*** NOTICE ***

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, April 13, 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 March 9, 1996 minutes (copy attached)

3. Proposal from committee to draft rules regarding Legislative Advisory Committee ("LAC") (Mr. Alexander); see draft revision incorporating proposed LAC rules into Council's Rules of Procedure (Attachment A to this agenda) (Mr. Hamlin)

4. Report of committee to study and review ORCP 17 and ORCP 54 E (Ms. Tauman)

5. Report of committee to study and review ORCP 55 I (Ms. Craine)

6. Continuation of 1995 session legislative review (see Attachment B to 12-9-95 agenda), specifically review of the following rules: 57 D, 63 E, 69 B, 78 C, 79 E, and 82 G (Mr. Gaylord)

7. Amendments to ORCP 7, 9, 15 and 21 proposed by Executive Director for preliminary consideration (Attachment B to this agenda) (Maury Holland)

8. Old business

9. New business

10. Adjournment

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Corrected

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of March 9, 1996
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present: J. Michael Alexander, David V. Brewer, Patricia Crain, Diane L. Craine, Don A. Dickey, Robert D. Durham, William A. Gaylord, Bruce C. Hamlin, John E. Hart, Nely L. Johnson, Rudy R. Lachenmeier, Michael H. Marcus, John H. McMillan, David B. Paradis, Karsten Hans Rasmussen, Nancy S. Tauman

Excused: Sid Brockley, Mary J. Deits, Stephen L. Gallagher, Jr., Rodger J. Isaacson, Milo Pope, Stephen J.R. Shepard

Charles S. Tauman, Executive Director, Oregon Trial Lawyers' Association, was in attendance. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. Mr. Gaylord called the meeting to order at 9:30 a.m. He announced that Marianne Bottini had felt compelled by illness in her family to submit her resignation as a Council member to the Board of Governors effective immediately, and that the Board would soon appoint a new member to serve the balance of Ms. Bottini's term. He also informed members that he had sent a letter to Justice Graber thanking her for her many years of distinguished service on the Council.

Agenda Item 2: Approval of minutes. The minutes of the January 13, 1996 meeting were, without objection or amendment, approved as previously distributed to the members.

Agenda Item 3: Recommendation of Williams proposal re ORCP 39 I(4) (Mr. Alexander). Mr. Alexander invited the members' attention to the proposed amendment to ORCP 39 I(4) as it appears on page 3 of the minutes of the 1-13-96 meeting, and asked whether there were any further comments or suggestions before voting to adopt it as a tentative amendment. A consensus of members agreed, by way of clarifying the aforementioned minutes,

that it was the sense of that meeting that the proposed amendment was as modified by the second indented paragraph, shown in bold face type, as appears on page 3 of said minutes.

Mr. Rasmussen asked whether the proposed language is sufficiently clear as to whether the term "a shorter period" is intended to refer to the time when a perpetuation deposition is taken, the time by which notice of such deposition is given, or to both. Justice Durham responded that he thought the phrase "before or during trial" removes any ambiguity on that score. Mr. Hamlin noted that the modification contained in the second indented paragraph drops the final clause, "upon a showing of good cause," and questioned whether that was intended. Justice Durham suggested that the concept of "upon a showing of good cause" might be implicit in the phrase "the court may." Judge Marcus, however, noted that, to him, the words "upon a showing of good cause" convey a sense that something a bit stronger must be shown than when courts are asked to exercise their discretion regarding matters that are routinely granted. It was agreed that "upon a showing of good cause" had not been intended to be omitted, and therefore should be restored. Judge Marcus, seconded by Justice Durham, then moved tentative adoption of ORCP 39 I(4) in the following language {language added highlighted; language deleted shown in strikeover}:

> I(4) Any perpetuation deposition shall be taken not less than seven 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~~. However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial upon a showing of good cause.

Mr. Lachenmeier expressed some concern about whether adoption of this amendment might have some negative impact on whatever future efforts might be made to authorize admission of "live" video testimony in jury trials by means of satellite link-ups or the like. No other members expressed a similar concern. On the call of the question, the Council thereupon unanimously voted tentatively to adopt the amendment to ORCP 39 I(4) as set forth above.

Agenda Item 4: Preliminary report of committee to study and review ORCP 7 (Judge Brewer). Judge Brewer reported on a phone conference conducted with all committee members, in addition to Prof. Holland, and summarized a "First Committee Report--March 9, 1996," copies of which were distributed at the meeting to the members. (Copy attached to these minutes.) Among the aspects of ORCP 7 practice he stated his committee is examining are whether the prerequisites for "DOT service" pursuant to 7 D(4)(a) and court-ordered service pursuant to 7 D(6), as mandated by ORCP 7

D(7), are unnecessarily onerous; whether service on the Department of Transportation (DOT), pursuant to ORCP 7 D(4)(a)(i), continues to serve any useful purpose, and whether inclusion of the phrase "or service of summons" in the second sentence of ORCP 7 G might be a source of some confusion. He added that Prof. Holland had prepared summaries of appellate court opinions handed down over the past two years to assist the committee in its work. (See copy attached to these minutes.)

Judge Brewer also reported that the committee does not believe ORCP 7 D could, consistently with the due process clause of the Fourteenth Amendment to the U.S. Constitution and cases such as *Mullane*, be amended to preclude challenges to sufficiency of service merely because defendant receives actual notice. He further indicated that the committee was presently inclined respectfully to disagree with Mr. Pat Rothwell's suggestion that ORCP 7 D(1) is confusing with regard to the relationship between specifically authorized methods of service and the overriding standard of service being "reasonably calculated, ... to apprise the defendant of the existence and pendency of the action. ..." Apart from the specific matters he mentioned at the outset of his report, Judge Brewer stated that the present sense of the committee was that ORCP 7 is currently working reasonably well, and is not now in need of comprehensive overhaul. He concluded by saying that his committee would be conducting additional phone conferences in the future and would appreciate any comments or suggestions other Council members might have, now or in the future.

Mr. Hamlin noted that ORCP 7 H provides that summonses may be "transmitted by telegraph," which he understood to mean that they may be transmitted by telegraph to be served by some conventional method, not that they may be served by being so transmitted. He raised a question as to whether this section might be improved by some rewording that would take account of modern communication technology, such as facsimile. Judge Marcus commented that he did not believe the requirement of service on the DOT, pursuant to ORCP 7 D(4)(a)(i), serves any purpose and should perhaps be deleted. Judge Brewer remarked that, at least in the context of motor vehicle cases, he was less than certain that mailings by certified or registered mail, return receipt requested, addressed to an address given by a prospective defendant at the scene of a motor vehicle accident, or to such defendant's residence address as shown in DOT records, would necessarily be insufficient even though no signed receipt is in fact returned. Justice Durham said he thought it would be important to look into the reason why the legislature restored the provision for DOT service after the original Council dropped it from the original version of the ORCP as submitted to the legislature. This discussion concluded on a note of consensus

that the committee was doing an excellent job, and that further refinements should be undertaken in that forum until such time as specific proposed amendments might be ready for debate and discussion by the Council.

Agenda Item 5: Report of committee to draft rules relating to the Legislative Advisory Committee (LAC) (Mr. Alexander). Mr. Alexander reported that his committee had been exchanging drafts of proposed LAC rules and was very close to having a final product to present for the Council's consideration, but finality had not yet been quite achieved. Mr. Gaylord indicated that this matter would be placed on the agenda of the 4-13-96 Council meeting. Mr. Alexander declined Mr. Gaylord's offer to appoint a new committee member to replace Ms. Bottini because its work appeared to be so nearly completed.

