*** NOTICE ***

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, March 9, 1996, 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

2. Approval of January 13, 1996 minutes (copy attached)

3. Recommendation re Williams proposal concerning ORCP 39 I(4) (see Attachment A to this agenda) (Mr. Alexander)

4. Preliminary report of committee to study and review ORCP 7 (Judge Brewer)

5. Proposal from committee to draft rules regarding Legislative Advisory Committee ("LAC") (see Attachment B to this agenda) (Mr. Alexander)

6. Continuation of 1995 session legislative review (see Attachment B to 12-9-95 agenda) (Mr. Gaylord)

7. Executive Director's proposed ORCP amendment (Attachment C, to follow) (Maury Holland)

8. Old business

9. New business

10. Adjournment

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COUNCIL ON COURT PROCEDURES
Minutes of Meeting of January 13, 1996
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	J. Michael Alexander	Bruce C. Hamlin
	Marianne Bottini	Rodger J. Isaacson
	Sid Brockley	Nely L. Johnson
	Diana L. Craine	Rudy R. Lachenmeier
	Don A. Dickey	Michael H. Marcus
	Robert D. Durham	Milo Pope
	Stephen L. Gallagher, Jr.	Stephen J.R. Shepard
	William A. Gaylord	Nancy S. Tauman
Excused:	David V. Brewer	John H. McMillan
	Patricia Crain	David B. Paradis
	Mary J. Deits	Karsten Hans Rasmussen
	John E. Hart	

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. The Chairperson, Mr. Gaylord, called the meeting to order at 9:43 a.m. Mr. Gaylord extended a warm welcome to Justice Durham (previously a member of the Council) who had been appointed to replace Justice Graber. Mr. Gaylord expressed appreciation for Justice Graber's many years of outstanding service on the Council.

Agenda Item 2: Approval of December 9, 1995 minutes. In the remark attributed to him under Agenda Item 3, second paragraph, fifth line, Mr. Hamlin wished to change "did not comply with Oregon's statutory requirements for administrative rule-making" to "might not comply ..." With that amendment, the minutes were unanimously approved.

Agenda Item 3. Status report from committee on LAC rules. Mr. Gaylord asked for comments on the draft of three rules regarding the Legislative Advisory Committee ("LAC") prepared by Mr. Alexander and set forth in his 12-7-95 memo to Council members (Attachment A to agenda of this meeting). Ms. Tauman questioned whether "technical" was intended to modify both "analysis" and "advice" as the latter two words appear in the second sentence of the first proposed rule, and stated that her preference would be that the LAC not be authorized to provide anything beyond "technical analysis." Mr. Alexander responded

that his intent was that the LAC should be limited to advising the legislature about the purely procedural aspects of contemplated ORCP amendments. Several members commented that the line separating "technical" from "non-technical," in the sense of either procedural or substantive policy, is not easy to define or maintain. Mr. Hamlin said he was inclined against attempting to incorporate any greater precision into the proposed rule, adding that there should be considerable reliance on the good judgment of LAC members not to exceed their delegated authority.

Justice Durham expressed doubt that, when communicating with legislators, LAC members would be in a position to debate with them the distinction between "analysis" and "advice." He also asked whether the phrase "full Council," as it appears in all three of the proposed rules, might not be misunderstood to require approval by all 23 Council members, rather than by vote of a supermajority, and suggested that the word "full" be deleted. Mr. Alexander agreed with this suggestion. He also agreed with Justice Durham's suggestion that the draft rules might be improved by greater avoidance of the passive voice. Justice Durham further suggested that the last sentence of the first proposed rule might be liberalized so that the LAC would not be precluded from informing legislators of a division of opinion among them when that occurs.

Judge Marcus raised a question as to whether the LAC should feel itself free to communicate to legislators as attributable to the Council positions it might have taken over some period in the past, but which might not be submitted to the Council for its approval and authorization in specific response to a legislative query. Judge Johnson asked whether the LAC could properly rely upon positions taken by the Council without limit of time, or whether this should be limited to the current biennium. Some further discussion followed concerning this and related questions, but with no further recommendations of specific changes to Mr. Alexander. The latter said that he and the other members of his subcommittee would give careful consideration to all the foregoing comments and suggestions, and that a revised draft would be presented to the Council at a future meeting.

Agenda Item 4: Recommendation re Williams proposal concerning ORCP 39 I(4) (see Attachment B to agenda of this meeting). Mr. Gaylord recapitulated the background of this long-pending proposal as set forth in Mr. Michael L. Williams' letter dated 11/24/93 to Messrs. Alexander, Hart and him, and noted that he had once encountered a situation where the court did not believe it had any discretion to allow telephonic testimony by a rebuttal witness in a jury trial. Judge Gallagher asked whether the statute authorizing telephonic testimony in non-jury trials, ORS 45.400(3-6), clearly precludes it in cases tried to a jury.

Mr. Hamlin pointed out that Mr. Williams' letter raised two distinct issues, the first being whether a court may permit a perpetuation deposition during trial, and the second being whether telephonic testimony might be admitted in a jury trial at the court's discretion.

