***** NOTICE *****

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, May 11, 1996
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

AGENDA

1. Call to order (Mr. Gaylord)

2. Approval of April 13, 1996 minutes (Mr. Gaylord)

3. Consideration for possible adoption of revised Council Rules of Procedure (Attachment A to follow) (Mr. Hamlin)

4. Possible problem re ORCP 55 I (see Attachment B) (Prof. Holland)

5. Status report of committee to review ORCP 7 (see Attachment C) (Karsten Rasmussen)

6. Report of Committee to review ORCP 17 and 54 E (see Attachment B to 12-9-95 agenda) (Ms. Tauman)

7. Continuation of legislative review of 1995 session enactments affecting civil practice, but not amending ORCP (see Attachment B to 12-9-95 agenda) (Mr. Gaylord)

8. Election of Legislative Advisory Committee (LAC) (Mr. Gaylord)

9. Old business (Mr. Gaylord)

10. New business (Mr. Gaylord)

11. Adjournment (Mr. Gaylord)

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

Present: J. Michael Alexander, David V. Brewer, Sid Brockley, Diana L. Craine, Don A. Dickey, Stephen L. Gallagher, William A. Gaylord, Bruce C. Hamlin, Michael H. Marcus, John H. McMillan, David B. Paradis, Milo Pope, Karsten Rasmussen, Mancy S. Tauman

Excused: Patricia Crain, Mary J. Deits, Nely L. Johnson, Robert D. Durham

Absent: John E. Hart, Rodger J. Isaacson, Rudy R. Lachenmeier, 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. The Chairperson, Mr. Gaylord, called the meeting to order at 9:30 a.m.

Agenda Item 2: Approval of March 9, 1996 minutes. With two corrections on pages 5 and 8 as noted by Justice Durham in writing prior to the meeting, the minutes were unanimously approved as previously circulated. Corrected copies of the minutes were distributed at the meeting and placed in the Council files in lieu of the uncorrected minutes.

Agenda Item 3: Proposal from committee to draft rules regarding Legislative Advisory Committee ("LAC") (Mr. Alexander). Mr. Alexander invited the members' attention to Attachment A Supp. to the agenda of this meeting as distributed under cover of the Executive Director's memo dated 4-1-96, in particular to the "First Rule" as it appears on p. 4, and an "alternative rule" on p. 5, thereof. At the request of Mr. McMillan, Mr. Alexander briefly summarized the background of these alternatively proposed LAC rules, including the concern generally shared among members that the LAC should avoid being placed in a position, during the course of a legislative session, of speaking on behalf of the Council or giving the appearance of doing so. He then noted that, as stated in his covering letter of 3-29-96, the LAC

committee unanimously recommends adoption of the "First Rule" as set forth on p. 4 of Attachment A Supp. He stated that, in drafting the proposed First Rule, the committee had been guided by tracking each of the three distinct functions assigned to the LAC by HB 2228 (amending ORS 1.730), namely, giving legislators technical advice on matters affecting the ORCP, taking positions on issues of civil procedure purportedly on behalf of the Council, and giving testimony before committees of the legislature.

Mr. McMillan asked whether the LAC would have any sort of staff support in carrying out its functions, and also why the Council's public member was designated to be a member of the LAC. To the first question, Mr. Holland responded that, in past legislative sessions the Executive Director and Executive Assistant had provided staff support, and would do likewise in support of the LAC. To the second question, Mr. Holland responded that it had been his sense that the public member was included in order to give the LAC a kind of political legitimacy.

Judge Pope commented that he was skeptical whether legislators would pay any attention to the disclaimers in the proposed First Rule about the LAC's very limited authority to speak on behalf of the Council. Judge Marcus stated that this was true, but added that these disclaimers are nonetheless important because they will govern the relationship between the LAC and the Council. In response to a question of Judge Brewer to Mr. Rasmussen about how legislators might react to disclaimers or limitations on the LAC's authority, the latter stated that caution should be employed lest legislators gain an impression that the Council is too grudging about the assistance and support the legislature obviously expects to get from the LAC. Many members remarked that it was important that the Council preserve the integrity of its deliberative process.

Mr. Alexander, seconded by Ms. Craine, then moved adoption of the aforementioned First Rule. After brief discussion, this motion was agreed to by a vote of 10 in favor, 3 opposed and 1 abstention. Mr. Gaylord asked whether there was any need to publish the rule just adopted, in response to which there was general agreement that the statute requires that only tentatively adopted ORCP amendments be published.

Mr. Gaylord then asked Mr. Hamlin what he proposed to do about his draft of revised Council Rules of Procedure with the LAC rule incorporated. (See Attachment A to the agenda of this meeting.) Mr. Hamlin pointed out that the existing Rules of Procedure, adopted at the inception of the Council, are inconsistent with the statutory requirement that the Council's Chair be elected annually, but are consistent with the Council's

practice of electing other officers, together with the Chair, at the beginning of each biennium to serve until their successors are elected at the beginning of the next biennium. Judge Marcus stated that, in his view, the Rules of Procedure should be made consistent with the statutory requirement of annual election of Chairs. He then moved, seconded by Judge Brewer, that all gendered references in the current Rules of Procedure, such as to "Chairman," be revised to become gender neutral. This motion was unanimously agreed to by voice vote.

