "in such sum as the court deems proper" to include "in zero amount." These tend to be cases wherein the plaintiff is thought to be asserting the public interest, but simply cannot afford to provide security in any amount. The fact that several good appellate courts have resorted to such a blatant play on words suggests to me that it is extremely problematic for a legislature or other rulemaking body to lay down absolute rules that would truncate the full ambit of equitable discretion when it comes to tro's or preliminary injunctions.

This harkens back to one of the most venerable traditions of historic equity, which is its readiness to dispense with general

COUNCIL ON COURT PROCEDURES
University of Oregon School of Law
1101 Kincaid Street
Eugene, Oregon 97403-1221

Telephone: 346-3834 or 346-3990
FAX #: 346-1564

October 26, 1993

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland, Executive Director

RE: **NEXT MEETING OF COUNCIL ON COURT PROCEDURES**

Please make note on your calendars of the time and place of our next meeting as follows:

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

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

An agenda and other materials will follow within a few days.

PLEASE CALL 346-3834 OR 346-3990 IF YOU WILL BE UNABLE TO ATTEND THE MEETING.

November 18, 1993

To: Chair and Members, Council on Court Procedures

From: Maury Holland, Executive Director Maury Holland

Re: Please Don't Be Discouraged

During the recent meeting on Nov. 13 I sensed a feeling of some dismay and disappointment, particularly on the part of new members for whom it was their first or second meeting. The reason for this was apparent. Some might well have gained an impression that the Council has become an organization with very little left to do that is related to its only real function, which is to keep the ORCP in good shape, and instead has become almost totally preoccupied with justifying its continued existence and funding. I sympathize with Judge Johnson's comment that she is willing to give up some Saturday mornings and otherwise invest the time required of a Council member because of her interest in the rules-amending process, but is not interested in devoting alot of time and energy to p-r efforts, cajoling legislators or drumming up work whose only purpose is to make the Council look busy.

Primarily to the new members I wish to say: Please don't be misled or jump to conclusions on the basis of the October and November meetings. The most recent, 1991-93 biennium alone produced five oversized binders bulging with memos, minutes, correspondence, drafts and so forth, which represent the Council's work product for that two-year period, a period during which it spent a good deal of time considering two highly complex and controversial amendments relating to class actions and discovery sharing, also completed work on some fairly intricate amendments to some of the discovery rules, as well as some relatively minor amendments of other rules. At this stage of the last biennium the concern was that the Council was facing far more work than it could possibly manage to complete. By dint of some hard work and a few extended meetings it did manage to complete every item of pending business apart from acting on possible amendment of ORCP 55 H.

Another thing to keep in mind is that the magnitude of the Council's work cannot be measured solely in terms of the number, importance or complexity of amendments promulgated. A great deal of time and effort goes into arriving at considered decisions not to act on proposed

to work as hard as needed remains actively available to tackle new problems that, sooner or later, will inevitably present themselves.

I certainly agree with whoever it was who said, during the Nov. 13 meeting, that it would be unfortunate if, throughout this biennium, the full Council devoted any substantial portion of its remaining meeting time to further belaboring the funding and outreach issues that probably did need an initial airing. That airing has now been done. I am confident that John Hart feels the same way. My hope is that, at least until some final policy decisions need to be made by the full Council, most of whatever thinking and planning about p-r, fence-mending and budget are called for can be handled by the three members who were gracious enough to agree to John's request that they constitute the committee charged with those tasks. Gilma and I stand ready to provide as much staff support as possible to that committee so that its members will not be unduly burdened with too much heavy lifting.

Beginning with the January meeting I think you will find the Council returning to the work it was created to do, the work it does best, your interest in which probably alone justifies in your minds the contribution of time and effort that membership entails.