COUNCIL ON COURT PROCEDURES
Minutes of Meeting of September 10, 1994
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	J. Michael Alexander	Bernard Jolles
	Jack A. Billings	John V. Kelly
	Marianne Bottini	Michael H. Marcus
	Sid Brockley	John H. McMillan
	Patricia Crain	Michael V. Phillips
	William A. Gaylord	Milo Pope
	Susan P. Graber	Charles A. Sams
	Bruce C. Hamlin	Stephen J.R. Shepard
	John E. Hart	Nancy S. Tauman
	Nely L. Johnson	
Excused:	William D. Cramer, Sr.	
	Mary J. Deits	
	Stephen L. Gallagher, Jr.	
	Rudy R. Lachenmeier	

The following guests were in attendance: Phil Goldsmith, Charles Tauman, Alan Wight, and Doug Wilkinson. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item # 1: Call to order. The Chair, Mr. Hart, called the meeting to order at 9:40 a.m. Mr. Hart expressed thanks to the subcommittee on the Future of the Council for the excellent report it has prepared for his signature and submission to the Emergency Board in compliance with the budget note to the 1993-95 appropriation bill (see Attachment A to these minutes), copies of which were distributed at this meeting. Mr. McMillan stated that all credit for this report was owing to Mr. Hamlin, who was chair of this subcommittee and who, according to Mr. McMillan, did the greatest share of the work.

Agenda Item # 2: Approval of August 13, 1994 minutes. The minutes of the August 13, 1994 meeting, as circulated as Attachment A to the Agenda of said meeting, were without objection approved, subject to the corrections set forth in Attachment B to these minutes. Maury Holland commented that in showing a member as "excused" rather than "absent" all that is meant is that the member in question had given advance notice of his or her absence. He did not want members to think that he takes it upon himself to pass upon the sufficiency of any reason a member might give for having to be absent. He added that sometimes a member giving advance notice that he or she will be absent includes the reason, but that he does not ask for any.

Agenda Item 3: Proposed Amendments to ORCP 55. Mr. Hart

first noted that Maury Holland had prepared a large number of proposed amendments to Rule 55 apart from those prepared either by the Council subcommittee or by the OSB Procedure and Practice Committee (P&PC) (see Attachment B to the Agenda of this meeting). Prof. Holland explained that these additional amendments were done, not in order to make substantive changes in Rule 55, but to improve the quality of draftsmanship throughout the rule. Justice Graber and Mr. Hamlin stated that, in view of the limitation of time and the urgency of fully resolving any issues presented by the amendments specifically proposed by the Council subcommittee or by the P&PC, the amendments prepared by Prof. Holland should be set aside for possible consideration at some later time. Justice Graber's motion to this effect, seconded by Mr. Gaylord, carried unanimously.

Discussion then turned to proposed new subsection 55 F(3). Mr. Phillips expressed the thought that each of the proposals that had been presented might contain or create drafting problems that would be difficult to resolve properly in the time available, and suggested that action on this might be deferred. The consensus of the meeting, however, was that any problems that might be created by the various versions of proposed subsection 55 F(3) should be overcome if possible, because of the members' sense that the basic thrust of what the P&PC had proposed in this regard was too worthwhile to defer for another biennium. Mr. Doug Wilkinson, on behalf of the P&PC, was recognized, and urged that the Council approve something as close to what the P&PC had proposed as possible.

Attention then focused upon the version of proposed subsection 55 F(3) that appears at Attachment A p. 3 of the minutes of the August 13 '94 meeting that had been drafted by Justice Graber. There followed a lengthy debate about whether that version would give the person subpoenaed the option of complying by mailing copies of requested materials or by permitting inspection and copying of originals and, if so, whether affording that option would be desirable. Mr. Phillips stated he generally approved of this version, but suggested addition of language saying that the subpoena could specify the time and place where the inspection and copying would take place.

Justice Graber then offered the following slightly modified version of proposed subsection 55 F(3):

> F(3) A party who issues a subpoena may command the person to whom it is issued, other than a hospital, to produce books, papers, documents, or tangible things by mail or otherwise, at a time and placed specified in the subpoena, without commanding inspection of the originals or a deposition. In such instances, the person to

whom the subpoena is directed complies if the person produces the copies of the specified items in the specified manner and certifies that the copies are true copies of all the items responsive to the subpoena or, if all items are not included, why they are not.

Mr. Hart then called the question on tentative adoption of the above proposed new subsection 55 F(3). The vote to approve was unanimous, 18 in favor, 0 opposed.

Justice Graber, seconded by Mr. Hamlin, then moved that subsection 55 D(1) be left in its present form except as amended by P&PC proposal #2 shown on p. 2 of Attachment C to these minutes, and that P&PC proposal #3 on p. 5 not be adopted. This motion carried by a vote of 15 in favor, 0 opposed.

