July 15, 1995

TO: Chair and Members, Council on Court Procedures

FROM: Maury Holland, Executive Director

RE: Legislative Summary et cetera

1. First Meeting of 1995-97 Biennium. John Hart has decided that the Council's first meeting of the new biennium will be October 7, 1995, beginning at 9:30 a.m. at the Bar Center. Adhering to the earlier thought of holding this meeting in conjunction with the OSB Annual Meeting, specifically on the Saturday morning of that meeting, would have presented some problems, such as conflicting with the MCLE ethics program early that morning and with the business meeting later on. Naturally, an agenda will be distributed prior to the October 7 meeting.

2. Appointments and Reappointments to the Council. I am pleased to report that the Executive Committee of the Circuit Judges Association has reappointed Judge Stephen L. Gallagher, Jr., to a full, four-year term, and has appointed Judges David V. Brewer and Rodger J. Isaacson to initial four-year terms. We have not yet received word from the Executive Committee of the District Judges Association concerning the appointment or reappointment it is entitled to make, nor from the OSB concerning the practitioner appointments or reappointments to be made this summer by the Board of Governors.

3. Piece in *For the Record* 6/95 re Council. In case you missed it, I enclose a copy of a short piece that appeared in the June '95 issue of *For the Record*, which strongly suggested that the Council was "missing in action" during the recent legislative session. I was a bit disappointed to see this item, the more so because it appeared in an issue otherwise given over to effusive praise for all sorts of other organizations and individuals for the wonderful assistance they were reported to have rendered to the 1995 Legislative Assembly. The piece made no mention of the considerable time and effort devoted by John Hart, Mick Alexander and myself to working with committee members and staff in an effort to limit any damage to the ORCP that might have been done by "tort reform," or of the fact that many, though concededly not all, the groups and individuals singled out for praise elsewhere in this issue were eagerly lobbying in their own interests or

those of clients. Well, I suppose this is just part of what's meant by life in the fast lane.

Despite whatever annoyance I might feel, and you might or might not share, there seems no doubt but that the predominant viewpoint among legislators and many elements within the OSB, who have been and remain highly supportive of the Council, is that the latter must change its ways and come to terms with what Bob Oleson has called "the term limits mentality" so evident during this session and perhaps those to follow. In any event, the debate about whether the Council should get directly involved in legislative sessions, and if so how, appears to have been resolved -- see paragraph 4 a below. There will be ample time, during the coming biennium, for the Council to gear up and prepare for its active participation in the 1997 session.

4 a. 1995 Legislation Affecting the Council or the ORCP.

HB 2228, Section 8. Amends the Council's organic statute, ORS 1.725 et seq., by adding the following sections:*

> (1) The Council on Court Procedures shall elect five persons from among its members to serve as a legislative advisory committee. Two members of the committee shall be judges. Two members shall be members of the Oregon State Bar who are not judges. One member shall be the public member designated under ORS 1.730(1)(f). The committee shall elect one of its members to serve as chairperson of the committee.
>
> (2) Upon the request of the chairperson of a legislative committee considering legislation that proposes changes to the Oregon Rules of Civil Procedure, the legislative advisory committee established under this section shall provide technical analysis and advice to the legislative committee. Analysis and advice shall be by a majority vote of the legislative advisory committee. The committee shall consult with and consider comments from the full Council on Court Procedures to the extent possible. Analysis and advice under this subsection must be provided within 10 days after the request from the chairperson of a legislative committee.
>
> (3) The legislative advisory committee established under this section may vote to take a position on behalf of the Council on Court Procedures on proposed legislation. If the legislative advisory committee has voted to take a position on behalf of the council, the committee shall so indicate to the legislative committee.

(4) Members of the legislative advisory committee established under this section may meet by telephone and may vote by telephone. Meetings of the committee are not subject to ORS 192.610 to 192.690.

(5) Members of the legislative advisory committee established under this section may appear before legislative committees for the purpose of testifying on legislation that proposes changes to the Oregon Rules of Civil Procedure.

*{Note: This engrossed bill does not specify how the above sections are to be distributed or organized within the existing organic statute. I suppose this is a matter left to the Legislative Counsel.}

4 b. ORCP Amendments

ORCP 1 A. C-Eng. HB 2625, Sec. 117 amends this section by deleting all references to "district courts." Section 150 of this act provides that sections "1 to 128" become "operative January 15, 1998."