Mr. McMillan commented that the existing Rules of Procedure confer many functions on the Executive Committee that, from his observation, tend to be performed by the Chair and, in his view, should be. He raised the question whether the Executive Committee should continue to have the authority to employ staff. Mr. Gaylord stated that he believed that past Chairs had closely consulted with the Executive Committee concerning staff members, and that he favored continuing to do so. Discussion of this item concluded when Mr. Hamlin said that he would prepare a further revised, "clean" draft of a proposed set of Rules of Procedure for discussion and voting upon at the next Council meeting.

Mr. Gaylord then stated that he did not think much more time should be allowed to pass before members of the LAC are elected, or at least agreement is reached on the process by which they are chosen. After lengthy discussion, there was general agreement with Judge Brockley's suggestion that Mr. Gaylord, as Council Chair, present at the next meeting a slate of nominees for election to membership on the LAC. Mr. Gaylord said that he would undertake the consultations necessary to prepare a slate of nominees that would conform to the requirements of the statute.

Agenda Item 4: Report of committee to study and review ORCP 17 and 54 E (Ms. Tauman). Ms. Tauman stated that she had no report to make on behalf of this committee at this meeting, and asked that this item be deferred to a future meeting.

Agenda Item 5: Report of committee to review study and review ORCP 55 I (Ms. Craine). Ms. Craine stated that she had no report to make on behalf of this committee at this meeting, and asked that this item be deferred to a future meeting.

Agenda Item 6: Continuation of 1995 legislative session review (see Attachment B to 12-9-95 agenda) (Mr. Gaylord). Upon review of the 1995 legislative amendments to ORCP 57 D, 63 E, 69 B, 78 C, 79 E and 82 G, there was general agreement that each of these amendments merely conformed references to state officers or other statutes as required by other legislative changes, that all the conforming references were accurate, and hence that none of them presents any issue the Council need address. There was

general agreement with Mr. Hamlin's suggestion that the statutory amendments shown under "Other 1995 Legislation Affecting Civil Practice" in the aforementioned Attachment B be placed on the agenda of the next meeting. Prof. Holland mentioned that the statutory amendments included in the aforementioned Attachment B merely reflected his own best guess as to which among the many statutes enacted by the 1995 Legislative Assembly affecting civil practice might cause difficulties related to the ORCP. He therefore asked that any member believing that one or more other statutes might usefully be included in the Council's review bring them to his attention so that the text of such statutes could be distributed with the agenda of the next meeting.

Agenda Item 7: Amendments to ORCP 7, 9, 15 and 21 proposed by Executive Director for preliminary consideration (see Attachment B to agenda of this meeting) (Mr. Gaylord). Mr. Gaylord asked Mr. Holland to summarize these proposed amendments, following which there was general agreement that these proposed amendments did not warrant consideration. It was specifically noted by many members that the amendment proposed to ORCP 21 A might cause unfairness if a motion to dismiss for failure to state a claim were, suddenly and without prior notice, treated by the court as an ORCP 47 motion for summary judgment. After some further discussion, Mr. Holland withdrew these proposals.

Agenda Item 8: Old business (Mr. Gaylord). Mr. McMillan, seconded by Judge Brockley, moved approval of Mr. Hamlin's report (copy attached to the original of these minutes) regarding ORCP 47 C as amended by the 1995 Legislative Assembly, recommending no action by the Council on this amended section at this time. This motion was agreed to by unanimous voice vote.

Agenda Item 9: New business (Mr. Gaylord). Reference was made to Mr. Hamlin's 4-3-96 memo to Mr. Holland (copy attached to the original of these minutes) regarding the Court of Appeals decision in *Long v. Oceanway Motors, Inc.*, 139 Or App 469, _P2d_ (1996), reversing and remanding to the trial court for special findings in connection with an award of attorney fees. In this memo, Mr. Hamlin raised the question whether, in light of this decision, consideration should be given to amending ORCP 68 C(4)(c)(I) as follows [language to be added highlighted; language to be deleted by strikeout]:

> C(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. ~~No findings of fact or conclusions of law shall be necessary.~~ The trial court shall make findings of fact and conclusions of law on awards of attorney fees if requested by any interested party.

Mr. Hamlin recalled that the Council had declined to adopt this amendment when it was proposed during the 1993-95 biennium (it was voted upon but did not pass by a supermajority). He added that his suggestion was not that finding and conclusions be required upon request in all cases, but only in those cases where they have been required by decisions of appellate courts. A difference of opinion was expressed among members as to whether this suggestion should be placed on the agenda for future consideration. Mr. Gaylord stated that he was inclined to exercise the discretion of the Chair to place this matter on the agenda of some future meeting.

Mr. Gaylord then asked members whether they had any thoughts or suggestions relating to Mr. Holland's 4-3-96 memo to Susan Evans Grabe of the OSB (see copy attached to these minutes) relating to the status of district court judge membership on the Council after the abolition of the district courts, and to the possibility of districting the Council's practitioner-membership geographical distribution requirement by reference to bar regions as opposed to U.S. House districts. In response to this query, the following points were unanimously resolved: 1) Eight members of the Council should continue to be trial court judges and, if possible, matters should be arranged so that Judges Marcus and Hickey continue to serve on the Council despite their change of status to "judges in the circuit court" effective 1-15-98; 2) the geographical distribution requirement applicable to practitioner-members of the Council should continue to be defined with reference to U.S House districts because changing to bar regions would foster the misapprehension that the Council is a committee of the Oregon State Bar; 3) the relating clause of any bill on this subject should, if possible, avoid reference to the Council on Court Procedures, but should make such other reference as to the status of judgeships. Mr. Holland stated that he would promptly forward these resolutions to Ms. Grabe so that she and the Board of Governors would be informed of the views of the Council.