Mr. Hamlin further commented, regarding Mr. Alexander's proposed amendment of ORCP 39 I(4), that there might be some ambiguity as to whether the "shorter period" that the court "may allow" applies to the 14-day notice period, the seven-day period before trial for the taking of the deposition, or both. Judge Marcus pointed out that the issue of under what circumstances deposition testimony, whether telephonic or not, is admissible at trial is different from the issue whether telephonic testimony is admissible at trial. He added that he thought ORCP 39 I(4) has some ambiguities in it which he believed the Council should seek to resolve, such as whether perpetuation depositions during trial should be allowed only with respect to witnesses also giving live testimony. Mr. Hamlin, seconded by Judge Marcus, moved that Mr. Alexander's proposed amendment be tentatively adopted as follows:

> **Any perpetuation deposition shall be taken not less than seven days before the trial or hearing, on not less than 14 days notice. However, the court in which the action is pending may allow a shorter period for a pretrial deposition, or may allow a perpetuation deposition during trial, upon a showing of good cause.**

Discussion of this amendment then followed. Mr. Lachenmeier questioned the wisdom of not limiting the discretion that would be conferred by this amendment, such as to rebuttal witnesses, which was the situation instanced by Mr. Williams. Some members questioned whether the phrase "in which the action is pending" was needed. Justice Durham stated that the second occurrence of the phrase "may allow" seemed duplicative. There was expressed considerable support for deleting both "in which the action is pending" and the second occurrence of "may allow," but no motion was offered for either purpose. Mr. Alexander then suggested that the second sentence of the proposed amendment might be changed to read as follows:

> **However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial.**

Mr. Gaylord then received an affirmative response to his query whether the Council was ready for the call of the question on Mr. Hamlin's pending motion, which was adopted by a vote of 10 in favor, 2 opposed, and 0 recorded abstentions. It was left unclear whether the amendment tentatively adopted by this vote

was as originally proposed by Mr. Alexander or as changed by his subsequent suggestion, a point that will remain for clarification at a subsequent meeting. Mr. Lachenmeier reiterated his doubts as to whether the language as tentatively adopted was adequate, to which Mr. Gaylord responded that, as a tentatively adopted amendment, this item would remain open on the agenda of any future meeting at which any member wished to recall it for further consideration.

Agenda Item 5: Status report of subcommittee to study and review ORCP 7. Mr. Gaylord said that substantive discussion of this matter would be premature, and that the only issue needing resolution was whether Justice Durham was agreeable to replacing Justice Graber as a member of this subcommittee. Justice Durham so agreed. Mr. Lachenmeier expressed willingness to serve as a member of this subcommittee, whereupon Mr. Gaylord thus appointed him.

Agenda Item 6: Status report of subcommittee to consider Justice Peterson's suggested amendments to ORCP 21 (see Attachment C to agenda of this meeting)--Mr. Lachenmeier. Mr. Lachenmeier briefly summarized the background of this item, including some of the possible difficulties about implementing the amendments to ORCP 21 proposed by Justice Peterson identified in the Council's previous discussion of the item. Judge Marcus stated that his involvement with this issue had been somewhat tangential, and that after receiving memos from Justice Peterson (Attachment pp. C-7 - C-9) and Maury Holland (Attachment pp. C-1 - C-4), he had heard nothing further. Mr. Hamlin moved to table this item, and was seconded by Justice Durham. Mr. Hamlin said that, while he agreed with Justice Peterson's point that questions relating to personal jurisdiction and sufficiency of summons and service should be settled at an early point in litigation, he did not favor an amendment to ORCP 21 to further that purpose. Judge Johnson commented that she was not aware of any basis for thinking that ORCP 21 is causing problems for judges, lawyers or litigants. On the call of the question, Mr. Hamlin's motion was adopted by vote of 14 in favor, one opposed, and two abstentions. Following some discussion of how Justice Peterson should be informed of this action, Maury Holland stated that he would soon be in contact with him about a related matter and would explain the Council's action to him.

Agenda Item 7: Continuation of 1995 session legislative review (see Attachment B to 12-9-95 meeting agenda)--Mr. Gaylord. Mr. Gaylord informed the Council that, as agreed at the 12-9-95 meeting, he was in the process of sending letters to bar leaders asking them to alert the Council to any problems that might arise in connection with any ORCP amendment enacted by the 1995 Legislative Assembly, as well as any difficulties that might be

encountered in applying any provision of the ORCP in light of the many statutes enacted in the 1995 session having impact on civil trial practice. At Mr. Gaylord's request, Mr. Hamlin briefly summarized the point he had made at the 12-9-95 meeting about the different levels at which the Council might conduct its legislative review. Mr. Gaylord stated that, rather than asking individual members to review one or more specific ORCP amendments or statutes, he thought the process would work better if all members were asked to review a limited, specified number of amendments or statutes, to see whether anyone spots any potential problems that might warrant discussion. It was agreed that, in preparation for the Council's next meeting, all members would review the 1995 session's amendments to ORCP 4 J through and including ORCP 55 I as set forth in Attachment B to the agenda of the 12-9-95 meeting. Mr. Gaylord directed that an item be reserved on the agenda of the next meeting for any discussion that might be prompted as a result of this review.

Agenda Item 8: Old business--Mr. Gaylord. In response to inquiry by the Chair, no item of old business was raised by any member.

Agenda Item 9: New business--Mr. Gaylord. In response to inquiry by the Chair whether any member had any item of new business to propose, Judge Johnson said, merely as an information item, that Judge Anna Brown intends to write a letter to the Council raising the question of whether the names and addresses of witnesses should be released prior to the day before trial, and also about perpetuation depositions.

Judge Marcus mentioned that the ORCP and the relevant statutes leave unclear whether there exists any barrier to deposing expert witnesses apart from the work product or trial preparation immunity provided in ORCP 36 B(3), which does not literally apply to deposition questions. He added that, from his experience, it seems to be generally assumed among judges and lawyers that opponents' expert witnesses may not be deposed, but there appears to be no authority for that proposition in the ORCP, the ORS, or elsewhere. No sense on the part of members present was expressed, however, that this is a matter the Council need now address, unless perhaps it were to be somehow raised in the letter from Judge Brown which Judge Johnson mentioned the Council could soon expect to receive.