Discussion then turned to subsection 55 D(3) and P&PC proposal #4 (see p. 7 of Attachment C) that is intended to authorize service of subpoenas not requiring appearance at trial or deposition by mail. After lengthy discussion the Council, on motion of Mr. Gaylord, seconded by Judge Brockley, voted to retain the present paragraph 55 D(3)(d), but as amended to delete the word "not" in the first line of said paragraph. In connection with this vote, the Council also unanimously voted to amend subsection 55 D(1) as follows, referring to the 6th line on p. 5 of Attachment C: by adding "whether the subpoena is served personally or by mail," following "[c]ommand to appear at trial or hearing or at deposition, ..." and preceding "[s]hall be served on each party ..." It was also agreed that subsection 55 D(3) should be renumbered to appear as follows:

D(3) **Service by mail.**

D(3)(a) Under the following circumstances, service of a subpoena to a witness by mail shall be the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a)(i) The attorney certified in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D(3)(a)(ii) The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)(a)(iii) The subpoena was mailed to the witness more than 10 days before trial by certified

> mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.
>
> D(3)(b) Service of subpoena by mail may be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

Discussion then turned to P&PC proposal #5 (see p. 8 of Attachment C). Mr. Hamlin, seconded by Justice Graber, moved that this proposal be adopted. This motion carried unanimously.

Mr. Hamlin, seconded by Judge Marcus, then moved that the words "duces tecum" be deleted from the second line of subsection 55 H(2) (see p. 9 of Attachment C), together with the adoption of CCP proposal #8 (see p. 9 of Attachment C), but changing the fourth line from the bottom (of p. 9 of Attachment C) by inserting a period following the word "consent" and deleting the immediately following words "[by] the patient." In the interest of clarification, Justice Graber proposed as a friendly amendment to the foregoing motion that subsection 55 H(2) be amended to read as follows:

> H(2) **Mode of compliance.** Hospital records may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law have been complied with and such compliance is evidenced through an appropriate court order or through execution of an appropriate consent. Absent such consent or court order, production of the requested records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate consent or court order does accompany the subpoena, then production of all records requested shall be considered production of the records responsive to the subpoena.

The Council then voted unanimously to amend subsection 55 H(2) as shown immediately above. Mr. Hamlin suggested that the word "section" at the end of the first sentence of this subsection should be changed to "rule," which was agreed to.

Justice Graber, seconded by Judge Marcus, then moved that paragraph H(2)(a) be amended by deleting the words "duces tecum" in the second line thereof and by adopting CCP proposal #9 (see

p. 10 of Attachment C). This motion carried unanimously.

Discussion then turned to P&PC proposals #10 and #11 (see pp. 10-11 of Attachment C). Mr. Jolles asked whether H(2)(b)(iv) would be left in or deleted. Mr. Phillips responded that he had intended to move deletion of H(2)(b)(iv) for the reasons set forth in the correspondence attached to the agenda of this meeting. He stated that some lawyers have read this provision not to require that copies be provided to lawyers for other parties. He further stated that in his opinion if records are subpoenaed in connection with a deposition, that would result in a copy being provided to a court reporter who could then provide copies to, or allow inspection by, other parties in a form that would make them admissible in evidence at trial. This, he thought, would also tend to avoid multiple requests for the same records. Mr. Hamlin agreed with concerns expressed by Mr. Hart about what Mr. Phillips proposed, and stated that he opposed both deleting H(2)(b)(iv) and adopting P&PC proposal #11. In light of the number of concerns and reservations that were expressed about it, Mr. Phillips withdrew his motion.

Judge Brockley then moved that the P&PC proposal #10 be adopted and that its proposal #11 be rejected. Mr. Hamlin suggested a friendly amendment to the effect that the final sentence of 55 H(2)(b) be amended to read: "If the subpoena directs delivery of the records in accordance with subparagraph H(2)(b)(iv), then a copy of the subpoena shall be served on the person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the hospital." The Brockley motion, as thus amended, carried by unanimous vote.

Judge Brockley, seconded by Judge Marcus, then moved that P&PC proposal #11 (see pp. 11-12 of Attachment C) not be adopted. Mr. Gaylord, seconded by Ms. Tauman, moved adoption of what would become H(2)(b)(1)(A) proposed by the P&PC as part of its proposal #11 (see p. 11 of Attachment C). The latter motion failed to carry by a vote of 13 opposed, 4 in favor. The former motion was not voted upon because the vote described in the immediately preceding paragraph, adopting the P&PC proposal #10, also determined that its proposal #11 not be adopted.

Mr. Hamlin, seconded by Justice Graber, then moved adoption of CCP proposal #12 (see p. 13 of Attachment C). This motion carried by unanimous vote.

Agenda Item 4: Proposed amendments to Oregon Rules of Civil Procedure (apart from Rule 55 (Mr. Hart) (N.B: Except as otherwise indicated, all references in this agenda item are to Attachment C to the Agenda of this meeting). Judge Marcus,

seconded by Mr. Shepard, moved adoption of the amendment proposed to section A of Rule 15 (see C-2 of Attachment C). This motion carried by unanimous vote.

Judge Marcus, seconded by Judge Brockley, move adoption of the amendment proposed to subsection C(1) of Rule 22 (see C-3 - C-4 of Attachment C). This motion carried by unanimous vote.