Agenda Item 10: Adjournment (Mr. Gaylord). On motion unanimously agreed to, Mr. Gaylord adjourned the meeting at 11:55 a.m.

Respectfully submitted,

Maury Holland
Executive Director

April 17, 1996

To: Susan Evans Grabe, OSB Public Affairs Attorney

From: Maury Holland, Executive Director, Council on Court Procedures

Re: Proposed OSB-Sponsored 1997 Session Legislation to Amend ORS 1.730

Ref: My memo to you dated April 4, 1996

At its April 13, 1996 meeting, the Council on Court Procedures discussed the above-referenced memo and attached proposed statutory amendments, specifically amendments needed to deal with the abolition of district court judgeships effective 1-15-98 and with the proposal to district practitioner-members of the Council by reference to bar regions as opposed to U. S. House districts. The Council unanimously adopted each of the following resolutions relating to those topics. Since these resolutions differ importantly from what was incorporated in my draft amendments to ORS 1.730, they are reported to you so that you and the Board of Governors might have the views of the Council in lieu of my own. The Council's resolutions were as follows:

1. The Council strongly believes it should continue to have 8 trial court judges as members, and that this number should be preserved even after the effective date of Or Laws 1995, ch. 658 abolishing district court judgeships as of Jan. 15, 1998. This could be accomplished, as suggested in my draft bill, by deleting ORS 1.730(1)(d) and amending 1.730(1)(c) to substitute "Eight" for "Six judges of the circuit court, ..."

Although the decision will be up to the Executive Committee of the Circuit Judges Association, not the Council, my clear sense at the April 13 meeting is that the Council's preference is that the two district court judges now serving as members continue to serve the balance of their terms in the new capacities they will acquire on Jan. 15, 1998. Judge Michael Marcus will be eligible for reappointment by the District Judges Association to a term to begin 9-1-96 and expiring 8-31-2000. Judge Don Dickey was appointed by the District Judges Association to his current term beginning 9-1-95 and expiring 8-31-99.

A highly technical problem might arise in the minds of some from the odd fact that, under the statute, Or Laws 1995, ch. 658, §3(3), the office conferred on Judges Marcus and Dickey effective 1-15-98 is referred to as "judge in the circuit court," not

"judge of the circuit court," which is the statutory title of circuit court judges. See ORS 3.041. I believe this was a consequence of the legislature's cumbersome effort to get around the fact that, under the Oregon Constitution, the only two ways one becomes a "judge of the circuit" court is by election or gubernatorial appointment. The statutes are not, in any event, consistent in styling the office held by existing circuit court judges. Thus in ORS 3.041 it is referred to as "judge of the circuit court," in 3.030 it is simply to "circuit judges," while in 3.011 it is to "circuit court judges."

In fact, casualness in the styling of judicial offices seems to be something of a tradition in Oregon. Thus, in the Oregon Constitution, the reference is to "judges" of the Supreme Court, as it is in ORS 2.010 ("The Supreme Court shall consist of seven judges"), although elsewhere in the statutes there are several references to someone whose title is "Chief Justice of the Supreme Court." Even the Oregon Reports have displayed this casualness. Thus, from volume 1 through volume 291 of the Oregon Reports, one member of the Supreme Court was referred to as "Chief Justice," while the others were dubbed "Associate Justices," even though no such office has ever existed in this state. Then, suddenly and without explanation, in November of 1964 the Oregon Reports shifted to the present styling of Supreme Court members, one "Chief Justice" and six plain old "Justices."

The point of all this, if there is any, is that I don't think there would be any practical problem if ORS 1.730(1)(c) is amended to read: "Eight judges of the circuit court, ..." Certainly, that seems better than the only obvious alternative, which would be to amend the provision to read: "Eight judges of or in the circuit court, ..." I cannot imagine the Executive Committee of the Circuit Judges Association taking the position that Judges Marcus' and Dickey's terms could not be extended because, on and after 1-15-98, they will be "[j]udges in the circuit court" as opposed to "judge[s] of the circuit court." After all, a rose by any other name, and so forth. Of course, Oregon being Oregon, someone might be found to bring an original proceeding of quo warranto in the Supreme Court. The hilarity that would produce, although perhaps not among the Justices, would almost make it worthwhile.

2. The Council recommends that, if it can be worked out with Legislative Counsel, the bill's relating clause avoid any reference to the Council on Court Procedures. George Reimer will know whether that is legally possible.