Justice Durham stated that he wished the Council to know that the Supreme Court very much values its work, and would always welcome any communications from the Council if, from the latter's perspective, any of the Court's opinions should pose problems relating to construction or application of the ORCP. He made clear that, while of course he could not, and was not,

committing himself or other members of the Court to agree with such comments as received from the Council, he could say that he and his colleagues would always be glad to have them and would give them careful consideration.

Judge Gallagher referred to Maury Holland's recent memo, "More Than Anyone Ever Wanted to Know about the Council on Court Procedures," as readable, informative and entertaining, and suggested that a copy of it be attached to the minutes as part of the Council's legislative history.

Mr. Gaylord asked the members whether, in light of the amount of work now going forward in subcommittees relating to a variety of matters, it might be sensible to omit the meeting scheduled for Feb. 10, 1996 and instead meet next on the scheduled date, March 9, 1996. There being general agreement with this suggestion, Mr Gaylord announced that the Council would meet next on March 9, 1996, adding that members should be prepared for a possibly somewhat longer meeting on that date than usual should the agenda so warrant.

Agenda Item 10: Adjournment. Without objection, Mr. Gaylord declared the meeting adjourned at 11:52 a.m.

Respectfully submitted,

Maury Holland
Executive Director

BURT, SWANSON, LATHEN, ALEXANDER, McCANN & SMITH, P.C.

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January 18, 1996

MEMO TO: MEMBERS OF COUNCIL ON COURT PROCEDURES

FROM: J. MICHAEL ALEXANDER

RE: MIKE WILLIAMS' LETTER OF NOVEMBER 19, 1993
PERPETUATION DEPOSITIONS

Dear Members:

At the prior meeting we discussed Mike Williams' concern about perpetuation depositions after trial is commenced. I wrote a memo to the council, a copy of which is attached. At our January meeting there was some discussion about whether or not the proposed rule would remedy the problem perceived by Mr. Williams, and also whether or not it even addressed the specific issue of testimony by telephone in rebuttal, after a witness has already testified in the trial, and the jury has been able to observe his demeanor. There was also discussion about our function as it relates to the evidentiary problems that may arise from such a situation, as opposed to providing a clear procedural vehicle giving the court discretion to allow such testimony. There was also some proposed editing to the rule that I had submitted in my prior letter. I am going to suggest some changed rules, not necessarily advocating them, but merely as procedural devices to address the issues that we discussed.

The first is just an edited version of my prior proposed rule:

> **Any perpetuation deposition shall be taken not less than 7 days before a trial or hearing, on not less than 14 days notice. However, the court in which the action is pending may also allow shorter periods for a perpetuation deposition, before or during trial, upon a showing of good cause.**

As a further alternative I propose the following:

> **Any perpetuation deposition shall be taken not less than 7 days before trial or hearing, on not less than 14 days notice. However, the court in which the action is pending may allow shorter periods for a pretrial deposition upon a showing of good cause. A court may**

also allow, upon a similar showing of good cause, and notice to the opposing party, a perpetuation deposition during trial.

As an addition to either of the foregoing rules, I would propose the following language:

> In considering whether to allow a perpetuation deposition during trial, the court, in determining whether the offering party has made a showing of good cause, shall consider, among other factors, whether the witness has previously testified in the trial or hearing.

In looking at the rules, I am still at a bit of a loss as to how we can properly formulate a rule of civil procedure that addresses a right to have a witnesses testify by phone. I certainly agree that if we can allow a perpetuation deposition by phone, which will then be submitted to a jury, that we should also have the authority to allow the testimony of a witness by phone. However, our rule concerning perpetuation, specifically ORCP 39(i), does note that testimony shall be admissible, subject to the Oregon Evidence Code. Finally, it would seem that any attempt to address the question of telephonic "testimony", would have to be outside of ORCP 39, which deals solely with depositions. I guess I am at a loss, at least at this time, to come up with an amendment or other change to the ORCP that addresses the specific issue of allowing telephonic testimony, as opposed to telephonic perpetuation deposition. I would certainly welcome any aid and assistance as to how this body could properly address what appears to me to be essentially an evidentiary issue.

Sincerely,

BURT, SWANSON, LATHEN, ALEXANDER, McCANN, & SMITH, P.C.

J. Michael Alexander

JMA/jb

BURT, SWANSON, LATHEN, ALEXANDER, McCANN & SMITH, P.C.

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December 7, 1995

MEMO TO: Members of Council on Court Procedures

FROM: J. Michael Alexander

RE: Mike Williams' letter of November, 1993
Perpetuation Depositions

This matter has been pending for quite some time. As you may remember, Mike Williams wrote the Council indicating that he had encountered a situation in which the trial court had felt unauthorized to allow a perpetuation deposition during the midst of trial. Mr. Williams' expert had testified in his case in chief, and then had to return to Baltimore. After the Defendant's case, Mr. Williams wanted to recall the physician in rebuttal. The physician was unavailable and Mr. Williams sought to either allow him to testify by phone, or to take a perpetuation deposition. The court allowed the deposition to be taken, although never ruled on whether it would be admissible. The case settled, and the issue was never resolved. Mr. Williams wrote asking if some rule in the ORCP could address this situation by granting the trial court the discretion to allow such procedure. I am enclosing a copy of Mr. Williams' original letter, and a copy of the brief motion that he submitted to the court.

