

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 John E. Hart
 Jack A. Billings Bernard Jolles
 Patricia Crain Rudy R. Lachenmeier
 Mary J. Deits Michael H. Marcus
 William A. Gaylord Michael V. Phillips
 Bruce C. Hamlin Milo Pope

Excused: Marianne Bottini John V. Kelly
 Sid Brockley John H. McMillan
 William D. Cramer, Sr. Charles A. Sams
 Stephen L. Gallagher Stephen J.R. Shepard
 Susan P. Graber Nancy S. Tauman
 Nely L. Johnson

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. Among 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

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 forthcoming. Mr. Williams explained, on Sen. Bryant's behalf, 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 do it. 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 non-judicial 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 in-session 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-

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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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

Lawrence D. Gorin

LDG:pl:m
Enclosure

Attachment B

RULE 57. JURORS

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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.

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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 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

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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

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

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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.

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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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PROPOSED RULES

LV

OREGON COURT RULES

65OrA657	Subd. C	648P2d416	Rule 61	Subd. C	Subd. B	83C
67OrA190	¶ 5	672P2d1228	Subd. A	67OrA29	294Ore234	649
75OrA159	77OrA662	675P2d507	¶ 2	72OrA581	51OrA717	657
78OrA532	713P2d1100	680P2d694	64OrA497	676P2d949	626P2d954	663
651P2d711	Subd. D	681P2d119	77OrA109	696P2d588	656P2d305	672
656P2d384	55OrA732	683P2d1379	668P2d1247	¶ 2	Subd. C	696
660P2d1086	57OrA699	686P2d409	712P2d153	67OrA30	289Ore345	698
672P2d66	67OrA381	687P2d146	Subd. B	72OrA582	54OrA111	717
677P2d758	76OrA235	691P2d124	61OrA531	676P2d949	61OrA515	719
706P2d580	639P2d1292	695P2d956	658P2d536	696P2d589	73OrA3	724
717P2d1187	646P2d45	725P2d932	62OLR359	¶ 3	613P2d1055	728
Rule 55	679P2d896	728P2d921	Subd. C	67OrA29	634P2d476	732
79OrA363	708P2d1192	736P2d558	61OrA532	72OrA582	658P2d524	¶
718P2d1389	Subd. E	768F2d1087	75OrA269	676P2d949	697P2d571	730
Subd. A	292Ore170	Rule 60	658P2d537	696P2d589	Subd. D	698
79OrA363	295Ore657	290Ore844	706P2d967	Subd. D	299Ore581	¶
718P2d1389	298Ore467	291Ore585	Subd. D	67OrA30	61OrA212	300
Subd. B	48OrA688	291Ore720	81OrA420	72OrA581	71OrA363	717
79OrA363	63OrA474	297Ore560	725P2d941	676P2d949	73OrA4	¶
718P2d1389	75OrA432	298Ore98	Rule 62	696P2d588	656P2d346	720
