*** NOTICE ***

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, October 14, 1995 Meeting
9:30 a.m.

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

A G E N D A

1. Call to order (John Hart)

2. Introduction and welcome to new Council members (John Hart)

3. Approval of April 22, 1995 minutes (copy attached) (John Hart)

4. Election of 1995-97 Council officers (New Chairperson assumes the Chair)

5. Open discussion: 1995 Legislative Session and Future of Council (Mick Alexander, John Hart, Maury Holland)

6. Status reports on items continued from 1993-95 biennium:

   a. Possible ORCP(?) amendment to grant discretionary authority to permit live telephonic testimony in jury trials (see Attachment A) (Mick Alexander)

   b. Proposal of retired Chief Justice Peterson re amendment to ORCP 21 to waive Rule 21 A(2) defense unless raised by pre-answer motion (see Attachment B) (Rudy Lachenmeier)

7. Proposed amendments to ORCP 7 and 15 (see Attachment C) (Maury Holland)

8. Open discussion: Suggested priorities for 1995-97 biennium (New Chairperson)

9. Old business

10. New business

11. Adjournment

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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

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November 24, 1993

Mr. John Hart, Chair
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Mr. William Gaylord
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Re: Telephone Testimony of Witnesses During Trial

Dear John, Bill and Mic:

Perhaps more than any other members of the Council, the three of you will appreciate the importance of the issue raised by this letter. Bob Keating and I recently tried a medical malpractice case against each other in Judge Steve Tiktin's courtroom in Bend. The case settled after five days of trial, just before the judge was to rule on the issue I raise in this letter. I know that Judge Tiktin would be willing to give you his views, if the Council decides to pursue this matter.

The, issue was this: I on behalf of the plaintiff, and Bob Keating, on behalf of the defendant doctor, each presented one of the two leading experts in the world on the disease at issue, primary pulmonary hypertension. My expert, Dr. Lewis Rubin from the University of Maryland, flew to Bend from Baltimore on Wednesday, November 3, traveling approximately eight hours with a brief stopover in Indianapolis, change of planes in San

Francisco, and a late arrival without his garment bag in Bend. Then he had to hang around all day on Thursday while we picked the jury and made opening statements. He finally got to testify live before the jury for approximately two hours beginning at 3:30 p.m. He was, I think Bob will admit, extremely impressive and knowledgeable. Immediately after his testimony, we raced him to the Redmond airport so that he could catch a plane back to Portland, where stayed overnight in a hotel, because he had to fly out early the next morning for Atlanta where he was presenting three papers at the annual meeting of the American Heart Association.

On the fourth day of trial, on Wednesday, November 10, Bob Keating called his counter-expert, the co-author with Dr. Rubin of the main reference work on primary pulmonary hypertension, another very impressive and knowledgeable expert doctor from the University of Illinois, Dr. Stuart Rich. Although he and Dr. Rubin agreed on most points, Dr. Rich raised two points which were not covered in Dr. Rubin's testimony, either on direct or cross, and to which I felt I had to have Dr. Rubin respond to in order get a fair result in the case.

To give you the import of the matter, my client, who was sitting beside me, was expected to die within 3 - 12 months by all the experts who testified, unless she had a lung transplant. The main issue of causation was whether or not she would have responded to drug therapy if the defendant doctor had read an x-ray report seven years earlier that diagnosed her disease. Her disease went undiagnosed for seven years, during which time she worsened considerably. She was an extremely attractive plaintiff from a long-time and well respected family in the Bend area, going up against a local doctor who was also very well respected. It was clearly an important case.

The trial was going to conclude on Friday morning. Thursday, November 11 was a court holiday. I phoned Dr. Rubin, and learned there was no way I could get him to come back out live to testify on Friday. He had patients flying in from all over the world to Baltimore, and other commitments, and so forth. He was willing and able to testify either live by telephone over a speaker in the courtroom on Friday morning (the courtroom was so equipped), or by perpetuation deposition on Thursday. Bob Keating objected to either approach, and Judge Tiktin initially ruled that he had no discretion to permit live testimony during trial over such an objection, under the case of Pope v. Benefit Trust Life, 494 P2d 420 (1972)(enclosed) and under the 1993 statute allowing telephone testimony in trials by the court without a jury.

I argued that that case did not apply to this situation, that we should be able to at least take a perpetuation deposition for rebuttal under ORCP 39I, and that Keating had waived his objection to such testimony by telephone in rebuttal because I had mentioned it off the record in front of the judge a couple of days earlier and Keating had not objected.

The judge did order Bob to attend a telephone deposition of the proffered rebuttal testimony on Thursday morning, which was done. The case settled that afternoon, so the judge never got to rule as to whether I could read the testimony to the jury, or play the audiotape.