Agenda Item 8: New business (out of order) (Judge Johnson). Because she would have to leave this meeting before its conclusion, Mr. Gaylord, without objection, asked Judge Johnson to summarize, as an item of new business taken out of order, a letter to the Council from Hon. Anna J. Brown, Circuit Court Judge (copy attached to these minutes), dated 2-16-96, requesting consideration of a rule authorizing trial judges to order disclosure of non-impeachment witnesses at trial.

Judge Johnson explained that the problem raised by Judge Brown's letter is whether, in the absence of any authorizing rule, trial judges have inherent discretionary authority to require parties to identify all of their non-impeachment witness, including expert witnesses, at the beginning of trial. She explained that the principal reason for requiring this disclosure is to minimize the possibility of having to declare a mistrial should it become known only in the course of trial that a juror has some sort of connection with a witness that would be disqualifying of the former. Judge Johnson added that, from her observations and discussions with other judges, she believes that, while most of them quite routinely ask counsel to make this disclosure, and many attorneys accede to such request without objection, some judges are in doubt whether they have the power to order this sort of disclosure over counsel's resistance.

Mr. Gaylord stated that a clarification was in order to the effect that the problem raised by Judge Brown's letter is not confined to expert witnesses, with which Judge Johnson agreed. Mr. Hamlin suggested that some sort of straw vote be taken to see whether a majority of members thought the Council should address this issue. Prof. Holland asked whether the kind of rule Judge Brown asks be considered might more appropriately be included in the Uniform Trial Court Rules. Mr. Hart commented that, on the basis of his non-scientific obseration, he would estimate that

about 70% of judges believe they have inherent authority to order this kind of disclosure, whereas about 30% appear to believe that they do not in the absence of an explicit authorizing rule. Ms. Craine said that she believes that most lawyers willingly disclose their witness lists at the beginning of trial because of concern about the costs if a mistrial has to be declared.

Judge Johnson expressed agreement with suggestions of other members that the problem is not really so much disclosure at the beginning of trial as disclosure prior to trial. Mr. McMillan asked how much time prior to trial would likely be involved with a new rule authorizing judges to require disclosure of witnesses. Mr. Gaylord cautioned that any disclosure rule that would operate prior to the beginning of trial would almost certainly plunge the Council into the thicket of pretrial disclosure of experts, contrary to the reluctance expressed by many members in the recent past to reopen that vexed question. When Mr. Gaylord asked how many members present favored the Council addressing this issue, two responded affirmatively if a prospective rule would involve disclosure at trial, and none responded affirmatively if it would involve disclosure prior to trial.

This discussion concluded with an observation by Justice Durham to the effect that if there are some trial judges who doubt their authority to, if necessary, order disclosure of witnesses at trial, the better solution might be by means of judicial education rather than amending the ORCP. Judge Marcus then asked that these minutes reflect his continued belief that the existing *de facto* prohibition in Oregon practice against pretrial discovery of expert witnesses should be codified in the ORCP or wherever else might be thought appropriate.

Agenda Item 6: Continuation of review of 1995 session legislation amending the ORCP or otherwise affecting civil practice (see Attachment B to agenda of 12-9-95 Council meeting) (Mr. Gaylord). Mr. Gaylord asked Mr. Hamlin and Judge Marcus to run down the ORCP amendments by the 1995 Legislative Assembly as listed in the aforementioned Attachment B, to state whether either of them detected any problems that might be created by each amendment in turn, and to ask whether other members detected any such problems. Beginning with the amendment to ORCP 4 J, Mr. Hamlin stated it did nothing more than change the reference to the correct state official, and therefore created no problems. He added that the amendment to ORCP 4 K(3) merely changed an ORS reference to the currently correct section, and similarly created no problem. Judge Marcus said that the amendments to ORCP 7 D, all involving modified references to state officials or ORS sections, were all correctly done.

Mr. Hamlin characterized the extensive amendment to ORCP 17 as one reflecting substantive policy decisions by the legislature arguably outside the Council's statutory jurisdiction. He added that this amendment seemed to him clumsily worded.

Justice Durham commented that, given the limited time available for legislative review, the meeting should expeditiously reach a threshold determination as to what, if any, role the Council can properly perform with reference to ORCP amendments of this sort that have been enacted by the legislature. Mr. Gaylord responded that, in his view, the Council has at least limited authority and responsibility to address any problems it discerns in the ORCP, whether residing in provisions enacted by the legislature or in those promulgated by the Council. Mr. Alexander and Judge Marcus added their opinions that it would not exceed its authority for the Council to identify legislative amendments of the ORCP as constituting bad procedural policy when that reflects its considered judgment, and should not confine its review to mere scrivener's errors. Mr. Rasmussen, however, cautioned the Council against amending any ORCP provision as recently amended by the legislature, especially if such amendment occurred in the immediately preceding session.

The legislative review then resumed with Judge Marcus stating that the amendment to ORCP 27 B was merely a housekeeping amendment tracking some statutory changes. Mr. Hamlin summarized the amendment to ORCP 47 C, and said that it was intended to incorporate the directed verdict standard into summary judgment practice. Differences of opinion were expressed as to what, if any, divergence from established practice this amendment would accomplish. Judge Brewer mentioned that some judges apparently believe this amendment was intended to codify the standard established in *Seeborg v. General Motors Corporation,* 284 Or 695, 588 P2d 1100 (1978). Justice Durham suggested that further consideration of this amendment seemed premature until more appellate opinions come down construing it.

Continuing the legislative review, Judge Marcus stated that he saw no problems with the amendment of ORCP 54 adding a new subsection D(2), while expressing doubt about what purpose it serves. He added that new section 54 F might be useful in authorizing trial courts to order settlement conferences. Mr. Alexander asked whether this section might not duplicate UTCR 6.010(1)(g), and also how this provision would work in the smaller counties. Mr. Hamlin questioned where and how the term "prevailing party fee," added to section 54 E by this amendment, is to be defined. Justice Durham noted that this section, as amended, is not clear about its bearing on attorney fee awards pursuant to 42 U.S.C. §1988. There emerged general agreement that section 54 E, as amended, warranted further study.

Mr. Hamlin stated that the amendments to ORCP 55 D raise no concerns in his mind, but the amendment tacking on a new section 55 I does, because, in his opinion, it is poorly drafted and might be inconsistent with other provisions of law. Mr. Lachenmeier reported that section 55 I is being read by some lawyers as providing carte blanche authority for reviewing doctors' records. Prof. Holland said he has been trying to contact the lawyer who drafted this amendment on behalf of the Oregon Medical Association, in an effort to find out what prompted it, and would persist in doing so.

At the conclusion of this review, as requested by Mr. Gaylord, Ms. Tauman agreed to chair a subcommittee to further study ORCP 17 and 54 E as amended, with Mr. Alexander and Judge Brockley serving as members. Ms. Craine agreed to serve as chair of a subcommittee to further study new section 55 I, with Messrs. Hart and Lachenmeier serving as members. Mr. Hamlin agreed to be a subcommittee of one to further study ORCP 47 C as amended. Mr. Gaylord directed that this legislative review be continued as an item on the agenda of the 4-13-96 Council meeting, at which time the focus would be on the amendments to 57 D, 63 E, 69 B, 78 C, 79 E and 82 G, after which the Council can decide whether to extend this review to statutory changes by the 1995 legislature apart from those amending the ORCP. Ms. Tauman requested that the agenda for the 4-13-96 meeting list the ORCP provisions that, as amended, would be the focus of review.