I examined the case of Pope v. Benefit Trust Life Insurance Co., 261 Or 397, 494 P2d 420 (1972). I am attaching a copy of this case. Quite frankly, I am at a bit of a loss to understand how that case would be necessarily controlling. Mr. Williams also referenced ORCP 39 and the 1993 statute relating to telephone depositions, ORS 45.400. (A copy of is attached) ORCP 39(i)(4) requires that "Any perpetuation deposition shall be taken not less than 7 days before the trial or hearing, on not less than 14 days notice, unless the court in which the action is pending allows a shorter period upon a showing of good cause." ORS 45.400 similarly speaks in terms of pretrial motions, and also applies only to trials to the court. Both the statute and the rule seem to contemplate that perpetuation depositions, or telephonic testimony, is only available if appropriate pretrial motions are made. The procedural issue thus seems to be whether there should be a method

by which the trial court could entertain a motion for telephone testimony, or a perpetuation deposition, after trial has commenced. Without getting into any substantive issues of the right to jury trial, the right of the jury to view the demeanor of a witness during the course of his testimony, or any other substantive evidentiary questions, it would seem that a procedure at least allowing the court the opportunity to permit a perpetuation deposition is not unreasonable, and could be provided under the rules. I would suggest that a simple amendment to ORCP 39(i)(4) would accomplish this goal. I would suggest the following change:

> **"Any perpetuation deposition shall be taken not less than 7 days before the trial or hearing, on not less than 14 days notice. However, the court in which the action is pending may allow a shorter period for a pretrial deposition, or may allow a perpetuation deposition during trial, upon a showing of good cause."**

We might even add that in determining good cause, the court may consider the factors contained in ORS 45.400(3-6).

Allowing telephonic testimony in a jury trial would appear to involve amended ORS 45.400, which is beyond our scope. I'm not sure if another portion of the rules could cover this situation.

Sincerely,

BURT, SWANSON, LATHEN, ALEXANDER, McCANN, & SMITH, P.C.

/s/ J. Michael Alexander

J. Michael Alexander

JMA/jb
Encls.

BURT, SWANSON, LATHEN, ALEXANDER, McCANN & SMITH, P.C.

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Circuit Judge
Multnomah County Courthouse
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RE: Council on Court Procedures

Dear Subcommittee Members:

At our last meeting there were various comments and criticisms concerning the internal rules which I drafted and submitted in my letter of December 7, 1995. I am going to try and address those issue and formulate a further draft for those internal rules, perhaps offering some alternatives.

First, I want to briefly reiterate my reasoning in drafting the three separate rules I proposed in my letter of December 7, 1995 (I am attaching that prior letter for your convenience).

I am trying to express our basic policy that the LAC should not speak for the council unless the council has approved any position that the LAC is taking. That is the basic goal of these rules. I tried to make them responsive to the various provisions of the new statute. I saw the statute as essentially encompassing three rather separate roles for the LAC.

First, Section 2 of the statute imposes a mandatory obligation ("shall provide") on the LAC to provide technical assistance and advice to a legislative committee upon its request. That part of the statute similarly commands the LAC to consult with and consider comments from the full counsel to the extent possible, and also commands the LAC to provide the technical analysis and advice within 10 days after the request from the chairperson of the legislative committee.

Subsection (3) of the new law then allows the LAC to vote to

take a position on behalf of the council on proposed legislation.

Subsection (5) then allows members of the LAC to appear before the Legislative Committee for the purpose of testifying on legislation.

Therefore, I see three somewhat distinct rolls. First, the LAC must provide technical assistance upon request, and must attempt to confer with the full council. Second, the LAC, apparently through its own internal vote, may take a position on behalf of the council. Third, members of the LAC may individually appear and testify, apparently regardless of whether or not the council has approved a position, or the LAC has chosen to speak for the council. My original draft was meant to contemplate those three situations. I'll first try to restate my proposed rules as I set them forth in my prior letter, each responding to these different roles of the council.

FIRST PROPOSED INTERNAL RULE:

When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the council unless one of the following has occurred:

> 1. **The council, during its current biennium, had previously approved such technical analysis and advice through a super majority;** or
>
> 2. **The LAC, after a request by a legislative committee, has presented any proposal to the council, and the council has voted, by its super majority, to support the specific analysis and advice to be rendered to the committee.**

Unless the council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the specific disclaimer that such technical analysis and advice does not represent the opinion of the council on court procedures.

SECOND PROPOSED INTERNAL RULE:

The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless such position has been submitted to the council and specifically approved by a super majority.

THIRD PROPOSED INTERNAL RULE:

Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and has

not obtained the approval of the council concerning the content of his testimony, shall not represent to the legislative committee that such member speaks for the council, but shall only identify himself as a member of the council, a member of the LAC, and specifically indicate that he is expressly not authorized to speak on behalf of the council.

I am sure that any of you can come up with alternative rules that may more effectively address the issue of the LAC's authority to speak on behalf of the council. I know that Judge Brockley suggested a much simpler rule which I will try to articulate as an alternative:

> **The LAC shall not exercise its statutory discretion to take a position on behalf of the council, nor shall any member of the LAC indicate that he is taking a position on behalf of the council, unless the position to be taken has been previously approved by a super majority of the council.**

I certainly welcome any comments or suggestions for changes, additions, or deletions.

Sincerely,

BURT, SWANSON, LATHEN, ALEXANDER, McCANN, & SMITH, P.C.

J. Michael Alexander

JMA/jb
CC: Bill Gaylord
Maury Holland

BURT, SWANSON, LATHEN, ALEXANDER, McCANN & SMITH, P.C.

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December 7, 1995

MEMO TO: Members of Council on Court Procedures

FROM: J. Michael Alexander

RE: **House Bill 2228 - The Legislative Advisory Committee (LAC)**

As you recall, we had extensive discussion at our last meeting concerning the effects of the LAC, and possible conflict with the general deliberative functions of the Council. It was suggested that internal rules should be drafted to provide direction to the members of the Council who are chosen to serve on the LAC. Attached to this memo is a copy of HB 2228 for your convenience.