3. The Council strongly prefers that the geographical districting requirement applicable to practitioner members in ORS 1.730(1)(e) continue to be cast in terms of U.S. House districts

rather than bar regions. Two reasons were expressed for this preference. First, there being only five House districts, as opposed to six bar regions, staying with the former would mean that two practitioner-members could continue to be appointed without regard to geographical balance. Relatedly, if a seventh bar region were to be created, either the total number of practitioner-members would have to be increased to 14 or the balancing formula would have to be somehow adjusted. The second reason for this preference is that the Council should continue to be perceived as the quasi-legislative body it is, not as a bar committee, as which it sometimes is by legislators when resisting requests to fund the Council from the General Fund in the belief it should be financed out of bar dues.

cc: Chair and Members, Council on Court Procedures

Attachment B to Agenda of 5-11-96 Meeting

April 29, 1996

To: Chair and Members, Council on Court Procedures

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

Re: Possible Problems with ORCP 55 I as Added by 1995 Legislature

On April 26 I had a phone conversation with Eugene attorneys Jim Walsh and William Wiswall, by the conclusion of which I gained a better understanding of a possible "problem" with 55 I that had been mentioned to the Council by Rudy Lachenmeier two or three meetings ago. That problem appears to be that some attorneys, and perhaps some trial judges, are intrepreting 55 I as, of its own force, effecting a waiver of the physician-patient privilege.

I failed to understand how this could be so until Messrs. Walsh and Wiswall pointed out what should have apparent from my first glance at this new section, namely, that provided only that a copy of a subpoena for medical records is served on the patient, the health care recipient, or his or her attorney if there is one, at least 24 hours prior to its being served on the records custodian, then the service is "valid" Not suprisingly, "valid" is apparently being widely interpreted to mean that the records must be produced--what else could it mean?--regardless of whether any privilege has been actually waived by the patient.

The drafters of 55 I must have believed that a physician or health care facility being served with such a subpoena could properly presume waiver of the privilege from the mere fact that, 24 hours prior to service on him, her, or it, the patient or health care recipient had gotten notice of the subpoena by service of a true copy, and hence, theoretically, had an opportunity to assert any privilege. Realistically, 24 hours is not enough of a lead time from which fairly to infer waiver by failure to object. That is especially so in light of the fact that, under 55 I, if the patient or health care recipient has an attorney, the effective date of advance service would be the date of mailing of the copy of the subpoena to the attorney, who might not actually receive it until 3 or 4 days later, by which time service of the subpoena itself, and perhaps even compliance with it, might already have occurred. Given the possible breadth of medical records subpoenas, Messrs. Wiswall and Walsh believe that some serious privacy issues might well be posed by 55 I, over and above garden variety discovery problems.

In an earlier phone conversation I had with Mr. Tom Cooney, general counsel for the OMA, who had a substantial role in

getting 55 I enacted in the '95 session, he told me that it was no part of the purpose of 55 I to weaken or abridge the physician-patient privilege, or to create a new method of waiver. If anything, he said, 55 I was intended to give greater practical protection to the privilege. Mr.Cooley added that the problem to which 55 I was intended to respond was that of physicians being served with patient record subpoenas, sometimes under pressure to comply in far less time than the 14 days allowed, but with no assurance that the patient had, or was willing to, waive the privilege. This imposed on physicians the burden of trying to contact patients or their attorneys, to learn whether the privilege had already been waived in the course of litigation or, if not, whether the patient was willing to waive the privilege in response to the subpoena. The premise of this must have been that certification accompanying service of a patient records subpoena that a copy thereof of had been served at least 24 hours earlier on the patient or his or her attorney would, assuming no objection or protest by the time the subpoena is served, constitute a form of waiver of the privilege which physicians and other health care providers could rely upon.

I told Messrs. Wiswall and Walsh that I would bring this issue to the Council's attention as promptly as possible, because if the problem is as serious as they believe it to be, the Council should probably discuss as early as its May 11 meeting whether and how to proceed. As a matter of its technical authority, since 55 I would seem clearly to be a matter of "practice and procedure," the Council has the statutory power to deal with any problem it perceives by simply promulgating a curative amendment in its usual fashion, if it can reach agreement on what such an amendment should provide.

However, 55 I was enacted by the 1995 legislature, a circumstance that presumably warrants an extra measure of caution. The Council might therefore decide that the more prudent course, perhaps after some consultation with the Mr.Cooney, would be to recommend to the OSB that it seek enactment of legislation to fix whatever is wrong with 55 I. Proceeding in that manner would have the Council drafting an appropriate amendment to 55 I for forwarding to the OSB Procedure and Practice Committee, which would, assuming approval by that committee, then send it up the line for official approval by the Board of Governors. At this point I do not know, but will try to find out as soon as possible, whether perchance this matter has already been called to the attention of the Procedure and Practice Committee. I doubt whether this has happened, since if it had, I'd guess that committee would already have been in contact with the Council.

On the other hand, an alternative way to proceed might be to prepare a proposed amendment for forwarding directly to Sen. Neil Bryant, Chair of the Senate Judiciary Committee. As you might recall, Sen. Bryant invited the Council, by letter to Bill Gaylord, to send him proposed legislation it deems necessary to deal with any problems created by any 1995 session legislation

related to the ORCP so that, subject to his agreement with it of course, he could prefile an appropriate bill. This might be a good opportunity to illustrate to legislators the possible downside of their short-circuiting the Council when dealing with the ORCP, though without much hope that this would prompt them to swear off the practice.

cc: Ms. Susan Evans Grabe
Mr. Jim Walsh
Mr. William Wiswall

Proposed Amendments without Comments {N.B: This is an early, preliminary draft of some ORCP 7 proposed amendments that are being circulated among members of Judge Brewer's committee. They have not yet been approved by the full committee, and are distributed to Council members for the limited purpose of providing information and possibly obtaining some early feedback at the May 11, 1996 meeting.}