Agenda Item 7: Executive Director's suggested ORCP amendments (see Attachment C to agenda of this meeting) (Prof. Holland). Judge Marcus, seconded by Justice Durham, moved that the proposed amendment to ORCP 7 B as shown on p. C-1 of Attachment C be tentatively adopted. This would amend the last sentence of section 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.

The above amendment was thereupon tentatively adopted by unanimous vote.

Prof. Holland then said that, in view of the time, he would withdraw the other two ORCP amendments suggested in Attachment C, and would place them on the agenda of some future meeting when sufficient time appears to be available for the Council's preliminary consideration of them.

Agenda Item 8: Old business. No item of old business was raised.

Agenda Item 9: New business. Prof. Holland stated that he had received a letter from the Oregon State Bar asking whether the Council wished to schedule a meeting in connection with the OSB Annual Meeting in Medford at the end of September. There was unanimous consensus that the regularly scheduled meeting on 9-14-96 being the last meeting at which proposed ORCP amendments could be tentatively adopted and those already tentatively adopted revised, the September meeting date should not be changed. Justice Durham inquired why the 1993 legislature had seen fit to amend the Council's organic statute in a manner that effectively prevents further work being done on prospective ORCP amendments after the September meeting. Mr. Hart responded by briefly recounting the event which prompted the legislature to take this action.

Mr. Hamlin said that he had distributed at the beginning of this meeting copies of a redlined draft revision of the Council's Rules of Procedure. He noted that his draft incorporates in his suggested revision of the Rules of Procedure the proposed new internal rules relating to the LAC as presently drafted. He asked that this draft be included as a related agenda item at the Council meeting when the proposed LAC rules are considered.

Mr. Hamlin also noted that the Federal Rules of Civil Procedure had recently been amended to clarify how post-judgment motions for new trial or judgment as a matter of law should be made in terms of serving and filing. He added that he was not aware whether there is any similar doubt under the counterpart provisions of the ORCP, but suggested that if there were, a comparable amendment to them might be worth consideration.

Mr. Gaylord reported that he had received a letter from Sen. Neil Bryant, Chair of the Senate Judiciary Committee, stating that if the Council wishes to propose any legislation in the 1997 session relating to the ORCP or other related aspects of civil practice, he would need to receive such proposals by October of 1996 so that any implementing bills could be pre-filed by him.

Agenda Item 10: Adjournment. Mr. Gaylord, on motion, declared the meeting adjourned at 12:30 p.m.

Respectfully submitted,

Maury Holland
Executive Director

TO: COUNCIL ON COURT PROCEDURES
FROM: ORCP 7 REVIEW COMMITTEE

SUBJECT: FIRST COMMITTEE REPORT- MARCH 9, 1996

All members participated in the committee's first meeting by teleconference on February 29, 1996. In preparing for the conference, the committee reviewed the memorandum from Patrick Rothwell proposing changes to ORCP 7, as well as excerpts from the soon to be published work on Civil Procedure authored by Maury Holland and Ed Peterson relating to motor vehicle case service, service methods meeting the reasonable notice standard, and ORCP 7G.

The committee made the following preliminary observations:

1) Motor Vehicle Cases (ORCP 7D(4) and 7D(7)) -

Several committee members expressed concern that the requirements for the use of DOT service are currently too strict. DOT service is permitted on a defendant " ... who cannot be served with summons by any method specified in subsection D(3)..." (ORCP 7D(4)(a)(i)). ORCP 7D(7) provides that a defendant cannot be served with summons by any method specified in subsection D(3) if the plaintiff attempted service of summons by all of the methods specified and was unable to complete service, or if the plaintiff knew that service by such methods could not be accomplished.

The "defendant who cannot be served" concept seems to be limited to motor vehicle cases under ORCP 7D(4), and publication service under ORCP 7D(6). The rule requires the "attempt" of all methods specified in subsection D(3). The committee wonders whether this formulation is sufficiently clear and instructive, and further whether identical standards should or must apply in motor vehicle and publication contexts.

Committee members also voiced concern about the need for any service on DOT at all, since the agency takes no affirmative steps to forward summons and complaint to the defendant. Some committee members took the view that the required mailings to the defendant and applicable insurance carrier ought to be sufficient. But see ORCP 7D(4)(a)(ii).

2) Methods that are Reasonably Calculated to Apprise (ORCP 7D(1))-

The committee felt it unwise to reconsider the possibility of a rule amendment providing that actual notice is sufficient in the absence of use of a reasonably calculated method. All agreed that due process concerns preclude such a rule. See e.g., Mullane v. Central Hanover Bank & Trust Co., 339 US 306 (1950). An open question exists whether the appellate courts would broaden

the permissibility of service by mail as a reasonably calculated method beyond the holding of Lake Oswego Review, Inc. v. Steinkamp , 298 Or 607 (1985), which endorses certified mail service, return receipt requested, delivery restricted to the defendant. No Oregon case upholds service of summons by mail as adequate unless receipt is acknowledged by the defendant. See Edwards v. Edwards, 310 0r at 679 (1990).

The committee respectfully disagreed with Mr. Rothwell's view that ORCP 7D(1) is confusing. The committee believes that the rule's listing of certain presumptively valid service methods subject to the overarching proviso that any method reasonably calculated to apprise the defendant will suffice, makes sense. See, Baker v. Foy, 310 Or 221, 228-29 (1990).

3) ORCP 7G-

The committee focused on an apparent ambiguity in the last clause of the second sentence of ORCP 7G. That clause admonishes the court to " ...disregard any error in the ... service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued. " Read literally, this clause could be interpreted to approve service which results in actual notice, irrespective whether it was reasonably calculated to apprise the defendant. The committee believes that a clarifying amendment may be appropriate to delete the word "service" from that clause.

Again, the committee did not concur with Mr. Rothwell's belief that the first sentence of ORCP 7G should be eliminated given that actual notice alone does not suffice regardless of the service method employed. The first sentence of ORCP 7G does not relate to the method of service, but rather to defects in the form and issuance of summons, and failure to utilize a qualified server.

4) Future Work-

The committee will meet again in the near future to further discuss the issues that we determined merit serious consideration.The committee did not identify any other areas of concern under ORCP 7 for further study, although Maury Holland kindly agreed to survey any recent cases relating to the rule. The committee is aware of Paschall v. Crisp, 138 Or App 618 (1996), which explores the relationship between the motor vehicle service rule, and the reasonable notice standard of ORCP 7D(1).

Respectfully submitted,

Dave Brewer

Dave Brewer, for the committee

CORRECTED AND REVISED COPY

March 8, 1996

To: Subcommittee to Review ORCP 7 (Judge Brewer, Chair; Justice Durham, Messrs. Lachenmeier, Paradis and Rasmussen, members)

From: Maury Holland, Executive Director M.J.H.

Re: Citations to, and summaries of, recent appellate court opinions re ORCP 7

Following is a listing of citations to, and brief summaries of, Court of Appeals opinions construing ORCP 7 from and including 1994 Advance Sheet No. 1, 125 Or App 341 (12/22/93) to and including 1996 Advance Sheet No. 4, 139 Or App 136 (2/7/96). During the period covered by these Advance Sheets, the Supreme Court published no opinions dealing with ORCP 7:

1. **Atterbury v. Wells, 125 Or App 591, 866 P2d 484 (1994).** Motor vehicle case. Plaintiff mailed copy of complaint, without summons, to defendant's insurer by regular mail and issued summons to be served by dep. sheriff by personal service at defendant's residence in Brookings. Deputy unable to make service because defendant was out of state. Defendant's daughter, visiting from home in California, went to residence to check mail and was told deputy was looking for her father. She then went to sheriff's office and identified herself, whereupon deputy handed her papers in response to her assurance that she would see father got them, but without further inquiry about her relationship with him. Plaintiff later sent papers to defendant at his residence by regular mail. Circuit Court granted defendant "summary judgment" on ground of insufficient service. Court of Appeals affirmed on ground that service did not conform to any specifically authorized method and was not valid under "reasonably calculated" standard because deputy had insufficient information about relationship between daughter and defendant. Also held mailing of papers to defendant's residence by regular mail without requesting receipt did not comply with reasonably calculated standard.