Judge Marcus, seconded by Judge Sams, moved adoption of the amendments proposed to transfer existing section C of Rule 69 to become new section B of Rule 58 and renumbering of both rules accordingly (see pp. C-6 - C-9 of Attachment C). This motion carried by unanimous vote.

Judge Marcus, seconded by Mr. Hamlin, moved adoption of the amendment additionally proposed to subsection C(1) of Rule 22 (see p. C-11 of Attachment C). After some discussion, this motion carried by a vote of 10 in favor, 6 opposed.

Judge Marcus, seconded by Mr. Jolles, moved adoption of the amendment proposed to subsection F(2) of Rule 32 (see p. C-14 of Attachment C), together with an amendment to subsection F(3) of Rule 32 proposed by letter from Mr. Phil Goldsmith to Judge Marcus dated 9/9/94 (see Attachment D to these minutes), but with the words "for individual monetary recovery" substituted for the words "for monetary relief." This motion carried by vote of 15 in favor, 0 opposed, 2 abstaining.

With reference to the amendment proposed to section C of Rule 57 (see p. C-16 of Attachment C), Mr. Phillips stated he was not persuaded the existing rule needed changing, but that if it were to be changed, he preferred a change in the direction of the statute governing juries in criminal cases (see p. C-21 of Attachment C). Mr. Hamlin moved, seconded by Judge Marcus, that the only change to be made in section 57 C should be to substitute "the jurors" for "each juror." Mr. Hart noted that the P&PC had taken great efforts to document existence of what they perceive to be a problem. The immediately aforementioned motion carried by a vote of 14 in favor, 1 opposed, and 1 abstaining, but was subsequently withdrawn in favor of a motion by Judge Pope, seconded by Mr. Phillips, that section 57 C be amended as proposed by Mr. Phillips (see p. C-20 of Attachment C). This motion carried by a vote of 16 in favor, 1 opposed.

Judge Marcus, seconded by Mr. Gaylord, moved adoption of the amendment proposed to subparagraph C(4)(c)(ii) of Rule 68 (see p. C-17 of Attachment C). Justice Graber questioned what was intended by "interested party," as opposed to "party to the litigation." Ms. Tauman stated she thought the amendment should provide for findings and conclusion at the request of "any party

to the litigation." Several members noted the opposition to this proposed amendment by a number of trial judges who had expressed their belief that it would mandate an unwise use of their time. Judge Brockley reiterated his strong opposition to this proposal.

Mr. Chuck Tauman, Executive Director of OTLA, was then recognized and spoke in support of a requirement that, if requested, findings of fact and conclusions of law be provided on the record in connection with rulings on fee petitions. He added that he and his organization believe that the Legislature has provided for attorney fee awards in many circumstances as a matter of sound public policy, and that findings and conclusions would assist in the implementation of that policy. Mr. Hart then called the question, and the motion carried by a vote of 9 in favor, 8 opposed.

Agenda Item 5: Appointment of final review committee. Mr. Hart appointed Judge Marcus, Mr. Hamlin and himself to constitute a final review committee to double-check the accuracy of the texts of tentatively adopted amendments in the form they would be forwarded for required publication in the Judicial Advance Sheets. Maury Holland reminded the Council that, pursuant to the statutory amendment by the 1993 Legislature, tentatively adopted amendments could not be further revised following their publication in the Judicial Advance Sheets, so that the only choices the Council could make at the Dec. 10 meeting would be to either promulgate or not promulgate them.

Agenda Item 6: New Matters. No new matters were raised.

Agenda Item 7: Old business. No items of old business were raised.

Agenda Item 8: New business. No items of new business were raised. Mr. Hart noted that there was no reason for the Council to meet in October or November, but once again stressed the vital importance of full attendance at the Dec. 10 '94 meeting, since a minimum of 15 votes are required for final promulgation of ORCP amendments.

Agenda Item 9: Adjournment. The meeting adjourned at 2:00 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

COUNCIL ON COURT PROCEDURES

Established by the Oregon Legislature in 1977

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September 2, 1994

HAND DELIVERED

Honorable Bill Bradbury
Senate President
S203 State Capitol
Salem, OR 97310

Honorable Larry L. Campbell
Speaker of the House
269 State Capitol
Salem, OR 97310

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

> 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.[1] 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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[1] That note was adopted by the House Appropriations Committee, and concurred in by the Senate Ways and Means Committee.

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;"[2] 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.[3] 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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[2] Testimony of Judge Arno Denecke before House Committee on Judiciary on February 24, 1977.

[3] Consequently, the creation of the Council resolved separation of powers issues.

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

> 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."[4]

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 <u>continuing review</u> 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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[4] Stephen C. Thompson, "Death Knell to Reform?" Oregon State Bar Bulletin (May 1993).

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

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[5] 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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[5] 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.

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

ATTACHMENT A-9

CONTENTS

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: [1]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.