{Language to be added in bold underlined; to be deleted in strikeover}

1. We propose that **D(2)(d)** be amended as follows:

D(2)(d) Service by Mail. ~~Service by mail, w~~ **W**hen allowed by this rule **and except as otherwise provided in subparagraph (4)(a)(i) of this section, service by mail** shall be made by mailing a true copy of the summons and ~~a true copy of~~ the complaint to ~~the~~ defendant by certified or registered mail, return receipt requested~~.~~ **and,** ~~F~~**f**or the purpose of computing any period of time prescribed or allowed by these rules, ~~service by mail~~ shall be complete ~~three days after such mailing if the address to which it was mailed is within this state and seven days after mailing if the address to which it is mailed is outside this state.~~ **on the date on which defendant signs the receipt therefor.**

2. We propose that **D(3)(a)(i)** be amended as follows:

D(3)(a)(i) Generally. Upon an individual defendant, by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons. **Service may also be made upon an individual defendant to which neither subparagraph (ii) nor (iii) of this paragraph applies**

by mailing made in accordance with paragraph (2)(d) of this section.

3. We propose that present **D(4)(a)(i)** be deleted in its entirety and replaced by the following:

D(4)(a)(i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways and street of this state, if the plaintiff first seeks at least once to make service on a defendant by a method appropriate under subsection D(3) of this section and such service, as evidenced by the return thereof, cannot be completed, plaintiff may then attempt to make service on said defendant by mailing a true copy of the summons and the complaint by certified or registered mail, return receipt requested (delivery restricted to defendant), as follows: (A) to defendant at his or her residence address as provided by said defendant at the scene of the accident; (B) to defendant at any current residence address shown for said defendant in any records of the Department of Transportation information from which information is available to the plaintiff; (C) to defendant at any other address where plaintiff has reason to believe said defendant might be found, and; (D) by certified or registered mail, return receipt requested, to any liability insurer of defendant if its identity is known to plaintiff or can be ascertained from information available to plaintiff from records of the Department of Transportation, at said insurer's registered address as shown in said records or those of the Commissioner of Insurance. Service by mailing

pursuant to this subparagraph shall be complete on the earliest date on which defendant signs the return receipt for any mailing made pursuant to (A), (B) or (C) above or, if all of such mailings are returned to plaintiff as undeliverable, and provided either that receipt of the mailing made pursuant to (D) above is evidenced by a duly signed receipt therefor or plaintiff certifies lack of knowledge of the identity of defendant's insurer and inability to ascertain the same from information available to plaintiff from records of the Department of Transportation, three days after the latest of such mailings if to an address within this state or seven days after the latest of such mailings if to an address outside this state. When service is made pursuant to this subparagraph, proof of service shall include a return of service showing that service was first once unsuccessfully attempted in accordance with a method appropriate under subsection D(3) of this section; receipt for the mailing made pursuant to (D) above signed an agent of defendant's insurer duly authorized to accept service on its behalf, or certification by plaintiff of lack of knowledge of the identify of defendant's liability insurer and inability to ascertain the same from information available to plaintiff from records of the Department of Transportation, and; either a receipt signed by defendant acknowledging receipt of at least one of the mailings made pursuant to (A), (B) and (C) above, or true copies of the front of the envelope in which each such mailing was made showing its return as undeliverable. If the mailing otherwise required by (C) above is omitted because plaintiff

lacks reason to believe defendant is likely to be found at any address other than those specified in (A) and (B) above, the proof of service shall so certify.

4. We propose that the present **D(4)(a)(ii)** be amended as follows:

D(4)(a)(ii) ~~The~~ **When service is made pursuant to subparagraph (i) of this paragraph any** fee paid by ~~the~~ plaintiff to the Department of Transportation **to obtain address information concerning defendant or the identity and registered address of defendant's liability insurer to complete such service** shall be taxed as part of the costs if plaintiff prevails in the action. ~~The Department of Transportation shall keep a record of all such summonses which shall show the day of service.~~

5. We propose no amendments to **D(4)(b)**, and also propose that, if our suggested amendments to **D(4)(a)(i)** are adopted as drafted or in substance, **D(4)(c)** in its entirety be deleted.

6. We propose that **D(6)(c)** be amended as follows:

D(6)(c) Where Published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calender weeks. **If information available to plaintiff indicates defendant is likely to be found at a specific location other than the county where the action is commenced, that information shall be included in the affidavit required by paragraph (a) of this subsection, and the court may**

on the basis thereof order publication in a comparable manner at such location in addition to publication in said county.

7. We propose that 7 D(7) be amended as follows:

~~D(7)~~ **D(6)(g)** *Defendant Who Cannot Be Served.* A defendant cannot **within the meaning of this subsection** be served with summons by any method specified in subsection D(3) of this rule if the plaintiff attempted service of summons by all of the methods specified in subsection D(3) and was unable to complete service, or if the plaintiff ~~knew that~~ **shows by affidavit as required by paragraph D(6)(a) the basis for concluding** that service by such methods could not be accomplished.