Based upon my own recollection, part of our discussions, and my own thoughts on the matter, I would propose the following internal rules:

1. House Bill 2228 requires the LAC to provide analysis and advice within 10 days after the request from the chairperson of the Legislative Committee. The statute also requires the LAC to consult with the full Council to the extent possible. I would suggest that we adopt the following rule:

> **When the LAC is called upon to provide technical analysis and advice to a Legislative Committee, it must not present such advice as being representative of the full Council unless the Committee has presented any proposal to the full Council, and the full Council has voted, through a super majority, in support of the specific analysis and advice to be rendered to the Committee. Without vote of the full Council by a super majority, any analysis and advice given a Legislative Committee shall be given with the specific disclaimer that the advice**

does not represent the opinion of the Council on Court Procedures, but only represents an opinion of the majority of the individuals comprising the LAC.

2. The statute also provides that the LAC may vote to take a position on behalf of the Council on Court Procedures on proposed Legislation. The statute goes on to say that if the LAC has voted to take a position on behalf of the Council, the Committee shall so indicate to the Legislative Committee. I believe that our internal rules should disallow the LAC to ever represent that it takes a position on behalf of the full Council unless the full Council has in fact approved the position through an appropriate vote of a super majority. Therefore, I suggest that we adopt the following rule:

LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless such position has been submitted to the full Council and specifically approved by a vote of a super majority.

3. Subsection 5 of House Bill 2228 allows members of the LAC to appear before Legislative Committees for the purpose of testifying on legislation that proposes changes to the Oregon Rules of Civil Procedure. If a member of the LAC chooses to so testify, then it would seem inappropriate, as discussed above, for that individual to represent that he speaks for the Council unless the full Council has approved the position taken. I suggest that we adopt the following rule:

Any member of the LAC who chooses to appear and offer testimony before a Legislative Committee, and has not obtained the approval of the full Council concerning the content of his testimony, shall not represent to the Legislative Committee that such member speaks for the full Council, but shall only identify himself as a member of the

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Council, a member of the LAC, and also indicate that he is expressly not authorized to speak on behalf of the full Council.

Sincerely,

BURT, SWANSON, LATHEN, ALEXANDER, McCANN, & SMITH, P.C.

/s/ J. Michael Alexander

J. Michael Alexander

JMA/jb
Encls.

Attachment C to Agenda of 3-9-96 Meeting

February 28, 1996

To: Chair and Members, Council on Court Procedures

From: Maury Holland, Executive Director MJH

Re: *Suggested ORCP Amendments*

Below are three proposed ORCP amendments for preliminary consideration by the Council at its March 9, 1996 meeting if this agenda item is reached. All of these proposals are technical and not intended to change policy. I assume the first proposal is likely to be so quickly agreed to that it can be a tentatively adopted amendment. The second and third proposals will probably be more problematic. With respect to either or both of them, the choices would seem to be either, by consensus, to summarily dismiss as not meriting further consideration at this time, if ever, or to decide that some further consideration is warranted, in which event the Chair might assign each to different subcommittees for reports and recommendations to the Council sometime down the line. {Deleted language is shown with strikeout; added language in bold type.}

1. Amend last sentence of ORCP 7 B as follows:

A summons is issued when subscribed by plaintiff or ~~a resident attorney of this state~~ **an active member of the Oregon State Bar**.

{Comment: Cf. ORCP 17 A. The present wording of 7 B was an obvious mistake by the original Council. While no appellate opinions address this issue, and there might well not be even any trial court rulings regarding it, it would almost certainly be unconstitutional to rule a summons insufficient on the ground that, while subscribed by an active member of the OSB, he or she is not resident in Oregon. ORCP 17 A uses the wording "an attorney who is" before "an active member of the Oregon State Bar," but my proposed language omits the former as redundant. For fuller discussion, see Attachment p. C-1 to agenda of Oct. 14, 1995 Council meeting.}

2. The rules pertinent to how a defendant "shall appear and defend" (ORCP 7 C(3), 15 A) appear to me not to make sense, or at least to be illogically organized. First of all, the "*Time for Response*" appears in a rule about summonses, ORCP 7 C(2), which seems to me out of

place. One would more naturally expect to find a rule about appearing and defending in ORCP 21, which is where it is found in FRCP 12, the federal rules counterpart of ORCP 21.

ORCP 7 C(2) provides that, except when service is by publication, a defendant must "appear and defend within 30 days from the date of service" of the summons and complaint. The next questions logically are: how does a defendant appear and defend, and within what period of time following service of the summons and complaint must this be done? ORCP 15 A answers those questions by providing that an answer or motion responsive to a complaint, cross-claim or third-party complaint, or a reply response to a counterclaim, "shall be filed with the clerk by the time required by Rule 7 C(2) to appear and defend." The three forms of Notice to Defendants prescribed by ORCP 7 C(3)(a), (b) and (c) are consistent with the command of ORCP 15 A. The problem, as I see it, is that ORCP 7 C and ORCP 15 A are logically inconsistent with ORCP 9, which follows the logic of the FRCP.

By "logic of the FRCP," I mean that the time within which a defendant must appear and defend is measured from the date of service of the pleading stating a claim to the date of defendant's service of the responsive pleading or motion. ORCP 7 C(2) is clear that the pertinent time period begins to run from the date of service of the pleading stating a claim, not the date of its filing in court. Similarly, ORCP 9 contemplates that, logically if not as a matter of actual chronology, "every pleading subsequent to the original complaint" shall be first served upon all other parties not in default, and then, pursuant to ORCP 9 C, "filed with the court within a reasonable time after service."