[1]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)	600	$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	
[1]Office supplies		375	13,944
PROJECTED DEFICIT IN SERVICES AND SUPPLIES			-$1,145

[1]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
[1]Insurance (property damage $750, liability $750)	1,500
[2]Information Systems	19
[3]Personnel	31
[4]Budget	6,440
General Services service charge	231
Accounting charges	580
[5]Audit charges	2,875
TOTAL	$24,781

[1]Amount obtained from Risk Management.

[2]Amount obtained from Budget & Management.

[3]Amount obtained from Budget & Management.

[4]Amount obtained from Budget & Management.

[5]Amount obtained from Audit Division.

ATTACHMENT A-15

		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							
020500	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	
911[illegible]	WORKERS' COMP. INSUR (SAIF)						
	GENERAL	107	175				
911504	PUBLIC EMPLOYES' RETIRE CONT						
	GENERAL	3,700	8,250	8,250	8,079	8,079	

ATTACHMENT A-16

		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	
RVICES AND SUPPLIES							
20500	INSTATE TRAVEL						
	GENERAL	8,692	6,612	6,612	8,000	8,000	
215	OFFICE EXPENSES						
	GENERAL	2,319	2,628	2,628	4,753	4,753	

ATTACHMENT A-17

		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					
TAL	SERVICES AND SUPPLIES						
	GENERAL	13,229	12,799	12,799	24,781	24,781	
ITA.	UTLAY						
TAL	COMBINED S&S AND C.O.						
	GENERAL	13,229	12,799	12,799	24,781	24,781	
AL EXPENDITURES							
TAL	ALL EXPENDITURES						
	GENERAL	67,665	82,954	82,954	99,388	99,709	
SITION SUMMARIES							
3100	CLASS/UNCLASS POSITIONS						
	POSITION	2	2	2	2	2	
TAL	AUTHORIZED POSITIONS						
	POSITION	2	2	2	2	2	
3500	CLASS/UNCLASS FTE POSITIONS						
	FTE	0.70	0.71	0.71	0.71	0.71	
TAL	AUTHORIZED FTE POSITIONS						
	FTE	0.70	0.71	0.71	0.71	0.71	
VER	NS AND ENDING BALANCES						
993..	REVERSIONS						
	GENERAL	-156					

September 10, 1994

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland, Executive Director

RE: *Corrections to Minutes of August 13, 1994 Meeting*

Please note the following corrections to the minutes of the Council's August 13, 1994 meeting as distributed under my August 29, 1994 covering memo:

1. Page 2 (Attachment A-2), third from last line of third paragraph: *Change* "Bill Cramer, but . . . ." *to* "Mr. Cramer, however, ..."

2. Page 2 (Attachment A-2), bottom, runover paragraph: Delete.

3. Page 6 (Attachment A-6), first line of first full paragraph: *Change* "Mr. Susan Grabe" *to* "Ms. Susan Grabe."

4. Page 7 (Attachment A-7), fourth from last line of first paragraph: *Change* "chance put in a word." *to* "chance to put in a word."

With apologies for these errors, which resulted from overhasty proofreading.

P.S. Judge Gallagher should be shown as "excused" rather than "absent".

ATTACHMENT B

Proposed amendments by OSB Practice & Procedure Committee: Labeled in the margin as "P&PC"

Proposed amendments by Council on Court Procedures: Labeled in the margin as "CCP"

SUBPOENA
RULE 55

A. Defined; form. A subpoena is a writ or order directed to a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For production of books, papers, documents, or tangible things and to permit inspection. A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody, or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection

thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things but not commanded to also appear for deposition, hearing, or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents, or tangible things, the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is reasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. Where any party objects to copies of books, papers, documents, or tangible things being produced without an inspection of the originals, the subpoena shall be amended to

#1 P&PC

NO

command the person to whom it is directed to produce and permit inspection at a time and place specified therein. If any party objects to copies of books, papers, documents, or tangible things being produced for inspection without a deposition, the subpoena shall be amended to command appearance at a deposition. Any such objection shall be made promptly and, in any event, before the time specified in the subpoena for compliance therewith. If objection is made, any party or the person commanded to produce or permit inspection and copying may move the court for such orders as may permit the fair and efficient production and identification of the books, papers, documents, or tangible things requested.

#1 P&PC (cont'd)

C. Issuance.

C(1) **By whom issued.** A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance of a person, to produce books, papers, documents, or tangible things and to permit inspection thereof: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C, or before

any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

C(2) **By clerk in blank.** Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

D. Service; service on law enforcement agency; service by mail; proof of service.

D(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and, whether or not personal attendance is required, ~~for~~ one day's attendance fees. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be

#2 P&PC

served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Copies of each subpoena commanding production of books, papers, documents, or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, shall be served on each party at least ~~seven~~ 14 days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

#3 P&PC

D(2) Service on law enforcement agency.

D(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this

manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

D(3) Service by mail.

Under the following circumstances, service of a subpoena to a witness by mail shall be the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a) The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness, indicated a willingness to appear at trial if subpoenaed;

D(3)(b) The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)(c) The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

~~D(3)(d) Service of subpoena by mail may not be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.~~

#4 P&PC NO

D(4) Proof of service. Proof of service of a subpoena is made in the same manner as proof of service of a summons.