ORCP 4 J. SB 851, Sec. 401 substitutes "Director of the Department of Consumer and Business Services" for "Corporation Commissioner."

ORCP 4 K(3). B-Eng. SB 213, Sec. 40 substitutes reference to "ORS 110.300 to 110.441" for reference to "ORS 110.005 to 110.291."

ORCP 7 D. SB 851, Sec. 402 substitutes "Secretary of State" for "Corporation Commissioner," and "Department of Transportation" for "Administrator of the Motor Vehicles DivIsion" throughout. Also substitutes references to "subsection D(3)" for references to "subsection 7 D(3)" throughout.

B-Eng. SB 61, Sec. 99 amends subparagraph D(3)(a)(iii) as follows {additions in bold; deletions in strikeout}:

> Upon ~~an~~ **a person who is** incapacitated **or financially incapable,** ~~person~~ as defined by ~~ORS 126.003(4)~~ **section 1 of this 1995 Act,** by service in the manner specified in subparagraph (I) of this paragraph upon such person, and also upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B(2).

ORCP 17. Sec. 4 amends this rule as follows:

A. Signing by party or attorney; certificate. Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member of the Oregon State Bar. A party who is not represented by an attorney shall sign the pleading, motion or other paper and state the address of the party. Pleadings need not be verified or accompanied by affidavit. ~~The signature constitutes a certificate that the person has read the pleading, motion or other paper, that to the best of the knowledge, information and belief of the person formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.~~

B. Pleadings, motions and other papers not signed. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

~~C. Sanctions. If a pleading, motion or other paper is signed in violation of this rule, the court upon motion or upon its own initiative shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee.~~

C. Certification to court.

C(1) An attorney or party who signs, files or otherwise submits an argument in support of a pleading, motion or other paper makes the certifications to the court identified in subsections (2) to (5) of this section, and further certifies that the certifications are based on the person's reasonable knowledge, information and belief, formed after the making of such inquiry as is reasonable under the circumstances.

C(2) A party or attorney certifies that the pleading, motion or other paper is not being presented for any improper purpose, such as to harass or to cause

unnecessary delay or needless increase in the cost of litigation.

C(3) An attorney certifies that the claims, defenses, and other legal positions taken in the pleading, motion or other paper are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law.

C(4) A party or attorney certifies that the allegations and other factual assertions in the pleading, motion or other paper are supported by evidence. Any allegation or other factual assertion that the party or attorney does not wish to certify to be supported by evidence must be specifically identified. The attorney or party certifies that the attorney or party believes that a denial of a factual assertion so identified is reasonably based on a lack of information or belief.

C(5) The party or attorney certifies that any denials of factual assertion [sic] are supported by evidence. Any denial of factual assertion [sic] that the party or attorney does not wish to certify to be supported by evidence must be specifically identified. The attorney or party certifies that the attorney or party believes that a denial of a factual assertion so identified is reasonably based on a lack of information or belief.

D. Sanctions.

D(1) The court may impose sanctions against a person or party who is found to have made a false certification under section C of this rule, or who is found to be responsible for a false certification under section C of this rule. A sanction may be imposed under this section only after notice and an opportunity to be heard are provided to the party or attorney. A law firm is jointly liable for any sanction imposed against a partner, associate or employee of the firm, unless the court determines that joint liability would be unjust under the circumstances.

D(2) Sanctions may be imposed under this section upon motion of a party or upon the court's own motion. If the court seeks to impose sanctions on its own motion, the court shall direct the party or attorney to appear before the court and show cause why the sanctions should not be imposed. The court may not issue an order to appear and show cause under this

subsection at any time after the filing of a voluntary dismissal, compromise or settlement of the action with respect to the party against whom sanctions are sought to be imposed.