We prepared a short brief on this issue, which we were going to submit to the judge on Friday morning, a copy of which is also enclosed.

During the perpetuation telephone deposition, I elicited testimony from Dr. Rubin about the difficulty, in fact, impossibility, of getting him to come back out for live rebuttal testimony. A copy of the rebuttal deposition is also enclosed.

I think in this situation a party should have the absolute right to have the witness testify either live by telephone in the courtroom, or by telephonic deposition. The jury has already seen the demeanor of the witness and sized him up. The expense and time involved in getting such an important expert witness to return for 20 minutes of testimony to a remote part of the country is outrageously high, and in many cases, such as in my own, a worthy claimant simply cannot do it.

The broader issue of when telephonic testimony should be allowed other than in rebuttal situations where the witness has already appeared, is more complex, but I think in the case of an expert witness who has already appeared live before the jury, such rebuttal testimony by telephone should be permitted as a matter of right.

I am certain that any federal judge would have permitted such testimony, and Judge Tiktin would have permitted it if he believed he had authority to do so.

Don't you agree that this is something that Council on Court Procedures should take up?

Yours truly,

WILLIAMS & TROUTWINE, P.C.

Michael L. Williams

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Enclosures

To: Maury Holland

From: Edwin J Peterson

Re: Proposed change to ORCP 21

Date: Nov 5, 1994

In the course of working on my chapter, I became convinced that defenses of lack of jurisdiction of the person based on insufficiency of summons or insufficiency of service of summons should be required to be made by motion to dismiss, not alternatively by motion to dismiss or by affirmative defense in the answer. The reasons:

1. Jurisdictional objections should be required to be made as early as possible in the case.

2. Permitting such objections to be made by affirmative defense may postpone the decision until trial. Decisions on such defenses are not jury questions and merely clutter up the trial.

3. Peculiar burden of proof problems may arise under the current practice. Suppose a plaintiff is anxious to get a decision on the jurisdictional question, but the defendant has raised it only by an affirmative defense in the answer. Suppose a plaintiff moves for summary judgment claiming that the service is valid. The burden of proof of establishing the affirmative defense is on the defendant. Suppose the plaintiff rests upon the pleadings, returns and other such matters in the file. I guess it falls upon the defendant to show that there is an issue of fact. (Of course, the pleadings, returns and other matters in the file may be sufficient to raise the legal issue of sufficiency of summons or service thereof.) My point, in essence, is that summary judgment is not the logical place to decide such issues. Motion to dismiss is the proper place to decide them.

My proposed language can be improved upon, but for starters:

4. Amend ORCP 21A by adding, at the beginning before the word "Every," the following:

> "Except as specified in Section G, every"

5. Amend Section G by adding this sentence following "there stated:"

> A defense of lack of jurisdiction over the person or subject matter based upon insufficiency of summons or process or insufficiency of service of summons or process must be raised by motion to dismiss under this rule. If not so raised the defense is waived.

6. Strike from section G(1) the words:

"insufficiency of summons or process, or insufficiency of service of summons or process,"

and add the word "or" before the words "that there" on the second line.

7. Actually, section G(1) is very ambiguous. It might be well to also strike these words:

> "under either of the following circumstances: (a) if the defense is omitted from a motion in the circumstances described in section F. of this rule, or (b)"

As so amended, the defenses of lack of jurisdiction over the person or that there is another action pending would be waived if made neither by motion to dismiss nor by answer.

Frankly, I lean to the view that the defense of lack of jurisdiction over the person also should be waived if not raised by motion to dismiss. If the Council were to agree, an appropriate change to my paragraphs 5 and 6 easily could be made.

Maury, after you have considered these, please give me a call or drop me a note. If you think that there is any merit to my suggestions, I would write a letter to the chair of the Council so recommending.

Proposed Amendments

SUMMONS
RULE 7

* * * * *

B. Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section E of this rule. A summons is issued when subscribed by plaintiff or ~~a resident attorney of this state~~ an attorney who is an active member of the Oregon State Bar.

