# COUNCIL ON COURT PROCEDURES Minutes of the Meeting of April 22, 1995 Oregon State Bar Center 5200 Southwest Meadows Road Lake Oswego, Oregon

Present:

J. Michael Alexander Jack A. Billings Patricia Crain Mary J. Deits William A. Gaylord Bruce C. Hamlin

John E. Hart Bernard Jolles Rudy R. Lachenmeier Michael H. Marcus Michael V. Phillips

Milo Pope

Excused:

Marianne Bottini Sid Brockley William D. Cramer, Sr.

Stephen L. Gallagher Susan P. Graber Nely L. Johnson

John V. Kelly John H. McMillan Charles A. Sams Stephen J.R. Shepard

Nancy S. Tauman

Bob Oleson and Susan Grabe, respectively Director of Public Affairs and Law Improvement Coordinator of the Oregon State Bar, and M. Max Williams II, Co-counsel to the Senate Judiciary Committee, were in attendance. Also present was Maury Holland, Executive Director.

Agenda Item 1: Call to order. The Chair, Mr. Hart, called the meeting to order at 9:42 a.m.

Agenda Item 2: Approval of December 10, 1995 minutes. Without objection or amendment, the minutes of the December 10, 1994 meeting were approved as previously distributed.

Agenda Item 3. Legislative amendments to ORCP (Mr. Hart). Mr. Hart introduced Mr. Williams for the purpose of briefing the Council on proposed statutory amendments to the ORCP as presently drafted. Mr. Williams distributed copies of the following Senate Bills: SB 597, 957, 868, 869, and 385, along with their latest dash amendments where applicable. He briefly explained the sponsorship and rationale of each ORCP amendment contained in these Senate Bills, and stated that he would be pleased to receive any comments on them that members might have, either during this meeting or by fax on Monday, April 24, prior to the work session scheduled for late that afternoon. other comments from members was one from Mr. Phillips regarding the sentence proposed to be added to ORCP 47 to the effect that the new definition of absence of a genuine issue of material fact equated particular issues with the verdict of a jury, which he

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thought might lead to confusion. Mr. Williams responded that he would take this and other comments under careful consideration for discussion with Legislative Counsel and members of the subcommittee.

Mr. Williams then stated that he had been authorized and directed by Senator Neil R. Bryant, Chair of the Senate Judiciary Committee and Co-Chair of the Joint Subcommittee on Civil Process, to convey a message to the Council on his behalf regarding the role of the Council during legislative sessions. The substance of this message was that Sen. Bryant believes the Council must become more pro-active during the course of legislative sessions, by which he meant more willing than it has tended to be in the past to be available to legislators who sponsor proposed legislation that would amend, or otherwise impact upon, the ORCP. Sen. Bryant's reason for forwarding this advice, according to Mr. Williams, is that the Council holds itself out as a uniquely valuable resource for the legislature in all matters concerning the ORCP, but when legislators have questions about the ORCP or ask for the benefit of the Council's expertise, the answers and advice requested are often not Mr. Williams explained, on Sen. Bryant's behalf, forthcoming. that while most legislators understand that the primary role of the Council is to consider and promulgate proposed amendments to the ORCP during the 14-month cycle of its meetings between legislative sessions, there are occasions when legislators with an urgent agenda, including ORCP amendments, are simply not willing to defer to the Council by waiting until the following session to review whatever action the Council has taken or not taken in the interim. Some legislators do not understand why, and do not react positively, to being told that they should never do anything that would amend the ORCP, or to be informed that, while the Council has been invited to present testimony or otherwise give the Legislative Assembly the benefit of its expertise during a session, the Council frequently appears unwilling or unable to respond or be helpful.

Sen. Bryant's message concluded by urging that, in addition to its primary and traditional function of processing proposed ORCP amendments during the cycle of its meetings between sessions, the Council carefully consider ways and means of assuming a perhaps secondary, but nonetheless important, additional role of acting as the preeminent source of disinterested expertise concerning the ORCP for legislators during the course of legislative sessions.

Mr. Oleson then stated that he strongly advised the Council to heed Sen. Bryant's message, that it consider undertaking a dual-track role in the future, and that it recognize how the

legislative and political environment had changed in the direction of many legislators becoming more insistent upon taking action that can result in a completed product by the end of a session. He attributed this greater impatience in part to the movement toward term limits for legislators.

After Mr. Williams left the meeting, there followed a lively discussion among the members as to whether the Council could or should take on the additional function as urged by Sen. Bryant. Some members questioned whether this additional function might not be inconsistent with the Council's organic statute, which prescribes in detail what the Council shall do and how it shall Other members, however, stated that while this statute does not provide for the consultative role suggested by Sen. Bryant, neither does it prohibit or preclude it. Many members expressed the view that, whatever might be done, a careful distinction should be preserved between things the Council does officially and as approved by vote of a majority or supermajority of members, in contrast to advice and assistance that might be rendered during legislative sessions by individual members speaking only for themselves, albeit with the advantage of the perspective and close familiarity with the ORCP that comes from Council membership.