D(3) A motion by a party to the proceeding for imposition of sanctions under this section must be made separately from other motions and pleading, and must describe with specificity the alleged false certification. A motion for imposition of sanctions based on a false certification under subsection C(4) of this rule may not be filed until 120 days after the filing of a complaint if the alleged false certification is an allegation or other factual assertion in a complaint filed within 60 days of the running of the statute of limitations for a claim made in the complaint. Sanctions may not be imposed against a party until least 21 days after the party is served with the motion in the manner provided by Rule 9. Notwithstanding any other provision of this section, the court may not impose sanctions against a party if, within 21 days after the motion is served on the party, the party amends or otherwise withdraws the pleading, motion, paper or argument in a manner that corrects the false certification specified in the motion. If the party does not amend or otherwise withdraw the pleading, motion, paper or argument but thereafter prevails on the motion, the court may order the moving party to pay to the prevailing party reasonable attorney fees incurred by the prevailing party by reason of the motion for sanctions.

D(4) Sanctions under this section must be limited to amounts sufficient to reimburse the moving party for attorney fees and other expenses incurred by reason of the false certification, including reasonable attorney fees and expenses incurred by reason of the motion for sanctions, and amounts sufficient to deter future false certification by the party or attorney and by other parties and attorneys. The sanction may include monetary penalties payable to the court. The sanction must include an order requiring payment of reasonable attorney fees and expenses incurred by the moving party by reason of the false certification.

D(5) An order imposing sanctions under this section must specifically describe the false certification and the grounds for determining that the certification was false. The order must explain the grounds for the imposition of the specific sanction that is ordered.

E. Rule not applicable to discovery. This rule does not apply to any motion, pleading or conduct that is subject to sanction under Rule 46.

Section 140(2) of this act provides that section 4 applies "to all actions, whether commenced before, on or after the effective date of this Act."

ORCP 27 B. SB 851, Sec. 403 substitutes reference to "ORS 126.003" for reference to "ORS 126.003(4)."
B-Eng. SB 61, Sec. 100 amends section 27 B as follows:

B. Appearance of incapacitated person by conservator or guardian. When ~~an incapacitated person as defined by ORS 126.003(4),~~ **a person who is incapacitated or financially incapable, as defined in section 1 of this 1995 Act,** who has a conservator of such person's estate or a guardian, is a party to any action, the ~~incapacitated~~ person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. If the ~~incapacitated~~ person does not have a conservator of such person's estate or a guardian, the ~~incapacitated~~ person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B(1) When the ~~incapacitated~~ person **who is incapacitated or financially incapable, as defined in section 1 of this 1995 Act,** is plaintiff, upon application of a relative or friend of the ~~incapacitated~~ person.

B(2) When the ~~incapacitated~~ person is defendant, upon application of a relative or friend of the ~~incapacitated~~ person filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summon, or if the application is not so filed, upon application of any party other than the ~~incapacitated~~ person.

ORCP 47 C. C-Eng. SB 385, Sec. 5 amends this section as follows:

C. Motion and proceeding thereon. The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The

moving party shall have five days to reply. The court shall have discretion to modify these stated times. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the movingparty is entitled to judgment as a matter of law. **No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.** A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Section 140(2) of this act provides that section 5 shall "apply to all actions, whether commenced before, on or after the effective date of this Act."

ORCP 54. C-Eng. SB 385, Section 1 amends this rule by amending sections D and E, and by adding a new section F, as follows:

D. Costs of previously dismissed action.

D(1) If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of any unpaid judgment for costs and disbursements against plaintiff in the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

D(2) If a party who previously asserted a claim, counterclaim, cross-claim or third-party claim that was dismissed with prejudice subsequently makes the same claim, counterclaim, cross-claim or third-party claim against the same party, the court shall enter a judgment dismissing the claim, counterclaim, cross-claim or third-party claim and may enter a judgment requiring the payment of reasonable attorney fees incurred by the party in obtaining the dismissal.

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be

given against the party making the offer for the sum, or the property, or the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, **prevailing party fees,** disbursements, ~~and~~ **or** attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, **not including prevailing party fees,** from the time of the service of the offer.

F. Settlement conferences. A settlement conference may be ordered by the court at any time at the request of any party or upon the court's own motion. Unless otherwise stipulated to by the parties, a judge other than the judge who will preside at trial shall conduct the settlement conference.

Section 140(2) of this act provides that section 1 applies "to all actions, whether commenced before, on or after the effective date of this Act."