E. Subpoena for hearing or trial; prisoners. If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F. Subpoena for taking depositions or requiring production of books, papers, documents, or tangible things; place of production and examination.

F(1) Subpoena for taking deposition. Proof of service of a notice to take a deposition as provided in Rules 39 C and 40 A, or of notice of subpoena to command production of books, papers,

documents, or tangible things before trial as provided in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein.

F(2) Place of examination. A resident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, or tangible things only in the county wherein such person resides, is employed, or transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, or tangible things only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

#5 P&PC YES

F(3) Production without examination or deposition. Notwithstanding ORCP F(1) and (2), where a subpoena commands production of copies of designated papers, books, documents, or tangible things in the possession, custody, or control of the person to whom the subpoena has been issued without commanding inspection of the originals or a deposition, the person to whom the subpoena has been issued may be compelled, without a personal appearance, to produce the copies by mail or otherwise, at a time and place specified in the subpoena.

#6 P&PC NO

G. Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, such party's complaint, answer, or reply may be stricken.

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(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 ~~only~~ obtained by subpoena duces tecum ~~only~~ as provided in this section; ~~.~~ However, if disclosure of such ~~requested~~ records is restricted ~~by~~ or otherwise limited by state or federal law, ~~the requirements of such law must be met~~ such protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law protecting such records have been complied with, and such compliance is evidenced through an appropriate court order or execution of an appropriate consent by the patient. Absent such court order or consent, production of records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate court

NO
#7
P&PC

#8
CCP

YES-
BUT
CHANG

order or consent by the patient does accompany the subpoena, then production of all records shall be considered production of the records responsive to the subpoena.

#8 CCP (cont'd)

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~~ responsive to 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.

#9 CCP

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 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 (A) the injured party and (B) all other parties to the litigation not less than 14 days prior to service of the subpoena on the hospital.

#10 P&PC

H(2)(b)(1) Each party who wants copies of the subpoenaed records shall notify the party issuing the subpoena. If a non-issuing party requests copies of the subpoenaed documents as set forth in this subpart, the procedure set forth in subpart H(2)(b)(1)(a) shall be followed, unless a non-issuing party objects thereto. Any such objection shall be made promptly and, in any event, before time specified in the subpoena for compliance therewith. If objection is made, any party or the person commanded to produce and permit copying may move the Court for such orders that may permit the fair and efficient production of the documents.

#11 P&PC

H(2)(b)(1)(A) The party issuing the subpoena shall, upon receipt of the records from the hospital, forward copies of all records provided by the hospital, at a reasonable charge to the requestor of the copies.

H(2)(b)(2) Unless good cause is shown therefor, the hospital will not be required to respond to subpoenas for the

same records from any party who had notice of the first subpoena. This rule does not preclude subsequent subpoenas issued by a party who received notice of the subpoena discussed in subpart H(2)(b)(iv) above for records generated by the responding hospital, after the response to the first subpoena.

#11 P&PC (cont'd)

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~~ responsive to the subpoena; (iii) that 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.

#12 CCP

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.

Phil Goldsmith
Attorney at Law
1100 S.W. 6th Avenue
Suite 1212
Portland, Oregon 97204

(503) 224-2301
FAX: (503) 222-7288

September 9, 1994

Via FAX 796-1234

The Honorable Michael H. Marcus
District Court Judge
1021 S.W. Fourth Avenue
Portland, OR 97204

Re: Proposed Amendments to ORCP 32 F(2) and F(3)

Dear Judge Marcus:

Alan Wight, Jim Murch and I have agreed that, to be consistent with the amendments proposed to ORCP 32 F(2), ORCP 32 F(3) should be amended as follows:

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

individual recovery

As we discussed, I will be in attendance at the Council meeting tomorrow and will have 25 copies of this letter for distribution to Council members.

Sincerely,

Phil Goldsmith

PG:lmk

cc: John E. Hart
Maury Holland
James Murch
R. Alan Wight
(all by FAX)

ATTACHMENT D

PLEASE NOTE

Attached also for ready reference when reading the minutes are ATTACHMENTS C-2 - C-21 TO THE 9-10-94 AGENDA (discussed on pages 6 and 7 of the minutes).

TIME FOR FILING PLEADINGS OR MOTIONS
RULE 15

A. Time for filing motions and pleadings. A motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a crossclaim [~~of a party summoned under the provisions of Rule 22 D~~] shall be filed with the clerk by the time required by Rule 7 C(2) to appear and defend. Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.

B. Pleading after motion.

B(1) If the court denies a motion, any responsive pleading required shall be filed within 10 days after service of the order, unless the order otherwise directs.

B(2) If the court grants a motion and an amended pleading is allowed or required, such pleading shall be filed within 10 days after service of the order, unless the court otherwise directs.

C. Responding to amended pleading. A party shall respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

D. Enlarging time to plead or do other act. The court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or allow any other pleading or motion after the time limited by the procedural rules, or by an order to enlarge such time.