2. **Gallogly v. Calhoun, 126 Or App 366, 869 P2d 346 (1994).** Trial court denied defendant's motion to set aside default judgment for assertedly insufficient service. Defendant a legislator and member of OSB, but had no permanent address. Defendant could not be found either at address listed in OSB Directory, a different address listed in OSB records, or at yet another address shown in MVD records. (This was an assault, not a motor vehicle case.) In Jan. '91 defendant phoned OSB and gave his grandmother's address as an updated business address. A month later defendant wrote OSB asking it not to divulge his updated address except as required by public records law. Under circumstances unclear in the report, OSB disclosed defendant's grandmother's address to plaintiff, who the next day attempted service on defendant by

delivering papers to grandmother at her residence, also defendant's updated OSB address. Plaintiff also sent copies of papers to same address by regular mail. Court of Appeals affirmed, holding that although service was not valid as substituted service since grandmother's residence was not in fact that of defendant, this service sufficient as comporting with the reasonably calculated standard given the circumstances. Circumstances were that defendant lawyer gave grandmother's address as one where he could be reached about business matters, and that defendant was not reachable at any other record address. {**Comment:** An entirely sound, though pretty fact-specific, holding without much broad significance.}

3. **Levens v. Koser, 126 Or App 399, 869 P2d 344 (1994).** Plaintiff police officers sustained injuries while attempting to arrest defendant. In order to make personal service on defendant, server obtained from MVD last address listed by defendant in MVD records, and attempted personal service at that address. Defendant's mother told server that defendant had not resided at that address for about 6 months, but that she would accept papers and see that he got them, whereupon server handed them to her. Plaintiff then mailed papers to defendant at same address by certified mail, return receipt requested. Post Office forwarded papers to defendant's forwarding address, but unable to make delivery. Defendant's wife picked up papers at Post Office, brought them home, and gave them to defendant. Circuit Court granted defendant "summary judgment" for insufficiency of service. On appeal to Court of Appeals plaintiff conceded service not valid as substituted service because address to which papers delivered by server was not defendant's place of abode at the time. Court of Appeals affirmed on ground that service methods used lack sufficient assurance of affording actual notice and hence did not meet the reasonably calculated standard. Also held that fact of actual notice, here conceded, not sufficient to trigger relief under ORCP 7 G.

4. **Boyd v. Boyd, 131 Or App 194, 884 P2d 556 (1994).** Divorced mother sought to serve order on father to show cause why child support should not be increased. Father had no permanent address, but retained a bookkeeper to handle his personal finances. Mother caused personal service of order on bookkeeper, and also mailed copies to bookkeeper's office, father's employer and father's last known address, all apparently by regular mail. Bookkeeper phoned father to tell him about the order, and father came to office to pick it up prior to hearing. Father failed to appear at hearing, at which circuit court granted mother's motion. Without having moved to set aside service in circuit court, father appealed to Court of Appeals. Latter affirmed the order increasing child support, holding that although service was not valid office service under ORCP 7 D(2)(c) (because father did not conduct his business, in sense of employment, at bookkeeper's office), it was valid under reasonably calculated standard, in part because he used bookkeeper to handle child support payments, thus affording sufficient assurance of actual notice. Judge Landau dissented, contending that *Baker v. Foy,* 310 Or 221, 797 P2d 349 (1990), *Atterbury* and *Levens, supra,* were controlling.

5. **Murphy v. Price, 131 Or App 693, 886 P2d 1047 (1994).** Motor vehicle case. Plaintiff

mailed papers to defendant at address given by latter at scene of accident and also as shown in MVD records by certified mail, return receipt requested (delivery unrestricted). Unbeknownst to plaintiff, defendant shared a mailbox with his landlord and each authorized the other to pick up his mail. Landlord signed receipt for papers and gave them to defendant the next day. Trial court granted defendant's motion for "summary judgment" on ground of insufficient service. On appeal to Court of Appeals, plaintiff conceded that service method used did not conform to any of specified methods. Court of Appeals affirmed, reasoning that method used did not meet reasonably calculated standard because, unless delivery is restricted, there is insufficient assurance that defendant will actually get the papers. Further held this defect not overcome by fact landlord authorized to pick up defendant's mail, *since that circumstances was not known to plaintiff.* [Emphasis supplied] Court further held ORCP 7 G unavailing because service meeting reasonably calculated standard is a prerequisite to relief thereunder.

{**Comment**: The point made about 7 G not coming into play unless the method of service meets the reasonably calculated standard, in which event there is no need for 7 G relief, seems to Ed Peterson and me entirely correct. This relates to a possible minor amendment to 7 G now assumedly under consideration by your subcommittee. Judge Landau's unanimous opinion, however, includes an alternative holding relating to ORCP 7 D(4)(a)(i) which I believes muddies the waters and underlines the need for modification or clarification of this provision. The alternative holding was that service in this case was not sufficient pursuant to 7 D(4)(a)(i) merely because plaintiff failed to "serve" the papers on the MVD, although plaintiff did comply with the requirement of this provision regarding mailings to defendant. That requirement prescribes use of registered or certified mail, return receipt requested, but not that delivery be restricted.

The fundamental mistake this opinion makes is to mischaracterize the MVD as defendant's "statutorily appointed agent for service, . . ." 131 Or App at 698. I doubt whether that is correct as a matter of state law, and in any event cannot be valid as a matter of 14th amendment due process. Many decades ago the U.S. Supreme Court approved this statutory-agent-to-accept-service scheme in the context of out-of-state motorists, but only on the condition that the state agency or official on which service is made be statutorily obligated to forward papers to defendant motorists by a form of mailing yielding a return receipt. *Hess v. Pawloski,* 274 US 352, 47 S Ct 632 (1927). Since the MVD, now the DOT, is under no such obligation, and does not in fact forward papers to defendants, it is merely a source of address information, not a statutory agent. I believe that what is now 7 D(4)(a) evolved out of a *Pawloski*-type statute, a common response of states to the fear of out-of-state motorists eluding jurisdiction in places where they caused accidents. These dated from before the invention of the concept of "minimum contacts" in *International Shoe* (1945), which, by authorizing constructive service outside the forum jurisdiction, obviated any need for fictional appointment of statutory agent by conduct. Many of these jurisdictional statutes nonetheless survived for many decades after they had ceased to serve any useful purpose.

This opinion also touches on something else that could produce confusion. Distinguishing this case from *Lake Oswego Review v. Steinkamp,* 298 Or 607, 695 P2d 565

(1985), the *Murphy* opinion makes a big point about the fact that the service by mail validated in the former was not merely by registered mail, return receipt requested, but that delivery was restricted. Judge Landau reasons that, unless delivery is restricted to the defendant, there is some chance that the papers will be delivered to someone else at the same address, as happened here. Ed Peterson and I have not yet quite settled this point between us, so I cannot speak for him, but my view is that neither the courts nor the text of ORCP 7 should go beyond requiring a form of mail that yields a receipt signed by defendant or other person to be served, such as an agent authorized to accept service. Whether to add "restricted delivery" is a judgment that plaintiffs' lawyers should make.