* * * * *

COMMENT

The present requirement of this section that, if not subscribed "by plaintiff," summonses must be subscribed by a "a resident attorney of this state" (emphasis added) appears to be nothing more than a mistake by the original Council. This section should be amended to bring it substantially into alignment with ORCP 17 A: "Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member of the Oregon State Bar," which of course includes OSB members not resident in Oregon. See also, ORAP 1.30 and 1.40. I take it everyone would agree that, if non-resident OSB members can sign pleadings and motions and in fact do everything else that resident OSB members can, there seems no good reason to make them ineligible to issue summonses by signing them. In fact, if the restriction imposed by 7 B were ever sought to be enforced, it would almost certainly be struck down as **a fortiori** unconstitutional under Supreme Court of New Hampshire v. Piper, 470 US 274, 105 S Ct 1272, 84 L Ed2d 205 (1985) (conditioning eligibility for admission to state bar on residence in state violates comity clause of U. S. Constitution, U.S. CONST. art. IV §2). The Oregon bar statute does not include Oregon residence as a requirement of eligibility for admission to the OSB. See ORS 9.220.

Section 7 B as tentatively promulgated by the original Council reads the same as the present 7 B except that what is now the second sentence did not appear. SEPT. 15, 1978 TENTATIVE DRAFT 14. It was modeled upon the predecessor statute, former ORS 15.020 (repealed OR LAWS 1979, c. 284 §199), which provided that summonses could be issued by "plaintiff or his attorney," and said nothing about the residence of either. Sometime between promulgation of the Tentative Draft in September 1978 and the final version dated December 2, 1978 as submitted to the 1979 Legislative Assembly, someone on the Council noticed that former ORS 15.040(1) (repealed OR LAWS 1979, c. 284 §199) contained the following curious language: "[A summons] shall be subscribed by the plaintiff if the plaintiff is a resident of this state or by a resident attorney of this state, ..." When this provision was called to the Council's attention, what is now the second sentence of section 7 B was added because former ORS 15.040(1) was thought unfairly discriminatory against non-resident plaintiffs, since unlike resident plaintiffs, the former would have no choice but to retain an attorney in order to issue a summons. The present second sentence of section 7 B was therefore added so that plaintiffs, regardless of residence, could appear **pro se**. However, the language of former ORS 15.040(1) about "a resident attorney of this state" was carried over to the second sentence of section 7 B, probably because it was assumed to mean "an attorney admitted to practice in this state," i.e., a member of the OSB. There is nothing in the surviving minutes of the original Council that suggests any deliberate purpose to disqualify OSB members not resident in Oregon from issuing subpoenas. The 1979 Legislative Assembly enacted section 7 B, without change, in its present form.

If the above analysis is correct, this mistake could easily be corrected by amending the second sentence of section 7 B as follows: "A summons is issued when subscribed by plaintiff or ~~a resident attorney of this state~~ an attorney who is an active member of the Oregon State Bar." (Note: This amending language could of course be shortened by omitting "an attorney who is," but is tentatively included to jibe with the language of section 17 A. However, I have not carried over from section 17 A "by at least one attorney of record" because, unlike signatures on pleadings and motions, there is no "attorney of record" until a plaintiff's attorney subscribes to a summons and thereby becomes one.)

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 cross-claim of a party summoned under the provisions of Rule 22 D shall be ~~filed with the clerk~~ served upon each of the other parties by the time required by Rule 7 C(2) to appear and defend. Any other motion or responsive pleading shall be ~~filed~~ served upon each of the other parties not later than 10 days after service of the pleadings moved against or to which the responsive pleading is directed.

* * * * *

COMMENT

In connection with the clarifying amendment to 15 A promulgated last December, I noticed for the first time something in this section which seems to me a mistake that was not addressed by the amendment. Should not the first sentence of 15 A state: "shall be served upon each of the parties ..." vice: "shall be filed with the clerk ..."?

The ORCP generally, like all civil rules I am acquainted with, contemplate that service upon parties will precede, or be contemporaneous with, filing "with the clerk within a reasonable time after service." ORCP 9 C. I cannot think of any reason why answers, replies or responsive motions under 15 A should be handled differently from answers or motions responsive to complaints pursuant to ORCP 7 C(2). I realize the latter states: "the defendant shall appear and defend within 30 days from the date of service," not: "the defendant shall serve upon each of the parties an answer or responsive motion," but am I not correct in thinking that the appearance and defense required by 7 C(2) normally, if not invariably, takes the form of serving an answer or responsive motion upon the parties, then followed by filing copies, with certificate or affidavit of service, with the clerk? Naturally, except for papers excluded by 9 D, anything served upon the parties must be filed with the clerk "within a reasonable time after service."

This mistake in the current 15 A, if I am right that it is a mistake, is probably no big deal. As far as I know, no one has ever raised a problem about it. Nevertheless, it seems to me worth correcting, especially since this could be done so easily. For one thing, the way 15 A currently reads, a blockheadedly literal interpretation of this section would dispense with any requirement of service, even though that would be inconsistent with ORCP 9 A. Except as provided in ORCP 9 D, the requirement of service triggers the requirement of filing, not the other way around.