COUNCIL ACTION

The Council voted (13 - 3) at its 4/16/94 meeting tentatively to adopt the OSB Practice & Procedure Committee's proposed amendment to ORCP 15 A. That Committee felt that "there appears to be some confusion over the amount of time a party has to file a reply to a counterclaim, stating that some attorneys appear to read ORCP 15 A as indicating 30 days and others say that the reply to a counterclaim of a party summoned under the provisions of ORCP 22 D is the only reply that is entitled to a 30-day time frame."

COUNTERCLAIMS, CROSS-CLAIMS,
AND THIRD PARTY CLAIMS
RULE 22

A. Counterclaims.

A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against a plaintiff.

A(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

B. Cross-claim against codefendant.

B(1) In any action where two or more parties are joined as defendants, any defendant may in such defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action and shall be: (a) one arising out of the occurrence or transaction set forth in the complaint; or (b) related to any property that is the subject matter of the action brought by plaintiff.

B(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

B(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C. Third party practice.

C(1) After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later that 90 days after service of the plaintiff s summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in [~~sections A~~

~~and B of~~] this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff s claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

C(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C(1) of this section.

D. Joinder of additional parties.

D(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29.

D(2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.

D(3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E. Separate trial. Upon motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

COUNCIL ACTION

The Council unanimously voted (5/14/94 Minutes, p. 4) tentatively to adopt Rudy Lachenmeier's proposed amendments to ORCP 22 C(1) deleting "sections A and B of" in the fourteenth

line and inserting "may assert" in the twelfth and twenty-fifth lines.

See following discussion and action taken at the Council's May 14, 1994 meeting:

> Mr. Lachenmeier said that the letter he received from Bruce Hamlin ... together with his own examination of some pertinent CLE materials, strongly convinced him that the two appearances of "shall" in the present text of 22 C(1), in contrast to the use of "may" elsewhere in this subsection, create a potentially serious ambiguity that should be corrected. He also expressed concern about the fact that, entirely independent of the language of this subsection, there probably are certain kinds of counterclaims that are made compulsory by decisional law respecting finality of judgments, and said that it might be helpful if a comment to this rule were added to provide warning about this. He moved that 22 C(1) be amended in accordance with the draft he had prepared and circulated to members at the beginning of this meeting [see above rule with proposed amendments]. He noted that, in addition to the two insertions of "may assert" to govern counterclaims and cross-claims asserted by third-party defendants, his draft would also delete the needless, and hence possibly confusing, reference in the concluding portion of the third sentence of this subsection to "sections A and B," so that the conclusion of this sentence would read: "as provided in this rule." This motion was seconded by Judge Marcus. **Following brief discussion this motion carried by unanimous vote.**

TRIAL PROCEDURE
RULE 58

A. Order of proceedings on trial by the court. Trial by the court shall proceed in the order prescribed in subsections (1) through (4) of section B of this rule, unless the court, for special reasons, otherwise directs.

B. Failure to appear for trial. When a party who has filed an appearance fails to appear for trial, the court may, in its discretion, proceed to trial and judgment without further notice to the non-appearing party.

~~B~~C. Order of proceedings on jury trial. When the jury has been selected and sworn, the trial, unless the court for good and sufficient reason otherwise directs, shall proceed in the following order:

~~B~~C(1) The plaintiff shall concisely state plaintiff s case and the issues to be tried; the defendant then, in like manner, shall state defendant's case based upon any defense or counterclaim or both.

~~B~~C(2) The plaintiff then shall introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.

~~B~~C(3) The parties respectively then may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense, or counterclaim.

~~B~~C(4) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.

~~B~~C(5) Not more than two counsel shall address the jury in behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours.

~~B~~C(6) The court then shall charge the jury.

~~C~~D. Separation of jury before submission of cause; admonition. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case, they may be admonished by the court that it is their duty not to converse with any other person, or

among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

[D]E. Proceedings if juror becomes sick. If, after the formation of the jury, and before verdict, a juror becomes sick, so as to be unable to perform the duty of a juror, the court may order such juror to be discharged. In that case, unless an alternate juror, seated under Rule 57 F, is available to replace the discharged juror or unless the parties agree to proceed with the remaining jurors, a new juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards formed.

COUNCIL ACTION

The Council voted unanimously (4/16/94 Minutes, pp. 4,5) tentatively to adopt Bruce Hamlin's proposal to amend ORCP 58 and ORCP 69. The text of former 69 C was moved to ORCP 58 B in order to emphasize that the procedures for a default order or judgment contained in the remainder of ORCP 69 do not apply to a party that fails to appear at trial.

DEFAULT ORDERS AND JUDGMENTS
RULE 69

A. Entry of order of default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default.

B. Entry of default judgment.

B(1) By the court or the clerk. The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B(i)(a) The action arises upon contract;

B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can be computation be made certain;

B(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B(1)(d) The party against whom judgment is sought is not a minor or an incapacitated person as defined by ORS 126.003(4) and such fact is shown by affidavit;

B(1)(e) The party seeking judgment submits an affidavit of the amount due;

B(1)(f) An affidavit pursuant to subsection B(3) of this rule has been submitted; and

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D(3)(a)(i), 7 D(3)(b)(i), 7 D(3)(e) or 7 D(3)(f).