My reasoning is as follows. Service by registered or certified mail, return receipt requested, is much like personal service, in that, just as the latter is defined in terms that include actual delivery to defendant or other person to be served, so with service by this kind of mail, for service to be sufficient, the proof of service must include a receipt signed by defendant. Service by mail can no more be claimed sufficient that does not result in a receipt signed by the defendant, or some equivalent proof of receipt, than can personal service that does not result in delivery to the defendant. This is in contrast to such other methods of service where there is some unavoidable, but acceptable, risk that the papers will not come to the notice of defendant, such as substituted and office service, or service by publication. If restricted delivery is used, the Postal Service will deliver the papers to the addressee in person and get a signed receipt or, if it cannot, will return the mailing to plaintiff with some notation that it was not deliverable. If, on the other hand, delivery is not restricted, the Postal Service will deliver the mailing to anyone at the indicated address and get that person's signature on the receipt, in which event the service will be insufficient for failure to get defendant's signature. ORCP 7 does not provide for anything along the lines of substituted service by mail receipted for by a resident of defendant's place of abode, and I assume no one would seriously propose such a newfangled procedure. Restricting delivery is probably the sensible thing to do from viewpoint of plaintiff's attorney, since it eliminates the possibility the carrier will hand the papers to the first person who answers the door even though the defendant might be available on the premises to sign if asked for. But whether delivery is restricted should not be a concern of courts, or of the ORCP unless you think the latter should incorporate "practice tips."}

6. **Hall v. Walrath, 132 Or App 555, 899 P2d 387 (1995).** A motor vehicle case of limited relevance because decided under ORCP 7 D(4)(a)(i), (ii), when, prior to amendment effective Jan. 1 '90 these required mailing to defendant's insurer to perfect service rather than, as currently, merely to authorize entry of default. Plaintiff attempted to employ 7 D(4)(a), but made no mailings to, or other forms of service on, defendant, merely mailing papers to defendant's insurer by registered or certified mail, return receipt requested. Court of Appeals affirmed the trial court's grant of "summary judgment" for defendant for insufficient service, rejecting plaintiff's implausible argument that insurer was defendant's agent authorized to accept service on his behalf. The opinion did not address plaintiff's alternative contention that the service method used met the reasonably calculated standard of 7 D(1). Had it done so, the ruling would almost

certainly have been that it did not since insureds normally face possibility of excess liability.

7. **Abbots v. Bacon, 133 Or App 315, 891 P2d 1321 (1995).** Plaintiff sued Tillicum Club, Inc. to recover damages for personal injury. Server attempted to serve defendant's registered agent, whose address was shown as that of the club. Bartender told server registered agent was not on the premises, but that he would sign for papers and see that she got them, which he did. Trial court granted defendant "summary judgment" for insufficient service on ground that bartender was not a "clerk on duty in the office of a registered agent" within the meaning of ORCP 7 D(3)(b)(i). Court of Appeals reversed on the basis of a rather strained conclusion that the bartender was a "clerk on duty" on these facts despite the registered agent's uncontested affidavit that she had expressly prohibited him from accepting or signing for any papers intended for her. Judge Haselton's sensible conclusion, in dissent, was that service might better have been sustained under the reasonably calculated standard, but felt constrained to dissent because he found this point either not preserved or not assigned. His opinion, incidentally, describes ORCP 7 as "arcane," leading to "practically absurd, results, . . ." and therefore requiring "[a]mendment, not judicial ingenuity, . . ." 133 Or App at 323. I wonder how common that attitude is among judges?

8. **Huffman v. Leon De Mendoza, 135 Or App 680, 899 P2d 734 (1995).** Action against a transferee of bankrupt under Uniform Fraudulent Transfer Act to apply property to satisfaction of attorney fee owed by bankrupt to plaintiff. Trial court granted plaintiff's motion to order service by posting papers in Klamath Falls Courthouse and by mailing, by regular mail, to last known address in California, even though plaintiff knew defendant was then living at unknown location in Mexico. Trial court granted defendant's motion to set aside default judgment for insufficiency of service. Court of Appeals affirmed on ground that plaintiff's affidavit in support of motion for order of service pursuant to ORCP 7 D(6)(a) failed to aver sufficient specific efforts showing service could not be made under any of methods prescribed by 7 D(3). Alternatively held that, when plaintiff knew that defendant was then living at unknown location in Mexico, posting papers in Klamath Falls and mailing them by regular mail to former address in California did not meet reasonably calculated standard.

{**Comment:** This case touches upon, though did not directly involve, an obvious flaw in ORCP 7 D(6)(c). The latter authorizes publication only in a newspaper in the county where the action is filed. When, in cases such as *Huffman,* the best information available to plaintiff is that defendant is in some remote place, but no mailing address is known, the court should have discretion to order publication at that place, where there is some chance it might be effective. This sort of flexibility is probably constitutionally required by *Mullane v. Central Hanover Bank & Trust Co.,* 339 US 306, 70 S Ct 652 (1950). In *Sabre Farms, Inc. v. Bergendahl,* 103 FRD 8 (1984), a diversity case, Judge Frye took advantage of the broader geographical discretion afforded under the FRCP to order publication in Australia, where the best information available to plaintiff suggested defendant was then located.}

9. **Paschall v. Crisp, 138 Or App 618, 910 P2d 407 (1996).** Auto accident Nov. 3 '90; complaint filed Nov. 2 '92. At scene defendant gave investigating officer X as his current address, whereas MVD records showed his address to be Y. Nov. 11 '92 plaintiff attempted personal service of defendant at Y, but was told defendant no longer lived there. Dec. 4 '92 plaintiff left copy of papers with MVD. Dec. 10 '92 plaintiff mailed papers, by method unspecified, to defendant at Y address, but mailing was returned with notation: MOVED. LEFT NO ADDRESS. UNABLE TO FORWARD. Jan 18 '93 plaintiff mailed papers to address X, which were returned with notation that defendant had moved. Trial court granted defendant's motion for "summary judgment" on ground of insufficient service. Court of Appeals affirmed, rejecting the strained argument of plaintiff that Y, the address shown in the MVD records, was also somehow an address given at the scene of the accident in addition to the X address actually given by defendant to investigating officer. The Court held service insufficient under ORCP 7 D(4)(a) because plaintiff did not complete mailing to one of the addresses prescribed therein--the address given at the scene of the accident--until Jan. 18 '93, more than the 60 days following filing of the complaint allowed by ORS 12.0020(2). The Court ignored plaintiff's argument that 7 D(4)(a)(i) provides that "service under this paragraph shall be complete upon the date of the first mailing to the defendant" because it was made for the first time on appeal. It rejected plaintiff's contention that service method used met the reasonably calculated standard, reasoning that by not attempting service by mail or otherwise at address X until more than 60 days after the complaint was filed, plaintiff had failed to make all reasonable efforts to afford actual notice.

{**Comment:** With respect, Judge Leeson's concurrence manages to inject every possible point of confusion into her analysis. In contrast to the majority, she would have reached the issue of whether the Dec. 10 '92 mailing to Y address completed service pursuant to ORCP 7 D(4)(a)(i), as the text of the provision clearly states it does. In resolving this issue, she summoned up the ghost of some Court of Appeals opinions, but without citing them or analyzing their pertinence, which held that completion of service for purposes of the ORCP is not necessarily the same thing as completion of service for purposes of the 60 days allowed by ORS 12.020(2). However, if memory serves, those opinions held that service was completed for purposes of 12.020(2) on a date earlier than the date prescribed by the ORCP. Even more ominously, Judge Leeson raised the possibility that service, even if sufficient under ORCP 7 D(4)(a)(i), only presumptively meets the overriding reasonably calculated standard, and that on the facts of this case, that presumption was rebutted. The circumstance rebutting the presumption of service pursuant to ORCP 7 D(4)(a)(i) being reasonably calculated was, in her view, that both mailings were to addresses where plaintiff knew defendant did not reside.