It strikes me that either ORCP 7 C(3) and 15 A, or ORCP 9, should be modified to resolve this anomaly. Imagine a very literal minded litigant or attorney who consults ORCP 7 C(2) and (3) to find out how, and within what period of time, he or she must appear and defend. Looking at those subsections, and section 15 A, he or she would determine that an answer or responsive motion must be filed with the clerk within 30 days of service of the summons and complaint or other pleading stating a claim. Defendant would also see that the pleading or motion thus filed with the clerk must contain certification of service of the same on the plaintiff or plaintiff's attorney, but only ORCP 9 would inform defendant that such pleading or motion must also be served upon any other parties. But when would this service, as opposed to the filing with the clerk, have to occur? ORCP 9 C gives the answer to this question, but in an awkwardly backhanded fashion, by stating: "[a]ll papers required to be served upon a party by section A of this rule shall be filed with the court within a reasonable time *after* service." [Emphasis added] Read literally, and that is one way rules of procedure should be read by rule-makers in order to test them, the answer to the question of when a pleading or responsive motion must be served on the plaintiff and all other parties is that it must occur a reasonable time *prior* to filing with the clerk. This is an odd way to be led to this result, and of course this is not what the ORCP, the Council, or anyone else intends. A tennis analogy would be if players were required to return the serve by hitting the ball to the referee. In civil procedure, the volley, i.e., the exchange of pleadings, is between the parties by service of successive pleadings by each on the other(s). Until and unless a motion is filed, the court's role during pleading is passive and inert. Its only

function is to maintain a file showing what has gone on between or among the litigants, so that it is prepared to make rulings when and as sought by them. Recasting the pertinent rules as I suggest would reflect the fact that time intervals within which there must be a response to a claim are set as they are in the interest of litigants, not of the court.

Again, I realize that the problem is not the practical one of actual chronology, as I'm well aware that lawyers normally attend to service upon parties and filing with the clerk simultaneously, and do not deliberately wait a few hours or days after doing one before doing the other. In other words, they don't say: "Hey, wait a minute, I have just mailed off certified copies of my pleading or responsive motion to the plaintiff's attorney, so now I should wait a few hours before mailing copies to the clerk because ORCP 9 C says I should file 'within a reasonable time after service.' " The problem is not actual chronology, but of the organizing structure and organizing logic, the *elegantia juris* if you will, that should characterize a good set of procedural rules. The logic implicit in ORCP 9, which is sound and adheres to that of the FRCP, is that the copies filed with the clerk should certify service upon all other parties as an accomplished fact, not something that is happening or will happen.

The FRCP seem to me to handle this matter much more logically and elegantly than the ORCP. The question is whether the Council wishes to consider changing the ORCP to conform to the FRCP in this respect. Pending the Council's preliminary decision on that question, I have not taken the trouble to prepare proposed amending language. The necessary amending language would have to be quite extensive, although the effort would not be very arduous since the FRCP furnish the model.

3. Amend ORCP 21 A by adding the following sentence before the present final sentence as follows:

> **If, on a motion asserting defense (8) or for judgment on the pleadings pursuant to section B of this rule, matters outside the pleading or pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 47.**

{Comment: ORCP 21 A provides in part as follows:

> If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may such determination until further discovery or until trial on the merits.

My question is why the reference above is only to "defenses (1) through (7)," and not to defenses (1) through (8).[1] Possibly the reason for the omission of (8)--"failure to state ultimate facts sufficient to constitute a claim"--is that it would be improper for a trial court to "determine the existence or nonexistence of the facts supporting" the defense of failure to state a claim prior to trial on the basis of "affidavits or other evidence," and in any case triable as of right to a jury, would violate Art. VII (Amended), Sec. 3 of the Oregon Constitution.[2]

Defense (8) is, in other words, very different from defenses (1) through (7) in terms of the circumstances under which a trial court can properly "determine the existence or nonexistence of the facts supporting" them on the basis of "affidavits or other evidence" at a preliminary hearing pursuant to ORCP 21 C. Defenses (1) through (7) all relate to what used to be call matters or pleas in abatement, meaning that they were and are jurisdictional or procedural defenses which, if sustained, normally result in dismissals without prejudice. If, in order to rule upon one of these procedural defenses, a trial judge must determine questions of fact, he or she has broad discretion about when to make this determination, and whether to consider evidence at a preliminary hearing, including live testimony, or whether to rely solely upon affidavits. In any event, in ruling upon defenses (1) through (7) when facts, as opposed to pure quetions of law, must be determined, a trial judge is not ruling upon a motion for summary judgment, which of course is a judgment that the opponent of the motion could not prevail at trial, whether to a jury or to the court, but is simply finding the pertinent facts on a less than complete record.

Bill Gaylord, by sheer coincidence, recently encountered an illustrative example, which I hope and expect he will share with the Council. The defendant apparently raised, *inter alia,* defense (5), insufficiency of service of summons, and therefore lack of jurisdiction. This defense was factually based upon defendant's assertion that, contrary to what was recited in the proof of service, he had not actually been personally served with summons. From what Bill told me, this defendant's lawyer was prepared to have him testify to that effect at trial, before the jury, on the assumption that such testimony would create a factual issue that should go to the jury. The individual who served the summons was, as I understood from Bill, prepared to take the stand and testify that he had made personal service on the defendant as recited in the proof of service. When Bill and I discussed this situation by phone, I told him that, in my opinion, for what it might be worth, the factual issue of whether the defendant had been served need not, and should not, go to the jury, but should be determined by the trial judge as trier of fact on the basis of sworn testimony at an evidentiary hearing if the judge thought sworn, live testimony were necessary.

Trial judges can, of course, rule upon the defense of failure to state a claim, even when

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[1] The omission of any reference to defense (9) is easily understood, since that defense is defined in terms which exclude consideration of any matter outside the pleadings.