ORCP 55. A-Eng. SB 597, Sec. 1 amends Rule 55 as amended by CCP by amendments promulgated Dec. 10, 1994, by addition of new section I as follows:

I. Medical Records.

I(1) Service on patient or health care recipient required. Except as provided in subsection (3) of this section, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is not valid unless proof of service of a copy of the subpoena on the patient or health care recipient, or upon the attorney for the patient or health care recipient, made in the same manner as proof of service of a summons, is attached to the subpoena

served on the custodian or other keeper of medical records.

I(2) Manner of service. If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient at least 24 hours before the subpoena is served on a custodian or other keeper of medical records. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by ORCP 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient at least 24 hours before the subpoena is served on the custodian or other keeper of medical records. Service on a patient or health care recipient under this section must be made in the manner specified by ORCP 7 D(3)(a) for service on individuals.

I(3) Affidavit of Service. If a true copy of a subpoena duces tecum for medical records of a patient or health care recipient cannot be served on the patient or health care recipient in the manner required by subsection (2) of this section, and the patient or health care recipient is not represented by counsel, a subpoena duces tecum for medical records is valid if the attorney for the person serving the subpoena attaches to the subpoena the affidavit of the attorney attesting to the following: (a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served; (b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and (c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

I(4) Application. The requirements of this section apply only to subpoenas duces tecum for patient care and health care records kept by a licensed, registered or certified health practitioner as described in ORS 18.550, a health care service contractor as defined in ORS 750.005, a home health agency licensed under ORS chapter 443 or a hospice program licensed, certified or accredited under ORS chapter 443.

Section 2 of this act provides that the amendment contained in section 1 is applicable only to subpoenas served on or after the effective date of the act.

ORCP 55 D. SB 851, Sec. 404 "clarifies structure" of this subsection by substituting "(D)4" [sic] for "D(3)(d)" and "D5" [sic] for "D(4)." The substituted designations are of course erroneous in form, and I shall contact the Legislative Counsel to see whether they can be corrected before they are officially published. This is on the assumption that the legislature does not enact parentheses or the absence of them. Also, a catch line has been added to newly designated D4 that reads as follows: "**(D)4 Service by mail; exception.**" More importantly, the text following this newly designated subsection D4 reads as follows: "Service of subpoena by mail may not be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition." This, of course, is how the present 55 D(3)(d) reads, but this legislative language would repeal the amendment to 55 D(3)(d) promulgated by the Council at its 12/10/94 meeting by restoring the "not" deleted by the Council. As I recall, this deletion was not only agreed to by the Council on the recommendation of its own Rule 55 subcommittee, but this was also recommended by the OSB Procedure & Practice Committee.

There are two possibilities here. The first, which I think unlikely, is that the legislature actually intended to disapprove the Council's amendment and to restore the "not." This seems unlikely because the "not" does not appear in bold print, and because with the fairly close working relation John Hart, Mick Alexander, and I established with the Senate Judiciary Committee this session concerning other ORCP matters, I'd have thought something would have been said to one of us. The second, more likely possibility, is that this legislative language appears as it does simply because it reflects the current language of D(3)(d), wherein the "not" would not disappear until the Council's amendment becomes effective January 1, 1996. I'll check with the Legislative Counsel to confirm that there was no legislative intent to disapprove the Council's amendment and, assuming this is the case, try to make sure that, when the official text of the provision is published, the final product does not make it appear that our amendment was trashed.

ORCP 57 D(1)(g). A-Eng. SB 868, Sec. 1 amends this paragraph as follows:

> D(1) (g) ~~Actual bias, which is the existence of a state of mind on the part of the juror, in reference to the action, or to either party, which satisfies the court, in the exercise of a sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party~~

~~challenging.~~ **Actual bias on the part of a juror. Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: (I) the action; (ii) either party to the action; (iii) the sex of the party, the party's attorney, a victim or a witness; or (iv) a racial or ethnic group that the party, the party's attorney, a victim or a witness is a member of, or is perceived to be a member of.** A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

Section 2 of this act provides that section 1 applies only to jurors sworn on or after its effective date. Note that, since this amendment relates to paragraph, it should not add a catch line.

ORCP 57 D. A-Eng. SB 869, Sec. 1 amends this section by amending subsection D(3) and by adding a new subsection D(4) as follows:

D(3) Conduct of peremptory challenges. After the full number of jurors have been passed for cause, peremptory challenges shall be conducted **by written ballot or outside the presence of the jury** as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the order of alternation shall not defeat the adverse party of such adverse party's full number of challenges, and such refusal by a party to exercise a challenge in proper turn shall conclude that party as to the jurors once accepted by that party, and if that party's right of peremptory challenge be not exhausted, that party's further challenges shall be confined, in that party's

proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted, but nothing in this subsection shall be construed to increase the number of peremptory challenges allowed.