Ed Peterson and I are now having a friendly, but spirited, debate about whether the dicta in Justice Unis' opinion in *Baker v. Foy, supra,* to the effect that the presumed validity of the specifically authorized methods of service in ORCP 7 D(2) is subject to being factually rebutted on a case-by-case basis. Ed believes that Justice Unis was correct in characterizing the presumption of validity as evidentiary, and thus subject to rebuttal on the basis of any particular

facts indicating that the specified service method used was not reasonably calculated to afford notice in light of them. My position, which up to now has not persuaded Ed, is that the presumption of validity should be one of law, not fact, in the sense that the use of any specifically authorized service method should be invalidated only if a court holds, as a matter of law, that it is not, as a general matter, in conformity with the reasonably calculated standard. Such a holding seems to me extremely unlikely respecting any of the service methods presently provided in ORCP 7 D(3). Why should the validity of use of any specifically authorized method, such as ORCP 7 D(4)(a)(i), be impugned on the basis of any factual circumstance in a particular case, especially when such circumstance will often not be known to plaintiff? For example, publication is, when certain preconditions are met, a valid and sufficient method of giving notice, and none the less so even if were shown that the defendant was a recluse who never reads newspapers. If my view is correct, and I'm far from sure it is, by providing a number of specified service methods which the legislature or the Council, and then the courts in the event of their being challenged, conclude to afford adequate assurance of providing actual notice in most cases and as a general proposition, ORCP 7 D(3) should be understood as shifting to defendants the consequences of an occasional failure of actual notice. Any particular facts and circumstances accounting for the failure of actual notice should be taken into account by courts in ruling upon motions to set aside default orders or judgments, rather than by holding service in conformity with a specified method insufficient. Even with the best designed specified service methods, there is often some irreducible risk that defendants will not get actual notice, as with publication. There occurs to me no good reason why the consequences of such risk when it occurs should always be loaded on plaintiffs. That is especially so when you consider that the consequence of invalidating service will often be that a perhaps meritorious claim will be time barred. By contrast, the normal consequence to a defendant who did not get actual notice, despite use of a service method generally good enough to meet the reasonably calculated standard, will merely be having to defend on the merits, assuming the courts are sensible about setting aside defaults. As between Justice Unis' dictum and my opinion, there is of course no contest, but perhaps someday the Supreme Court will revisit and reconsider the issue.

Granted that in *Paschall* at least one of the mailings made by plaintiff was to an addresss at which he already knew defendant did not reside. So what? What more could plaintiff do? What I wish the *Paschall* court had done is to hold that when a motorist defendant gives a false address at the scene or shows a false address in the MVD records, he is estopped from denying that either of them was his proper address. The trial court ruling would probably still have to be affirmed, however, because the two mailing were no good, not because plaintiff did not reside at either of the addresses, but because ORCP 7 D(4)(a)(i), in requiring registered or certified mail, return receipt requested, must be understood to require that at least one of the mailings yields a receipt signed by defendant. If I'm right about that, then the whole mailing scheme presently required by 7 D(4)(a)(i) makes little sense. Unless your subcommittee is prepared to provide, the Council to approve, and the courts to uphold, a scheme under which mailings to certain prescribed addresses completes service even if no signed receipt is returned, then there is no

point in mandating mailings to any prescribed addresses.[1] Why not add the Pope and the Queen of England for good measure? On the other hand, if a mailing to any address that does produce a signed receipt would suffice, as it should in my opinion, then why not leave it to plaintiffs to ferret out the right address and decide whether to attempt personal service or service by mail, return receipt requested? If you follow me that far, doesn't this suggest that the original Council was right in junking ORCP 7 D(4)(a) in its entirety, as a misshapen, skeletal remains of a pre-*International Shoe* dinosaur? It is, moreover, a dinosaur that has become totally disconnected from its original purpose, which was to provide a device by which jurisdiction might be obtained over non-resident motorists hitting someone in Oregon and running out of the state before they can be served.}

[1]At the March 9 meeting, Judge Brewer expressed some hestitations about my dogmatic assertion that service by any form of mail is no good unless unless it yields a receipt signed by the defendant or other person to be served. On reflection I think his hesitations might be well founded after all. If your subcommittee should decide to preserve DOT service in some form, it *might* be both constitutionally permissible and good policy to provide that mailing, by certified or registered mail, return receipt requested, to any address given at scene of accident and to the current address as shown on DOT records would suffice, even if no receipt is returned or the mailing is returned as undeliverable. If your subcommittee should reach the point of seriously considering something along these lines, I'd be happy to undertake the research on the due process issue that would be presented. My guess is that the full Council might be rather skittish about this sort of proposal, but its concerns might be overcome if some supportive authority could be located. Who knows, maybe this review of ORCP 7 could generate the next *Mullane*, a case that would get all the way to the U. S. Supreme Court and then into the casebooks!

Another thought that has occurred to me. Whatever your subcommittee, and subsequently the Council, finally do with ORCP 7 D(4)(a), liability insurers will undoubtedly attack in the legislature any amendment which they perceive as not protecting their interests at least as fully as the current provision does. While I have not checked back into the relevant legislative history, I'd give good odds that the insurance industry was largely responsible for the 1979 legislature restoring MVD service after the original Council dropped it from ORCP as submitted to that body. In this connection, the current device of requiring notice to insurers only in order to get a default strikes me as a bit cumbersome. Why not require that, at least when DOT, as opposed to conventional service methods, is used, notice by mail to the insurer, as shown in DOT records, is part of perfecting service at the outset?

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

Attachment A to 4-13-96 Agenda

COUNCIL ON COURT PROCEDURES

RULES OF PROCEDURE

The following are ~~suggested~~ Rules of Procedure ~~to be~~ adopted pursuant to ~~Section 2(1)(b), House Bill 2416~~ ORS 1.730(2)(b). The rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in the statute.

I. MEETINGS

Meetings of the Council shall be held regularly at such time and place fixed by the ~~Council or~~ Chairman in consultation with the Executive Committee. Special meetings of the Council may be called at any time by the Chairman ~~or~~ in consultation with the Executive Committee. Notice of special meetings of the Council stating the time, place and purpose of such meeting shall be given personally by telephone or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of the meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of such meeting except where a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called.

All meetings shall be conducted in accordance with parliamentary procedure, or such reasonable rules of procedure as are adopted by the Chairman.

II. OFFICERS, EXECUTIVE COMMITTEE, SUBCOMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a Chairman,[1] Vice Chairman, and Treasurer. These officers shall be elected for

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[1] ORS 174.115 expresses a preference for gender neutral drafting of rules and statutes. However, ORS 1.730(2)(b) uses the word "chairman" rather than "chair."

a period of two years[2] at the first meeting of the Council following the adjournment of a regular session of the legislature. The powers and duties of the officers shall be as follows:

1. Chairman. The Chairman shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chairman by the Council.

2. Vice Chairman. The Vice Chairman shall preside at meetings of the Council in the absence of the Chairman and shall have such other powers and perform such other duties as may be assigned to the Vice Chairman by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chairman and Vice Chairman and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and perform such other duties as may be assigned to them by the Council. The Executive Committee or its delegate shall set the agenda for each

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[2] Curiously, the Council practice of electing a chair for two years has departed from the statutory mandate of one year terms at all times since ORS 1.730(2)(b) was adopted in 1977. Probably the chair was still "official" in the second year of each two year term because Oregon Constitution Art XV, § 1 says that officers (with no qualification that I am aware of) serve until their successors are elected and qualified. However, one might ask whether that is a satisfactory answer.