8. We propose that 7 G be amended as follows:

G. Disregard of Error; Actual Notice. Failure to comply with provisions of this rule relating to the form of summons, issuance of summons, and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, or affidavit or certificate of service of summons, and shall disregard any error in the content of ~~or service of~~ summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

May 2, 1996

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

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

Re: Attachment A to Agenda of May 11, 1996 Meeting

Enclosed is Attachment A to the agenda of the May 11 meeting. It consists of Bruce Hamlin's draft of Council Rules of Procedure revised in light of comments at the April 13 meeting and to incorporate the LAC rules adopted at that meeting.

Attachment A to Agenda of 5-11-96 Meeti

DRAFT

COUNCIL ON COURT PROCEDURES

RULES OF PROCEDURES

The following are ~~suggested~~ Rules of Procedure ~~to be~~ adopted pursuant to ~~Section 2(1)(b), House Bill 2316~~ 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~~ Chair after any appropriate consultation with the Executive Committee. Special meetings of the Council may be called at any time by the ~~Chairman or~~ Chair after any appropriate 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 Chair from time to time.

II. OFFICERS, EXECUTIVE COMMITTEE, SUBCOMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a ~~Chairman,~~ Chair, Vice ~~Chairman~~ Chair, and Treasurer. These officers shall be elected for a period of ~~two years~~ one year at the first meeting of the Council following the

~~adjournment of a regular session of the legislature~~ October 1 of each year. It is the intent of the Council that each of the officers will be elected to two consecutive terms, and that the Vice Chair will succeed the Chair in office. The powers and duties of the officers shall be as follows:

1. ~~Chairman.~~ Chair. The ~~Chairman~~ Chair 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~~ Chair by the Council.

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

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the ~~Chairman~~ Chair and Vice ~~Chairman~~ Chair 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 Council meeting prior to such meeting and provide reasonable notice to Council members of such agenda.

C. Subcommittees. The ~~Executive Committee~~ Chair may appoint such subcommittees from Council membership as ~~it~~ the Chair 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").

1. Definitions. When used in this section, the phrase "LAC" means the committee selected pursuant to ORCP 1.760. The phrase "super majority" means the vote necessary to promulgate rules under ORS 1.730(2)(a) (last sentence).

2. Activities of LAC and LAC Members. 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 the 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 him or herself as a member of the Council, a member of the LAC, and expressly indicate that he or she is 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~~ Chair, 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, Chair, 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.

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 , 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 B to Agenda of 5-11-96 Meeting

April 29, 1996

To: Chair and Members, Council on Court Procedures

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

Re: Possible Problems with ORCP 55 I as Added by 1995 Legislature

On April 26 I had a phone conversation with Eugene attorneys Jim Walsh and William Wiswall, by the conclusion of which I gained a better understanding of a possible "problem" with 55 I that had been mentioned to the Council by Rudy Lachenmeier two or three meetings ago. That problem appears to be that some attorneys, and perhaps some trial judges, are intrepreting 55 I as, of its own force, effecting a waiver of the physician-patient privilege.

I failed to understand how this could be so until Messrs. Walsh and Wiswall pointed out what should have apparent from my first glance at this new section, namely, that provided only that a copy of a subpoena for medical records is served on the patient, the health care recipient, or his or her attorney if there is one, at least 24 hours prior to its being served on the records custodian, then the service is "valid" Not suprisingly, "valid" is apparently being widely interpreted to mean that the records must be produced--what else could it mean?--regardless of whether any privilege has been actually waived by the patient.

The drafters of 55 I must have believed that a physician or health care facility being served with such a subpoena could properly presume waiver of the privilege from the mere fact that, 24 hours prior to service on him, her, or it, the patient or health care recipient had gotten notice of the subpoena by service of a true copy, and hence, theoretically, had an opportunity to assert any privilege. Realistically, 24 hours is not enough of a lead time from which fairly to infer waiver by failure to object. That is especially so in light of the fact that, under 55 I, if the patient or health care recipient has an attorney, the effective date of advance service would be the date of mailing of the copy of the subpoena to the attorney, who might not actually receive it until 3 or 4 days later, by which time service of the subpoena itself, and perhaps even compliance with it, might already have occurred. Given the possible breadth of medical records subpoenas, Messrs. Wiswall and Walsh believe that some serious privacy issues might well be posed by 55 I, over and above garden variety discovery problems.

In an earlier phone conversation I had with Mr. Tom Cooney, general counsel for the OMA, who had a substantial role in

getting 55 I enacted in the '95 session, he told me that it was no part of the purpose of 55 I to weaken or abridge the physician-patient privilege, or to create a new method of waiver. If anything, he said, 55 I was intended to give greater practical protection to the privilege. Mr.Cooley added that the problem to which 55 I was intended to respond was that of physicians being served with patient record subpoenas, sometimes under pressure to comply in far less time than the 14 days allowed, but with no assurance that the patient had, or was willing to, waive the privilege. This imposed on physicians the burden of trying to contact patients or their attorneys, to learn whether the privilege had already been waived in the course of litigation or, if not, whether the patient was willing to waive the privilege in response to the subpoena. The premise of this must have been that certification accompanying service of a patient records subpoena that a copy thereof of had been served at least 24 hours earlier on the patient or his or her attorney would, assuming no objection or protest by the time the subpoena is served, constitute a form of waiver of the privilege which physicians and other health care providers could rely upon.