After lengthy discussion, a general consensus emerged that Mr. Hart should write a letter to Sen. Bryant thanking him for his good will toward the Council and for his message, and also outlining some suggestions that were broached and considered during the course of this discussion on ways in which the Council might be constructively responsive to that message. Among those suggestions were that the Council might schedule full meetings on strategic dates during legislative sessions at which it might frame a collegial response to requests from legislators for the Council's views and advice on proposed legislative amendments to the ORCP; that the Legislative Assembly might be provided at the beginning of each session with a roster of the Council nonjudicial members, including names and addresses, who would make themselves available on an individual basis to provide advice and other forms of assistance on request of legislators, and that prior to each session, legislative liaison subcommittees might be appointed, composed of members having special expertise concerning particular aspects of civil procedure and the corresponding ORCP provisions, which would track and keep abreast of bills relating to their respective areas and be prepared to respond to legislative requests for comments and advice on relatively short notice. There was broad agreement that this kind of activity would almost certainly be regarded as inappropriate by the Council's judicial members.

All members who spoke were in definite agreement that, if there is any legislative consultation by individual members, or even by legislative liaison subcommittees, both of the latter would be obligated to make clear that they were not speaking or acting on the Council's behalf except when an authorizing majority vote of the full Council had been previously taken. Some members added a suggestion that it might be useful if any legislative liaison subcommittees that might be created were to meet before each session, or early in each session, with Chairs of the Senate and House Judiciary Committees, with committee staff, or with individual legislators planning to sponsor legislation affecting the ORCP. Mr. Lachenmeier raised a question as to what the legislature might itself do to facilitate the Council's carrying out the new function Sen. Bryant has urged, such as by providing advance notice of bills that would amend the ORCP.

While considerable interest in, and support for, responding in these or other ways to Sen. Bryant's message were widely expressed, some notes of caution were also sounded, lest insession consultation by the Council, legislative liaison subcommittees, or individual members, foster an appearance of the Council unqualifiedly approving given ORCP amendments with the policy of which a majority of Council members might strongly disagree, merely because some Council input had occurred with respect to their more purely technical aspects, draftsmanship, and the like. Some members noted how difficult and artificial it often is to separate out the purely technical aspects of rules amendments from their soundness as policy. Active involvement with the legislature during sessions would run some unavoidable risk that the Council would come to be perceived as one among many lobbying groups, or taking sides on controversial issues of policy, and perhaps even of acting in a partisan fashion.

Agenda Item 4: Proposed amendments to ORCP 57 (Mr. Hart). Mr. Hart suggested that, in light of the fact that these amendments are well into the stage of being enacted, there seemed no point in any comments on those amendments being formulated at this meeting, with which there was general agreement. Maury Holland was therefore directed to write a letter to Judge De Muniz informing him that timing had prevented the Council from giving these amendments the careful consideration that formulating worthwhile comments would require.

Agenda Items 5, 6, 7, and 8 (Mr. Hart). In view of the time remaining in this meeting, action on these amendments was deferred to future meetings. With respect to Item 5, Mr. Alexander was asked to prepare a preliminary report and recommendation for the first Council meeting of the coming 1995-

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97 biennium, and Messrs. Jolles and Lachenmeier were asked to do the same with respect to Item 6. Maury Holland was directed to write Justice Peterson informing him of this preliminary action taken regarding Item 6. No preliminary reports were assigned respecting Items 7 and 8, but without foreclosing either of them from being carried over to the coming biennium.

Agenda Item 9 (Mr. Hart). In response to the Chair's inquiry as to any items of new business, Maury Holland asked whether the members present favored or opposed trying to schedule the Council's first meeting of the 1995-97 biennium to coincide with the late September Annual Meeting of the Oregon State Bar, which this year will be held at Seaside, as was done with the September 1993 Council meeting in conjunction with the Annual Meeting in Eugene. There was general support for this plan.

Agenda Item 10. Old business (Mr. Hart). In response to the Chair's inquiry, no new items of old business were raised.

Agenda Item 11. Adjournment. A motion to adjourn was made, seconded, and unanimously carried at 11: 55 a.m.

Respectfully submitted,

Maury Holland Executive Director Keller, Gottlieb & Gorin

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Harvey W. Keller Ira L. Gottlieb Lawrence D. Gorin Maria C. Sosnowski Sandra L. Gerbish Legal Assistant

FAX (503) 274-0818

December 5, 1994

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

Re: Comments on ORCP Amendments Existing

Dear Professor Holland:

I note with dismay the proposed amendment to ORCP 58, whereby a new section B would be created and the subsequent sections would be "pushed down" and sequentially recodified.

Given the citation history that has now accrued with the existing arrangement for ORCP 58 (see attached copies of Shephard's Citations), would it not make more sense to leave the existing arrangement alone, with the proposed amendment (dealing with failure to appear for trial) being codified as a new subsection E and placed at the end of the existing rule?

Legal research is difficult enough as it is. Why add needless confusion? When amending existing statutes and rules, the existing scheme of codification should be maintained, if it is possible to do so. And here it can be done. Simply place the proposed new subsection at the end of the existing rule, rather than inserting it into the middle. You will thus avoid recodification and also avoid the future legal research problems that would otherwise result.