Subd. E	77OrA118	51OrA98	293Ore371	Subd. E	692P2d652	696
295Ore110	84OrA110	51OrA847	298Ore228	290Ore844	697P2d572	300
663P2d769	617P2d1380	52OrA553	42OrA692	68OrA77	704P2d511	300
Subd. F	637P2d124	53OrA78	51OrA559	73OrA492	Subd. E	720
295Ore110	664P2d1131	53OrA284	51OrA709	626P2d366	299Ore580	695
663P2d769	666P2d1123	53OrA885	61OrA563	682P2d779	73OrA4	717
¶ 1	693P2d640	60OrA570	62OrA200	698P2d1014	697P2d572	300
79OrA363	707P2d619	60OrA585	63OrA312	Subd. F	704P2d510	720
718P2d1390	711P2d988	61OrA515	63OrA631	297Ore694	Rule 64	695
Rule 56	733P2d106	66OrA919	65OrA644	53OrA660	295Ore836	717
52OrA77	Subd. G	67OrA674	72OrA580	55OrA842	300Ore589	296
627P2d910	292Ore612	71OrA628	73OrA317	59OrA366	49OrA807	530
Rule 57	642P2d636	72OrA727	84OrA124	59OrA443	61OrA518	540
Subd. D	¶ 2	73OrA93	601P2d837	61OrA564	65OrA6	631
294Ore197	52OrA76	73OrA487	626P2d399	67OrA249	73OrA4	636
655P2d176	627P2d909	74OrA108	626P2d950	69OrA696	73OrA484	672
¶ 1	18WML410	76OrA194	648P2d56	71OrA621	76OrA544	650
Cl. f	¶ 3	77OrA99	658P2d546	84OrA677	77OrA511	720
294Ore197	47OrA385	79OrA195	659P2d1022	632P2d1315	81OrA14	740
655P2d176	49OrA588	80OrA200	663P2d815	640P2d625	658P2d525	840
Cl. g	52OrA586	84OrA124	673P2d535	650P2d1077	670P2d169	670
66OrA579	614P2d1205	85OrA57	692P2d86	651P2d151	671P2d111	695
675P2d185	619P2d1355	626P2d365	696P2d588	658P2d547	697P2d572	696
Rule 58	629P2d411	626P2d951	698P2d507	678P2d1237	698P2d992	703
Subd. A	¶ 4	627P2d38	733P2d112	687P2d810	709P2d1155	733
288Ore744	61OrA647	628P2d1265	736P2d608	688P2d390	713P2d687	580
608P2d1166	72OrA120	630P2d1324	Subd. A	693P2d1315	715P2d492	600
Subd. B	658P2d1183	631P2d840	293Ore371	735P2d374	724P2d347	610
54OrA535	695P2d575	632P2d1375	57OrA440	Rule 63	732P2d935	610
635P2d1028	¶ 5	633P2d791	59OrA443	298Ore82	733P2d899	650
¶ 4	72OrA120	634P2d1339	61OrA562	299Ore582	Subd. A	720
54OrA535	695P2d576	655P2d203	67OrA30	45OrA282	294Ore422	730
635P2d1028	Subd. H	655P2d206	72OrA580	61OrA515	65OrA6	760
¶ 6	289Ore128	658P2d524	79OrA79	66OrA915	73OrA483	649
54OrA535	291Ore303	677P2d708	84OrA124	67OrA167	81OrA15	653
635P2d1028	297Ore18	680P2d693	645P2d555	76OrA544	83OrA589	658
54OrA535	297Ore551	687P2d152	648P2d56	76OrA642	657P2d671	658
635P2d1028	46OrA854	689P2d1304	651P2d151	84OrA106	670P2d169	670
Rule 59	48OrA375	693P2d656	658P2d546	608P2d570	698P2d992	670
Subd. A	52OrA190	696P2d1180	665P2d364	658P2d524	724P2d347	696
69OrA249	58OrA234	698P2d47	676P2d949	677P2d706	732P2d935	697
686P2d409	66OrA49	698P2d995	696P2d588	678P2d1255	Subd. B	708
Subd. B	66OrA611	701P2d460	717P2d1255	689P2d1295	294Ore422	Su
62OrA280	67OrA677	708P2d645	733P2d112	704P2d511	296Ore46	510
76OrA234	68OrA409	712P2d817	Subd. B	709P2d1155	300Ore655	650
77OrA662	69OrA249	717P2d1284	67OrA29	711P2d155	58OrA541	730
660P2d707	71OrA96	721P2d880	72OrA581	733P2d899	63OrA125	730
708P2d1192	72OrA289	733P2d112	73OrA653	Subd. A	72OrA551	760
713P2d1100	81OrA401	735P2d1244	84OrA125	298Ore685	73OrA483	810
	82OrA538		676P2d949	61OrA515		
	611P2d302		696P2d588	72OrA727		
	613P2d1065		700P2d307	658P2d524		
	616P2d1215					