[2] "In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, . . ."

such ruling requires that factual issues must be examined, though certainly not "determined," on the basis of affidavits or other matters outside the pleadings. They can do this even in cases where the Oregon Constitution protects the right to trial by jury, without encroaching upon the jury's proper domain. That is because the jury's domain is limited, at least in civil cases, to determining contested issues of fact as to which there is a genuine issue and as material to the merits either of the claim or to any "substantive" defenses to the claim; i.e., what used to be called pleas in bar, including of course any denials of a claimant's material allegations. In contrast to their role of triers of fact with respect to defenses (1) through (7), the function of trial judges with respect to defense (8), as well as ORCP 21 B motions for judgment on the pleadings, is not to determine any pertinent factual issues, but merely to determine whether there is a genuine issue as to them. No such genuine issue exists when, on the basis of the pleadings, affidavits and other materials presented to the trial court, the judge would have to direct a verdict against the party opposing the summary judgment motion. In other words, when matters outside the pleadings are considered in connection with defense (8) or a 21 B motion for judgment on the pleadings, the judge is not functioning as a trier of fact, but is ruling on a motion for summary judgment, which if granted, normally results in a merits dismissal with prejudice, unlike dismissals pursuant to defenses (1) through (7).

ORCP 21 A does not include any language that makes this clear by connecting motions to dismiss for failure to state a claim, or for judgment on the pleadings, with motions for summary judgment pursuant to ORCP 47, as FRCP 12(b), the counterpart of 21 A, does with FRCP 56, the counterpart of ORCP 47. The language I propose above be added to existing ORCP 21 A would remedy this defect. While I am not aware that the present language of 21 A is causing any practical problems in the "real world," it could do so at any time, and in any event it conduces to lack of clarity. One example of what I mean by lack of clarity is the apparent practice of Oregon trial judges of almost invariably characterizing any ruling on any motion to dismiss on any basis, which requires resolution of factual issues, as "summary judgment." Unless a judgment of dismissal is based on the merits, calling it a summary judgment is a misuse of the term and could be productive of unnecessary confusion. One possibility for confusion would arise if any of these spurious summary judgments were ever pleaded, especially in another jurisdiction, by way of claim preclusion. Another, and probably more likely, source of confusion would be in a case like *Loudermilk v. Hart,*[3] where the Court of Appeals misapplied the standard of review

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[3] 92 Or App 293, 758 P2d 397 (1988). *Loudermilk* did not involve rulings on any of the defenses listed in ORCP 21 A, but did involve misapplication of the standard of review appropriate for summary judgment to a situation where the trial judge properly functioned as trier and finder of fact. The factual issue was whether, at the time requests for admissions were served on a lawyer he was the attorney of record for defendant. Since defendant made no timely response to the requests, the matters were taken as admitted, but such admissions were binding upon defendant only if the lawyer was former's attorney of record when the requests were served on him. The Court of Appeals reversed the trial court on the astonishing ground that, since there was some reasonable doubt as to whether the lawyer was defendant's attorney of record at the pertinent time, it should not have granted plaintiff summary judgment on the basis of the admissions. The Court of Appeals accordingly did not reach the issue of whether the admissions, if binding upon the defendant, would warrant summary judgment. In remanding for further proceedings, the Court of Appeals did not say that the issue of whether the lawyer was defendant's attorney of record must be put to the jury, but did somewhat vaguely hold that this issue could be determined only in the course of trial.

appropriate to grants of summary judgment--whether there was any genuine issue of fact regarding whether a lawyer served with requests for admissions was the defendant's attorney of record on the date of service--to situations where a trial judge's determination of fact issues should be reviewed according to the highly deferential standard of ORCP 62 F.[4]}

{General Comment: During my period of association with it, the Council has tended to confine its efforts almost entirely to responding to problems with the ORCP called to its attention by the bench and bar as currently causing practical difficulties of one kind or another. No sensible person would quarrel with this priority. None of the three matters suggested above appear to answer that description. My thought, however, is that there can exist flaws or deficiencies in a set of procedural rules that might not be perceived as causing practical difficulties at any particular moment, because lawyers and judges understand the rules as they are, work with them, and don't sense any real need for them to be changed.

My view, though, is that the "we can live with this" or "if it ain't broke don't fix it" are not the sole standards the Council should apply to the ORCP as they exist at any point in time. By making the suggestions above, I am asking the Council whether, given the concededly limited time and other resources available to deal even with the most pressing problems called to its attention by the bench and bar, there might nonetheless be an opportunity here to improve the ORCP in subtler, but not unimportant, ways.}

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[4] The standards of review applicable to trial judges' findings of fact is another area of civil practice where Oregon's law appears to me to stand in need of reconsideration. However, since this area implicates ORS 19.125(3), which traces back to the Legislative Assembly's misunderstanding of English Chancery practice, it could be reformed only, if in addition to the Council's revising ORCP 62 F, the OSB were persuaded to lobby the legislature to repeal this statutory provision. ORS 19.125(3) mandates appellate courts, which in practice means the Court of Appeals, to accord no deference to trial court finding on appeals "from a decree in a suit in equity, . . ." ORCP 62 F goes to nearly the opposite extreme, by according to trial court findings in actions at law the nearly total deference perhaps appropriate to jury verdicts and in any even probably required by Article 7, Section 3 of the Oregon Constitution. Not to put too fine point upon it, this divergence is nutty. I cannot imagine anyone seriously defending the proposition that the scope of appellate review of trial court fact findings should vary so enormously, if at all, depending upon whether the case was one historically cognizable in equity as opposed to common law. Oregon's persistence in doing so perpetuates, at the appellate level, the historical bifurcation of law and equity which plagued practice at the trial court level until procedural merger was accomplished by adoption of the ORCP effective in 1980. However, even if ORS 19.125(3) reflects unsound and untenable procedural policy, that does not mean that, in going to the other extreme, ORCP 62 F is right. There are probably good reasons why trial court findings, whether in what would historically be a suit in equity or an action at common law, should be subject to a somewhat more searching standard of review than are jury verdicts.