Attachment A - 2

Council meeting prior to such meeting and provide reasonable notice to Council members of such agenda.

C. Subcommittees. The Chairman, in consultation with the Executive Committee, may appoint such subcommittees from Council membership as it the Chairman shall deem necessary to carry out the business and purposes of the Council. Such subcommittee shall report to and recommend action to the Council.

D. Legislative Advisory Committee ("LAC"). 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 Council unless the LAC has presented any proposal to the Council, and the Council supports the specific analysis and advice to be rendered by an affirmative vote of fifteen members. Without such a vote of the Council, 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, but only represents an opinion of the majority of the individuals comprising the LAC.

LAC shall not exercise its statutory discretion to take a position on behalf of the Council on proposed legislation unless such position has been submitted to the Council and specifically approved by an affirmative vote of fifteen members.

Any member of the LAC who chooses to appear and offer testimony before a Legislative Committee, who 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 him or herself as a member of the Council, a member of the LAC, and also indicate that he or she is expressly not authorized to speak on behalf of the Council.

III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

~~A. Executive Director. The Council shall select and appoint an Executive Director on such terms and conditions as the Council shall specify.~~

A. ~~Executive Director~~ Under direction of the ~~President, Treasurer and~~ Executive Committee, the Executive Director shall be responsible for the employment and supervision of other Council staff, maintenance of records of the council, presentation and submission of minutes of the meetings of the Council, provision of required notice of meetings of the Council, preparation and disbursement of Council agenda and receipt and preparation of suggestions for modification of rules of pleading, practice and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council or the Executive Committee.

B. Staff. The Council shall employ or contract with, under terms and conditions specified by the council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council shall be retained by the State Court Administrator's office and shall be paid out only by the State Court Administrator as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. Council shall designate a location for an administrative office for the Council. All Council records shall be kept in such office under the supervision of the Executive Director.

Attachment A-4

IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE AND PROCEDURE

The Council shall consider and propose such rules of pleading, practice and procedure as it deems appropriate at its meetings. ~~Two weeks prior to the regularly scheduled meeting in October, or any meeting in October specified by the Council or the Executive Committee, of a year prior to a regular session of the legislature~~ Thirty days before the meeting at which final action is to be taken on the promulgation, modification or repeal of a rule, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the rules and amendments which have been proposed, and notice that copies of any specific rules and amendments proposed may be secured upon request from the Administrative Office of the Council. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to the proposed amendments and rules of procedure.

Thereafter, the Executive Director shall distribute to the members of the Council a draft of the tentative final action to be taken to amend or adopt rules of pleading, practice and procedure as directed by the Council, together with a list of statutory sections superseded thereby, and appropriate explanatory comments, in such form as the Council shall direct, and the Council shall take final action to modify, repeal or adopt rules of pleading, practice and procedure and direct submission of such amendments and rules and any list of statutory sections affected thereby, together with explanatory comment, to the legislature before the beginning of the regular session of the legislature.

Attachment A-5

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

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March 29, 1996

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Gilma Henthorne, Executive Assistant
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RE: LAC Subcommittee
Proposed Internal Rules

Dear Bill, Maury & Gilma:

The LAC Subcommittee met to consider two proposed internal rules concerning operation of the LAC. I am enclosing a copy of the letter I sent to the subcommittee members outlining these proposed rules. The subcommittee unanimously recommended adoption of the first rule. Although it is longer, and we realize the virtues of brevity, we felt it more clearly stated the affirmative obligation of members of the LAC to indicate to the Legislature that they were not speaking for the full council absent appropriate approval through a super majority. I am including the

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TO: CCP (Gaylord, Holland & Henthorne)
RE: LAC Subcommittee Rules
DATE: March 29, 1996
PAGE: 2

text of both rules to enable the full council to consider either alternative. As I said, our recommendation is for the adoption of the first rule.

Sincerely,

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

J. Michael Alexander

JMA/jb
CC: Diana Craine
Honorable Michael Marcus
John Hart

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

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March 18, 1996

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Honorable Michael H. Marcus
Circuit Judge
Multnomah County Courthouse
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Portland OR 97204

RE: LAC Subcommittee
Internal Rules

Dear Subcommittee Members:

I reviewed my letter of January 23rd, John's letter of January 1st, Marianne's letter of January 16th, and Judge Marcus' letter of March 4th. I am enclosing all of this correspondence for your convenience. I have tried to integrate some of the proposed editorial changes to the internal rules that I initially drafted. I am also taking into account John's preference for the shortened version of the proposed rule which I characterized as the "Brockley" rule in my prior letter. I am going to set forth both the longer proposed rules, and the Brockley rule. My office will then call yours to set up a conference call so that we can hopefully reach an agreement as members of the subcommittee for an approved proposal to submit to the entire council.

Here are what I consider the alternative internal rules governing the LAC. The first tracks my prior three proposed

internal rules, and the last is the Brockley Rule:

FIRST 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 express disclaimer that such technical analysis and advice does not represent the opinion of the council on court procedures.

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 approved by a super majority.

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 expressly indicate that he is not authorized to speak on behalf of the council.

TO: LAC Subcommittee Members
RE: Internal Rules
DATE: March 18, 1996
PAGE: 3

The alternative Rule is as follows:

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.

Sincerely,

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

J. Michael Alexander

JMA/jb
Encls.

Attachment B to Agenda of 4-13-96 Meeting

March 21, 1996

To: Chair and Members, Council on Court Procedures

From: Maury Holland, Executive Director M.J.H.

Re: *Suggested ORCP Amendments*

Below are two proposed ORCP amendments for preliminary consideration by the Council at its April 13, 1996 meeting if this agenda item is reached. These proposals are technical and not intended to change policy. With respect to either or both of them, the Council's 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.

1. The rules pertinent to how a defendant "shall appear and defend" (ORCP 7 C(3), 9, 15 A) appear to me to be illogically structured. 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 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, even though, as a practical matter, the two steps are normally taken simultaneously

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 drafting would not be very arduous since the FRCP furnish the model.

2. 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] Probably 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

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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, . . ."

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, but is determing 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, for what it might be worth, my opinion was that 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 testimony were necessary.

Trial judges can, of course, rule upon the defense of failure to state a claim, even when 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 requiring trial. 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 that 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, regardless of whether the ruling implicates resolution of factual issues as well as issues of law, 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, with respect, misapplied the standard of review 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 factual issues should be reviewed according to the highly deferential standard of ORCP 62 F.[4]}

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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.

[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 event 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

{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. Neither of the two matters suggested above appears 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 are therefore not prompted to ask the Council to consider a "fix."

My view 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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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 on 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).

April 4, 1996

To: Chair and Members, Council on Court Procedures

From: Maury Holland, Executive Director M.J.H.