With kind regards,

KELLER, GOTTLIEB & GORIN

Lawrence D. Gorin

LDG:pl:m Enclosure

attachmens B

#### RULE 57. JURORS

\* \* \* \*

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 doesns 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.

#### RULE 58. TRIAL PROCEDURE

- 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  $B \ \underline{C}$  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.
- BC. 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:
- BC(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.
- BC(2) The plaintiff then shall introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.
- BC(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.
- BC(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.

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PROPOSED RULES

- BC(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.
  - BC(6) The court then shall charge the jury.
- CD. 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.
- DE. 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.

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

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.

## RULE 69. DEFAULT ORDERS AND JUDGMENTS

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

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	¶ <b>1</b> 790rA363	707P2d619 711P2d988	60OrA570 60OrA585	62OrA200 63OrA312	Subd. F 297Ore694	704P2d510	300C 72O:					
	7901A363 718P2d13	90 733P2d106	61OrA515	63OrA631	53OrA660	Rule 64	695I					
	71012013	62OLR503	66OrA919	65OrA644	55OrA842	295Ore836	7171					
	Rule 5	Subd. G	670rA674	72OrA580	59OrA366	300Ore589						
	52OrA77	292Ore612	71OrA628	73OrA317	59OrA443	49OrA807	2960					
	627P2d91	0 642P2d636 ¶ 2	72OrA727 73OrA93	84OrA124 601P2d837	61OrA564 67OrA249	61OrA518 65OrA6	53Oı 54Oı					
	Rule 5'		730rA487	626P2d399	69OrA696	73OrA4	631F					
	Subd. 1		74OrA108	626P2d950	710rA621	73OrA484	636F					
	294Ore19	7   18WML410	760rA194	648P2d56	840rA677	76OrA544	672P					
	655P2d17		77OrA99	658P2d546	632P2d1315	770rA511						
	11	47OrA385	79OrA195	659P2d1022	640P2d625	81OrA14	65Or					
	Cl. f	49OrA588	80OrA200 84OrA124	663P2d815 673P2d535	650P2d1077 651P2d151	83OrA589	72Or 72Or					
	294Ore19 655P2d17		85OrA57	692P2d86	658P2d547	84OrA106 621P2d602	74Or					
	Cl. g	619P2d1355	626P2d365	696P2d588	678P2d1237	658P2d525	84Or					
	66OrA579	629P2d411	626P2d951	698P2d507	687P2d810	670P2d169	670P					
	675P2d18		627P2d38	733P2d112	688P2d390	671P2d111	695P					
178	D	61OrA647	628P2d1265 630P2d1324	736P2d608 Subd. A	693P2d1315	697P2d572	696P					
	Rule 5 Subd. A		631P2d840	293Ore371	735P2d374	698P2d992 709P2d1155	703P 733P					
	288Ore74		632P2d1375	57OrA440	Rule 63	713P2d687	, 551					
	608P2d11	66 95	633P2d791	59OrA443	298Ore82	715P2d492	58Or					
	Subd. J		634P2d1339	61OrA562	299Ore582	724P2d347	60Or					
	54OrA535 635P2d10		655P2d203 655P2d206	67OrA30 72OrA580	45OrA282 61OrA515	732P2d935 733P2d899	61Or. 61Or.					
	931 2010	289Ore128	658P2d524	79OrA79	66OrA915	Subd. A	65Or.					
	54OrA535	291Ore303	677P2d708	840rA124	67OrA167	294Ore422	72Or.					
	635P2d10	28   297Ore18	680P2d693	645P2d555	760rA544	65OrA6	73Or.					
	¶6	297Ore551	687P2d152	648P2d56	76OrA642	73OrA483	76Or.					
	54OrA533		689P2d1304	651P2d151	840rA106	81OrA15	649P;					
	635P2d10	28   48OrA375   52OrA190	693P2d656 696P2d1180	658P2d546 665P2d364	608P2d570 658P2d524	83OrA589 657P2d671	653P2					
	Rule 5		698P2d47	676P2d949	677P2d706	670P2d169	658P2					
	Subd. A		698P2d995	696P2d588	678P2d1255	698P2d992	670P1					
	69OrA249		701P2d460	717P2d1255	689P2d1295	724P2d347	696P2					
	686P2d40		708P2d645	733P2d112	704P2d511	732P2d935	697P2					
	Subd. I		712P2d817 717P2d1284	Subd. B 67OrA29	709P2d1155 711P2d155	Subd. B 2940re422	708P2 Su					
	62OrA280 76OrA234		721P2d880	720rA581	733P2d899	2940re422 2960re46	51Or/					
	77OrA662		733P2d112	73OrA653	Subd. A	300Ore655	65Or/					
	660P2d70	7 810rA401	735P2d1244	840rA125	298Orc685	580rA541	73Or/					
	708P2d11			676P2d949	61OrA515	630rA125	730r/					
	713P2d11	00 611P2d302 613P2d1065		696P2d588 700P2d307	72OrA727 658P2d524	72OrA551 73OrA483	76Or/ 81Or/					
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