B(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefore, but no judgment by default shall be entered against a minor or an incapacitated person as defined by ORS 126.003(4) unless the minor or incapacitated person has a general guardian or is represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

B(3) Amount of judgment. The judgment entered shall be for the amount due as shown by the affidavit, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B(4) Nonmilitary affidavit required. No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article I of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

~~[C. Failure to appear for trial. When a party who has filed an appearance fails to appear for trial, the court may, in its discretion, proceed to trial and judgment without further notice to the non-appearing party.]~~

[D]C. Setting aside default. For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B and C.

[E]D. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.

[F]E. "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

COUNCIL ACTION

The Council voted unanimously (4/16/94 Minutes, pp. 4,5) tentatively to adopt Bruce Hamlin's proposal to amend ORCP 69 and ORCP 58. The text of former 69 C was moved to ORCP 58 B in order

to emphasize that the procedures for a default order or judgment contained in the remainder of ORCP 69 do not apply to a party that fails to appear at trial.

COUNTERCLAIMS, CROSS-CLAIMS,
AND THIRD PARTY CLAIMS
RULE 22

A. Counterclaims.

A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against a plaintiff.

A(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

B. Cross-claim against codefendant.

B(1) In any action where two or more parties are joined as defendants, any defendant may in such defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action and shall be: (a) one arising out of the occurrence or transaction set forth in the complaint; or (b) related to any property that is the subject matter of the action brought by plaintiff.

B(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

B(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C. Third party practice.

C(1) After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later that 90 days after service of the plaintiff s summons and complaint on the defending party. Otherwise the third party plaintiff must obtain [~~agreement of parties who have appeared and~~] leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, may assert any defenses to the third party plaintiff's claim as provided in Rule 21 and counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant

may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff s claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

C(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C(1) of this section.

COUNCIL ACTION

The following is an excerpt from minutes of the Council meeting regarding Rudy Lachenmeier's proposed amendment to ORCP 22 C(1) (5/14/94 Minutes, pp. 4,5):

> There was then discussion of a second proposed amendment to 22 C(1) prepared by Mr. Lachenmeier. ... This amendment would retain the requirement that "leave of court" be obtained in order validly to serve a third-party complaint and summons more than 90 days after service of plaintiff's complaint on a third-party plaintiff, but would delete the additional requirement that "agreement of parties who have appeared" also be obtained. Judge Marcus stated that he preferred the change proposed by Mr. Lachenmeier to no change at all, but suggested that making the two requirements disjunctive or alternative, rather than conjunctive as they now are, might be better. ... Bill Cramer suggested that it might make more sense to abolish the 90-day period during which there can be third-party joinder as of right and require discretionary leave of court in all instances. Mr. Hart stated he thought it useful to give defendants 90 days in which to bring in third-party defendants for contribution and the like, and said that the real issue is what should be required after the 90 days have elapsed. He continued by asking whether this question should be put over until the next meeting when a supermajority hopefully will be present.

Mr. McMillan remarked that, after such extended discussion, he thought there should be a vote. He then moved the question and Mr. Gaylord seconded. The motion failed to carry on a vote of 6 in favor, 6 opposed and 0 abstentions. **Mr. Hart directed that the minutes reflect that this remains an open issue for possible further consideration.** Judge Johnson said that possibly a compromise, whereby 120 days would be substituted for 90 days, might be worth consideration.

CLASS ACTIONS
RULE 32

F. Notice and exclusion.

* * * * *

F(2) Prior to the [~~final~~] entry of a final judgment against a defendant the court shall request members of the class who may be entitled to individual monetary recovery to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member who has filed a statement required by the court, assessable court costs, and an award of attorney fees, if any, as determined by the court.

* * * * *

COUNCIL ACTION

Mr. Jim Murch, representing the Oregon Bankers' Association, suggested revisions (5/14/94 Minutes, p. 3) to Judge Marcus's draft of February 26, 1994, as follows:

> Prior to entry of a final judgment against defendant, the court shall request members of the class who may be entitled to monetary relief ...

After discussion the consensus was that "recovery" rather than "relief" was less ambiguous and that the language should be as set forth in the rule (above). The version set forth in the rule above was on the agenda for discussion at the Council's July 16, 1994 meeting (7/16/94 Minutes, pp. 2-4). See following excerpt (7/16/94 Minutes, p. 4):

> Mr. Hart then said he thought the discussion had lasted as long as was useful, and that he expected the amendment proposed by the Marcus subcommittee would be voted on at the September meeting unless different

language is proposed before then ... All members present indicated that they either support that language or are leaning in that direction, with three members indicating that they do not wish to foreclose the possibility of further thought on the matter. **Mr. Hart concluded this discussion by expressing the hope that absent members would give due consideration to this matter and come to the September meeting prepared to cast their votes.**

JURORS
RULE 57

* * * * *

C. Examination of jurors. The full number of jurors having been called shall thereupon be examined as to their qualifications. The court may examine the prospective jurors to the extent it deems appropriate, and thereupon the court shall permit the parties to examine [~~each juror~~] the prospective jurors. The court may permit the parties to examine each of the jurors individually and one at a time, first by the plaintiff, and then by the defendant, or the court may permit the parties to examine all of the prospective jurors, both individually and collectively as a group, first by the plaintiff, and then by the defendant. The court shall regulate the examination in such a way as to avoid unnecessary delay.