Re: Two Items of New Business for 4-13-96 Meeting

I. Susan Grabe of the OSB just contacted me to get my thoughts about a bit of legislation regarding the Council that needs to be introduced in the 1997 legislative session because of the abolition of the district courts and district court judgeships effective 1-15-98, and because of the apparent belief of OSB leaders that the geographical districting requirements respecting appointments of practitioner members should be recast in terms of bar regions as opposed to congressional districts. I gave Susan my own thoughts, which are incorporated in the attached draft of a bill, but told her that I wanted the Council to have an opportunity to discuss and debate these issues so that she and the OSB would get the benefit of the collective views of all members. Susan asked that I send along my draft bill right away, but she understands that the attached reflects only my personal opinions, and that those of the full Council will be forthcoming after the April 13 meeting.

i. The first issue is posed by the fact that district court judges will not exist effective Jan. 15, 1998, so ORS 1.730(d) needs to be deleted in light thereof. My assumption is that the Council badly needs to continue to have the 8 trial court judges it has included since its inception, so my draft bill amends ORS 1.730((c) to substitute "eight" for "six," as in "six judges of the circuit court."

ii. The second issue is perhaps more debatable, and might provoke real differences of opinion among Council members. I don't know just where the idea came from, but some folks at the OSB would like to change the geographical districting requirement of ORS 1.730(e) from U.S. House districts to bar regions. There are presently 6 bar regions, but Susan told me that some consideration is being given to creating a new region 7 that would include all OSB members not resident in Oregon, the bulk of whom reside in Vancouver, WA or thereabouts.

As you will see, my draft bill would change the present requirement that no less than 2 practitioner members of the Council be appointed from each of the 5 congressional districts to no less than 1 from each bar region. The final decision about that will of course be up to the BOV, which should get the thoughts of the full Council rather than just my own. My reasoning is that any requirement of geographical balancing can get in the way of recruiting and appointing new members who are best qualified by reason of interest, experience and willingness to put shoulders to the wheel. At the same time, geographical balancing does have its legitimate claims, and I'd guess that any bill which wholly dispensed with it might draw some fire in the legislature. Requiring 1, rather than 2, practitioner members to be appointed from each bar region seemed to

me a good compromise. Even if the number of bar regions remains at 6, requiring 2 members from each region would of course mean that not even one new member could be appointed without regard to geography. At present, since there are only 5 congressional districts, 2 members can be appointed as "wild cards" geographically speaking. Should the number of regions increase to 7, it would obviously be impossible to require that 2 members be appointed from each unless the total number of practitioner members were increased to 14. There might be some among the present members who would favor increasing the size of the Council for that, or other, reasons.

I hope there is time at the April 13 meeting to get the thoughts of the full Council on the record, so to speak, because Susan seems under some time pressure to get the OSB's 1997 legislative package firmed up fairly soon.

II. The second item of new business is submitted by Bruce Hamlin in his attached memo dated April 3, 1996. It appears that the Court of Appeals is, in a sense, forcing the Council's hand.

April 4, 1996

To: Susan Evans Grabe, OSB Public Affairs Attorney

From: Maury Holland, Executive Director, Council on Court Procedures M.J.H.

Re: Proposed 1997 Session Legislation Affecting Council

As agreed at the conclusion of our phone conversation today, I am forwarding a draft bill that would amend ORS 1.730 to deal with the abolition of district court judgeships effective 1-15-98 and with the possibility of "redistricting" Council membership in terms of bar regions instead of U. S. House districts. I want to re-emphasize that the attached bill reflects only my own views, not those of the Council. At the Council's April 13 meeting, I shall ask the Chair to solicit the views of Council members, which will then be promptly reported to you. Many thanks for touching base with me about this matter.

cc: Chair and Members, Council on Court Procedures

{Language added in bold; deleted in strikeover}

AN ACT relating to Council on Court Procedures; increasing number of circuit court judges and deleting provison for district court judges; requiring at least one attorney member from each bar region; amending ORS 1.730.

SECTION 1. ORS 1.730(1) is amended to read:

1.730. Council on Court Procedures; membership; terms; meetings; expenses of members.

(1) There is created a Council on Court Procedures consisting of:

(a) One ~~judge~~ **justice** of the Supreme Court, chosen by the Supreme Court;

(b) One judge of the Court of Appeals, chosen by the Court of Appeals;

(c) ~~Six~~ **Eight** judges of the circuit court, chosen by the Executive Committee of the Circuit Judges Association;

~~(d) Two judges of the district court, chosen by the Executive Committee of the District Judges Association;~~

~~(e)~~ **(d)** Twelve members of the Oregon State Bar, at least ~~two~~ **one** of whom shall be from each of the ~~congressional districts of the state~~ **regions of the Oregon State Bar**, appointed by the Board of Governors of the Oregon State Bar. The Board of Governors, in making the appointments referred to in this section, shall include but not be limited to appointments from members of the bar active in civil trial practice, to the end that lawyer members of the council shall be broadly representative of the trial bar; and

~~(f)~~ **(e)** One public member, chosen by the Supreme Court.

SECTION 2. This Act shall take effect January 15, 1998.

{Comment by MJH. Maybe this date should be September 1, 1999 rather than January 15, 1998 I must check to see when the terms of our two district court judges expire. If either of them expires Sept. 1, 1997, there would seem to a problem that would have to finessed. Could the District Judges Association Ex. Comm. appoint or reappoint a district court judge to begin a term commencing Sept. 1, 1997 and ending either Aug. 31, 1999 or Aug. 31, 2001 when he or she would be a circuit court judge on and after Jan. 15, 1998? Maybe so, since the members in

question would be district court judges when appointed. On the other hand, perhaps the only solution is the cumbersome one of asking the District Judges Association to make any necessary appointment(s) or reappointment(s) effective Sept. 1, 1997 until Jan. 15, 1998, and then ask the Circuit Judges Association to appoint both district court judges then serving as circuit court judge members for the unexpired balance of their terms. I cannot imagine that the Ex. Comm. of the Circuit Judges Association would not be amenable. But there must be a smoother, more elegant way to handle this, which I hope someone can think of. Maybe you will tell me I am seeing a problem where none exists.}

MEMORANDUM

April 3, 1996

TO: Maury Holland, Executive Director
Council on Court Procedures

FROM: Bruce C. Hamlin

RE: Special Findings to Support Attorney Fee Awards

FILE: 12685.88

During the last bienium, the Council voted 8 to 8[1] not to amend ORCP 68C(4)(c)(ii) so as to require findings of fact supporting an award of attorney fees. The specific language proposed at that time read:

> "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."**

Recently, in Long v. Oceanway Motors, Inc., 139 Or App 469, ___ P2d ___ (1996), the Court of Appeals reversed an award of attorney fees and remanded for findings as to frivolousness under ORS 646.638(3) (Unlawful Trade Practices Act). In doing so, the Court noted that such findings had previously been required by the Supreme Court for a claim for attorney fees based upon ORS 20.105(1), and by the Court of Appeals for a claim for attorney fees under former ORCP 17C. 139 Or App at 473.

In light of those rulings, it may be prudent to amend ORCP 68 to read:

> "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~~

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[1] Some members of the Council may have voted against the proposal on the ground that it may not have been properly tentatively adopted. See Minutes of December 10, 1994, p 2.

~~shall be necessary.~~] **The trial court shall make findings of fact and conclusions of law on awards of attorney fees made pursuant to ORCP 17D or ORS 20.105(1)."**[2]

In that way, judges and practitioners reading ORCP 68 would have the requirement of special findings called to their attention. This proposal would do no more than to codify existing case law.

[2] ORS 646.638(3) is not listed because an award of attorney fees in favor of a defendant is no longer conditioned on a finding of frivolousness. There are other statutes, including some amended by 1995 Or Laws, Chap 618, which condition an award on some determination by the court. It is unclear which of those statutes may be interpreted so as to require a finding of fact or conclusion of law.