I told Messrs. Wiswall and Walsh that I would bring this issue to the Council's attention as promptly as possible, because if the problem is as serious as they believe it to be, the Council should probably discuss as early as its May 11 meeting whether and how to proceed. As a matter of its technical authority, since 55 I would seem clearly to be a matter of "practice and procedure," the Council has the statutory power to deal with any problem it perceives by simply promulgating a curative amendment in its usual fashion, if it can reach agreement on what such an amendment should provide.

However, 55 I was enacted by the 1995 legislature, a circumstance that presumably warrants an extra measure of caution. The Council might therefore decide that the more prudent course, perhaps after some consultation with the Mr.Cooney, would be to recommend to the OSB that it seek enactment of legislation to fix whatever is wrong with 55 I. Proceeding in that manner would have the Council drafting an appropriate amendment to 55 I for forwarding to the OSB Procedure and Practice Committee, which would, assuming approval by that committee, then send it up the line for official approval by the Board of Governors. At this point I do not know, but will try to find out as soon as possible, whether perchance this matter has already been called to the attention of the Procedure and Practice Committee. I doubt whether this has happened, since if it had, I'd guess that committee would already have been in contact with the Council.

On the other hand, an alternative way to proceed might be to prepare a proposed amendment for forwarding directly to Sen. Neil Bryant, Chair of the Senate Judiciary Committee. As you might recall, Sen. Bryant invited the Council, by letter to Bill Gaylord, to send him proposed legislation it deems necessary to deal with any problems created by any 1995 session legislation

related to the ORCP so that, subject to his agreement with it of course, he could prefile an appropriate bill. This might be a good opportunity to illustrate to legislators the possible downside of their short-circuiting the Council when dealing with the ORCP, though without much hope that this would prompt them to swear off the practice.

cc: Ms. Susan Evans Grabe
Mr. Jim Walsh
Mr. William Wiswall

May 2, 1996

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

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

RE: **SUPPLEMENTAL ATTACHMENTS TO AGENDA OF MAY 11, 1996 MEETING**

Please add the following enclosed materials as supplemental attachments to the previously distributed agenda for the May 11, 1996 meeting:

1. Attachment C Supp. pp. 1-2: Comments of Judge Brewer re Attachment C to agenda of 5-11-96 meeting as previously distributed.

2. Attachment C Supp. pp 3-6: Comments of Mr. Rasmussen re Attachment C to agenda of 5-11-96 meeting as previously distributed.

3. Attachment D: Memo by Mr. Hamlin dated 4-29-96 regarding possible amendment of ORCP 68 C(4)(c)(ii). At the discretion of the Chair, this would be taken up as an item of old business at the May 11 or subsequent meeting

Attachment C

TO: Maury Holland and Karsten Rasmussen 346-1564
FROM: Dave Brewer
RE: ORCP 7 Amendments

Dear Karsten and Maury:

I've reviewed what I understand to be the latest draft of proposed ORCP 7 amendments, and have several comments and questions:

D.(2)(d) -

1) At line 3, I'd suggest changing " ... by mailing a true copy ..." , to " ... by mailing true copies ..."

2) I wonder whether D (2) (d) is the subsection to which to add the last new clause ; i.e., "... on the date on which Defendant signs the receipt therefor." D (2) (d) applies to mailings in several different contexts, including for example D (2)(b), and D (6)(d). In those instances, one can easily envision successful mailing for which the defendant has not signed any receipt. I doubt that we want to constrict mailing under such subsections as this proposed change might do. I'd suggest leaving D(2)(d) alone altogether, apart from the other minor changes proposed, and covering the same objective through a change to D(3), discussed just below.

D (3) (a)(i) -

I like the idea suggested here, with the following trailer at the end :

" ... of the section (,) provided that the defendant signs the receipt therefor, in which case service shall be complete on the date on which the defendant signs such receipt. "

This formulation seems simpler to me, and hopefully doesn't otherwise unnecessarily restrict use of mail service in non-MVA settings.

D (4) (a)(i) -

I have several comments here:

1) p. 4, line 2 - I question the desirability of restricting delivery to defendant.

2) p. 4, line 5 - the word "information" seems redundant.

3) p. 4, line 6, et seq. - I personally prefer the existing usage of an address known to plaintiff. Otherwise, we invite further , perhaps inefficient inquiry into what objective, and/or subjective "reason to believe" may have existed.

4) It seems to me that insurers don't need to be served as though they were parties. They aren't, and the existing formulation of the rule gives them a sufficient protection against unnoticed defaults. I question why we need to make service on a non-party a service requirement. It opens

any number of cans of worms, including standing to make a Rule 21 motion, and the philosophical question why a case might be dismissed for defects in service when the defendant gets actual notice but the carrier doesn't.

5) I would suggest that service be deemed complete as provided in the last sentence of the existing version of D (4) (a)(i). It's much simpler, and I'm not clear on what justification exists for the more complicated test consuming the entire last half of p. 4.

6) For reasons mentioned above, I would delete lines 3 - 7 (ending with the word "Transportation").

7) I would change the last sentence on p. 5 to resurrect the "knowledge" standard, vs. "reason to believe".

8) Do we really want to eliminate DOT service? Just a question.

D(7) -

Should we amend to make clear that the defendant who cannot be served concept is now limited to publication? Maybe it should be merged into D (6).

I look forward to your reactions.