* * * * *

COUNCIL ACTION

At its August 13, 1994 meeting the Council discussed and considered the above proposed amendments submitted by the Bar's Procedure & Practice Committee. It was decided to defer further consideration to the September 10, 1994 meeting. See Mike Phillips' comment letter dated 8/23/94, with proposed redraft (attached).

ALLOWANCE AND TAXATION OF ATTORNEY FEES
AND COSTS AND DISBURSEMENTS
RULE 68

* * * * *

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

* * * * *

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.~~] The trial court shall make findings of fact and conclusions of law on awards of attorney fees if requested by any interested party.

* * * * *

COUNCIL ACTION

The Council discussed the above amendment (5/14/94 Minutes, p. 5) proposed by Mick Alexander's subcommittee. The consensus was that the proposed amendment should be disseminated to all presiding trial court judges for comment prior to the Council's July 16, 1994 meeting. Comments letters were received in response to the letter sent to the judges; see Council's further discussion (7/16/94 Minutes, pp. 4). **It was agreed that Maury Holland would give further notice of this proposed amendment and solicit comments from the following organizations: OADC, OTLA, Oregon Legal Services, and the Litigation and Family Law Sections of the OSB** (7/16/94 Minutes, p. 5). NOTE: the notice was sent and no word has been received from those organizations (as of August 22, 1994).

MICHAEL PHILLIPS
ATTORNEY AT LAW

1158 High Street Suite 102

Eugene Oregon 97401

503 465-8898

August 23, 1994

Maury Holland
School of Law
University of Oregon
Eugene, OR 97403

Re: ORCP 57.C

Dear Maury:

The Procedure and Practice Committee has tendered to the Council a proposed amendment to ORCP 57.C. The forwarding letter states a preference for examination of the panel as a whole:

> "The general rule should be voir dire by examination of the panel on the whole. The exception should be voir dire of each juror where good cause is shown."

Notwithstanding that stated preference, the proposal is somewhat more modest, merely stating that the court may proceed in either of two alternate methods. As a matter of drafting, I would prefer to use language like that in ORS 136.210, which governs voir dire in criminal cases. It was under that statute that the so called "fast track" system first found its way into Oregon jurisprudence over the objection of the State in State v. Jones. The applicable language of ORS 136.210 is the following:

> "When the full number of jurors has been called, they shall thereupon be examined as to their qualifications, first by the court, then by the defendant, and then by the state."

Modified to apply to civil cases, that language incorporated into ORCP 57 would make that rule read as follows:

> "When the full number of jurors has been called, they shall be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court shall regulate the examination in such as way as to avoid unnecessary delay.

My preference as a drafting matter for the ORS 136.210 format is that it accomplishes the objective of the Procedure and Practice Committee in fewer than one-third as many words.

On the merits, I see nothing in the forwarding letter, nor the survey, to suggest that the present system of "fast track," unless there is objection, is not working. The Procedure and Practice Committee's proposal does not get at what seemed to me the true vice of the present system, and that is that there are nearly as many idiosyncratic variations on "fast track" as there are judges who employ it. The present rule allows a litigant to opt out of such idiosyncracies and get on with the trial under a procedure that everyone understands. Unless there is some move toward uniformity in what "fast track" means, I oppose a rule which would allow each trial judge to impose his or her idiosyncratic notion on every trial. If we are to opt for placing that decision in the hands of each trial judge, rather than the Council, I prefer the language of ORS Chapter 136.

Best regards.

Sincerely,

Michael Phillips

MVP:vh

57.C. Examination of Jurors. ~~The full number of jurors having been called shall thereupon be examined as to their qualifications. The court may examine the prospective jurors to the extent it deems appropriate, and thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant.~~ When the full number of jurors has been called, they shall be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court shall regulate the examination in such a way as to avoid unnecessary delay.

SELECTION OF JURY

136.210 Jury number; examination. (1) Except as provided in subsection (2) of this section, in criminal cases the trial jury shall consist of 12 persons unless the parties consent to a less number. It shall be formed, except as otherwise provided in ORS 136.220 to 136.250, in the same manner provided by ORCP 57 B, D(1)(a), D(1)(b), D(1)(g) and E. When the full number of jurors has been called, they shall thereupon be examined as to their qualifications, first by the court, then by the defendant and then by the state. After they have been passed for cause, peremptory challenges, if any, shall be exercised as provided in ORS 136.230.