At the risk of appearing to believe that where federal practice diverges from Oregon practice, the former is always superior, it does seem to me that, on this issue, the feds have gotten it right: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FRCP 52(a). The reliability of trial judges as fact finders, and hence the degree of deference to which their findings should be entitled, does not vary in the least depending whether the case would have been historically classified as legal or equitable.

The persistence of ORS 19.125(3) is objectionable on another ground, namely, the tendency of the appellate courts occasionally to stray off the reservation. While I have not analysed Court of Appeals decisions with this in mind, there are at least a few Supreme Court decisions where this statute has been candidly violated. The following by Justice Tongue is an illustrative victory of common sense over statutory literalism: "We recognize that in a suit in equity we are not bound by such findings [of the trial court]. Nonetheless, we have often said that in a suit in equity the findings of fact by a trial judge who has had an opportunity to observe the demeanor of the witnesses, as in this case, are entitled to great weight." Phillips v. Johnson, 266 Or 544, 554, 514 P2d 1337, 1342 (1973).

COUNCIL ON COURT PROCEDURES

University of Oregon
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Eugene, Oregon 97403-1221

Telephone: (503) 346-3990
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March 2, 1996

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

FROM: Maury Holland, Executive Director

RE: Additional item for consideration at Council's March 9 meeting (under new business):

Consideration of Rule Requiring Disclosure of Nonimpeachment Witnesses at Trial

Attached herewith are copies of a February 23, 1996 letter from Judge Nely L. Johnson and Judge Anna J. Brown's February 16, 1996 letter concerning the above agenda item.

Encs.

cc: Members of public (mailing list)

FEB 26 1996

CIRCUIT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
MULTNOMAH COUNTY COURTHOUSE
1021 SW FOURTH AVENUE
PORTLAND, OR 97204-1123
(503) 248-3404

NELY L. JOHNSON
JUDGE

DEPARTMENT 06
COURTROOM 544

February 23, 1996

William A. Gaylord
Gaylord & Eyerman, P.C.
1400 SW Montgomery Street
Portland, OR 97201

Dear Mr. Gaylord:

I am enclosing the letter I mentioned at the last meeting which Judge Anna Brown wrote to the Council. Please make it available to the other members if the issue will be discussed at the next meeting.

Sincerely,

Nely L. Johnson
Circuit Court Judge

Enclosure

FEB 26 1996

CIRCUIT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
MULTNOMAH COUNTY COURTHOUSE
1021 SW FOURTH AVENUE
PORTLAND, OR 97204-1123
(503) 248-3348

ANNA J. BROWN
JUDGE

DEPARTMENT 07
COURTROOM 222

February 16, 1996

NELY L. JOHNSON

Hon. Nely L. Johnson
Circuit Court Judge
Multnomah County Circuit Court
1021 SW Fourth Avenue
Portland, OR 97204

Re: Council on Court Procedures
(Consideration of Rule Requiring Disclosure of Nonimpeachment Witnesses at Trial)

Dear Judge Johnson:

As we have recently discussed, I am requesting that the Council on Court Procedures consider adoption of a rule which requires disclosure, or at least makes clear the inherent discretionary authority for a trial judge to require disclosure, of all nonimpeachment witnesses at the commencement of trial. I am not suggesting that the Council revisit the often debated subject of pretrial discovery of expert witnesses. I am urging that the time has come for there to be routine disclosure of nonimpeachment witnesses at the beginning of trial for the following reasons:

1. Nondisclosure of witnesses at the beginning of trial has caused otherwise unnecessary and costly mistrials when, after the jury is empaneled and trial is well underway, a witness is called who turns out to be closely connected to a juror or opposing party.

For example, I granted a mistrial after four days of trial in a medical malpractice case when it became apparent that plaintiff's retained medical expert was an existing client of defense counsel in an existing malpractice case. Defense counsel didn't know his client had been retained as plaintiff's expert until he walked in the door, and defense counsel was in the untenable position of potentially having to discredit in cross examination the very client whose professional competence counsel was required to defend in the other action. In

another case, after many days of trial, a medical expert called by one party turned out to be a juror's treating physician in an existing relationship.

2. Disclosure of witnesses at the beginning of trial promotes a better, more cohesive presentation of the evidence by all parties.

When a lawyer knows all the witnesses before voir dire and opening statement, the lawyer can do a much better job presenting the evidence to the factfinder. This advances the ends of justice. Trial by ambush does not.

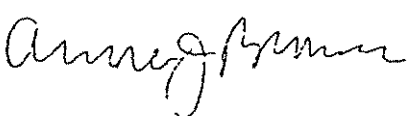
3. I know of no reason why trial commencement disclosure should not be the rule.

I've been told that some lawyers fear that, upon disclosure of witnesses at the beginning of trial, the other side will marshall resources to quickly develop cross examination material for when that witness testifies, and if the opposition doesn't have similar resources, there might be an unfair imbalance. To whatever extent that occurs, it is already the case, the investigation simply being more hurried and urgent since it might not begin until a party hears the opponent call the witness to the stand.

I understand that Judge R. P. Jones requires disclosure at the commencement of trial and orders parties not to contact, and in some cases not to investigate, the opposing witness until the witness testifies. Other remedies for this concern could be identified.

In any event, my experience with good trial lawyers is that they welcome my "invitation" at the beginning of trial to exchange witness lists. . . an "invitation" which I sometimes followup with an observation that nondisclosure which results in a mistrial might be a basis to award court costs and opposing party's costs against the nondisclosing party. Experienced trial lawyers usually consent to such disclosure anyway at least by the beginning of trial, if not earlier. A rule to this effect would help the more suspicious, less experienced lawyer over that traditional bias in favor of trial by ambush. I urge the Council to adopt a rule toward this end.

Very truly yours,



Anna J. Brown