Sincerely,

Dave

Attachment C

LAW OFFICES OF
RASMUSSEN, TYLER & MUNDORFF
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Eugene, Oregon 97401-2138

Karsten H. Rasmussen
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MAURY HOLLAND
UNIVERSITY SCHOOL OF LAW
(FAX 346-1564)

Re: ORCP 7

Dear Maury:

Attached please find my proposed language for changes to ORCP 7. I have done my version in final form, ie not showing the changes. I hope this is not too inconvenient.

You will note that I have proposed going back to the original language of D(2)(d) in service by mail in which service is deemed complete by mail three days after the necessary mailings. I have added a version of your language regarding Defendant's signature of a receipt for that mail.

My objection to eliminating the three day rule is that it leaves entirely in the power of the Defendant to determine whether or not he will be served by simply refusing to sign a receipt for mail. In fact, I had that very thing happen in my office last week.

In D(3)(a)(i) I like your additional proposed language and I add to that as well.

In D(4)(a)(i) I have made substantial changes eliminating such language as "may be involved while" and "attempt to" and I have also eliminated the requirement of service on the liability insurer for the Defendant since I think this will, in fact, cause more problems than it will solve. By way of example, it would be possible for the Plaintiff to have actually served under this rule and have complied with the rule in its entirety, with the exception of serving the motor vehicle liability insurer, and for service to then be imperfect because of this failure of service of a non party.

I recognize that the idea of including the liability carrier in some form has merit. I look forward to further discussion on this with you.

My changes to D(4)(a)(i) probably will necessitate a second look at D(4)(a)(ii).

Lastly, my only other comment is on D(6)(c). I suggest that the language "if information available to Plaintiff . . ." be replaced with "if Plaintiff has information which . . ." The purpose of this change is to eliminate any question about the reasonability of Plaintiff's actions in determining whether Defendant was at some specific location other than the county where the action was commenced. Your proposed language "information available to Plaintiff" could

Portland Office: 1600 S.W. Fourth Avenue, Suite 650 Portland, Oregon, 97201-5518; Fax 503-796-1009; Tel 503-223-8101

give rise to a question as to whether some information was "available" to Plaintiff but was not found or used by Plaintiff.

I look forward to hearing back from you with respect to these proposals.

Very truly yours,

RASMUSSEN, TYLER & MUNDORFF

Karsten

Karsten H. Rasmussen

KHR:sld

D(2)(d) Service by Mail. When required or allowed by this rule or by statute, service by mail shall be made by mailing true copies of the summons and complaint to defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service by mail shall be complete three days after such mailing if the address to which it was mailed is within this state and seven days after mailing if the address to which it is mailed is outside this state but in no event later than the date on which defendant signs a receipt therefor.

D(3)(a)(i) Generally. Upon an individual defendant, by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot by found at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons. **Service may also be made upon an individual defendant to which neither subparagraph (ii) nor (iii) of this paragraph applies by mailing made in accordance with paragraph (2)(d) of this section, provided that the defendant signs the receipt therefor, in which case service shall be complete on the date on which the defendant signs such receipt.**

D(4)(a)(i) In any action arising out of any accident, collision, or liability involving a motor vehicle being operated upon the roads, highways and streets of this state, if the plaintiff first

seeks at least once to make service on a defendant by a method appropriate under subsection D(3) of this section and such service, as evidenced by the return thereof, cannot by completed, plaintiff may then make service on said defendant by mailing a true copy of the summons and the complaint by certified or registered mail, return receipt requested as follows:

(A) to defendant at his or her residence address as provided by said defendant at the scene of the accident; (B) to defendant at any current residence address shown for said defendant in any records of the Department of Transportation information from which information is available to the plaintiff; and (C) to defendant at any other address known to plaintiff where defendant might be found. Service by mailing pursuant to this subparagraph shall be complete as provided under subsection D(2)(d) of this section. When service is made pursuant to this subparagraph, proof of service shall include a return of service showing that service was first once unsuccessfully attempted in accordance with a method appropriate under subsection D(3) of this section; and either a receipt signed by defendant acknowledging receipt of at least one of the mailings made pursuant to (A), (B) and (C) above, or, if no acknowlegement is received, true copies of the front of the envelope in which each such mailing was made showing its return. If the mailing otherwise required by (C) above is omitted because plaintiff lacks reason to believe defendant is likely to be found at any address other than those specified in (A) and (B) above, the proof of service shall so certify.

Attachment D

MEMORANDUM

April 29, 1996

TO: Chair and Members, Council on Court Procedures

FROM: Bruce C. Hamlin

RE: Special Findings to Support Attorney Fee Awards

FILE: 12685.88

I propose that ORCP 68C(4)(c)(ii) be amended as follows:

> "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 except as otherwise required by law."

I also suggest the following Staff Comment:

> "Several recent cases have required findings for purposes of appellate review. See, e.g., Mattiza v. Foster, 311 Or 1, 10, 803 P2d 723 (1990); Long v. Oceanway Motors Inc., 139 Or App 469, 473, ___ P2d ___ (1996). Such findings should be in the form and have the content required by that other law. See, e.g., ORCP 17D (5)."

This proposal more narrowly accomplishes the purpose of codifying existing case law addressed in my memo of April 3, 1996 (copy attached).

Attachment D

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.

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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.