D(4) Challenge of peremptory challenge exercised on the basis of race, ethnicity or sex.

D(4)(a) A party may not exercise a peremptory challenge on the basis of race, ethnicity or sex. Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.

D(4)(b) If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph (a) of this subsection, the party may object to the exercise of the challenge. The objection must be made before the court excuses the juror. The objection must be made outside the presence of potential jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the potential juror on the basis of race, ethnicity or sex.

D(4)(c) If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity or sex. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not violate paragraph (a) of this subsection is rebutted.

D(4)(d) If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity or sex, the court shall disallow the peremptory challenge.

Section 3 of this act provides that the above amendment applies only to jurors sworn on or after its effective date.

ORCP 63 E. SB 851, Sec. 405 corrects "noticer" to read "notice" in the second-to-last line in this section. This typo appears only in the official version of the ORCP, not those published by Butterworth or West.

ORCP 69 B. SB 851, Sec.406 substitutes references to "ORS 126.003" for references to "ORS 126.003(4)" throughout.

ORCP 78 C. B-Eng. SB 213, Sec. 41 substitutes reference to "ORS 110.330 to 110.441" for reference to "ORS 110.005 to 110.291."

ORCP 79 E(1). B-Eng. SB 493, Sec. 27 adds: "or sections 2 to 9 of this 1995 Act" at end of sentence.

ORCP 82 G(2). SB 851, Sec. 407 substitutes "Director of the Department of Consumer and Business Services" for "Insurance Commissioner."

cc: Hon. David V. Brewer
Hon. Rodger J. Isaacson

Committee missed council's input

FOR THE RECORD 6/95

Judiciary committee leaders were disappointed that the Council on Court Procedures was not more involved with civil rule changes this legislative session. Late session amendments to HB 2228 are, in part, a response to the council's reluctance to participate and are intended to allow the council to play a more active role in the legislative process. Language was added to the council's enabling statute to address concerns raised by council members that such activity would not be allowed by existing statute.

The new language limits this advisory committee role to periods when the Legislature is in session. Some members of the council objected to the legislature's grant of "super power" to an advisory committee which purports to speak or act on behalf of the full council. One council member raised concerns that legislative sessions are inherently political and that the continued ability of the council to perform its special deliberative role is best served by having it remain detached from the legislative process. However, most insiders would argue that increased session participation is the only way for the council to become a relevant "player" on major civil procedure issues and to maintain the option of affecting important changes. During this era of rapid change the council will not always have the luxury of a long timeline (up to two years) for making recommendations and giving advice.

January 16, 1996

To: Chair and Members, Council on Court Procedures

From: Maury Holland, Executive Director Maury

Re: Two Information Items

1. To remind those present at the Jan. 13 meeting and inform those who were not, Bill Gaylord decided, with the concurrence of members present, to cancel the Council meeting scheduled for Saturday, February 10, 1996. This was decided in order to give the various subcommittees now at work on their respective projects time to make more progress before the Council meets again. **Thus, the next Council meeting will be on the scheduled date, Saturday, March 9, 1996.** ← NOTE

2. Toward the end of the Jan. 13 meeting Bill Gaylord asked me to remind everyone of the work schedule the Council must maintain if any ORCP amendments it finally promulgates at the end of the current biennial cycle are to be ready for final votes on promulgation at the Dec. 14 '96 meeting. The response I gave--something like "a year from this October"--was seriously in error, probably because I did not think in terms of our being as close to the 97 legislative session as we are. A 1993 amendment to ORS 1.735(2) requires that the exact texts of any ORCP amendments promulgation of which will be finally and officially voted upon at the December meeting preceding the opening of a legislative session be "published or distributed to every member of the bar" no less than 30 days prior to the date of that meeting. The means by which the Council has accomplished this required publication is publication in the monthly judicial advance sheets. The publication date of the November advance sheets will be too late to meet this requirement unless a decision were made to move the date of the December meeting back from Dec. 14 to Dec. 21, which I assume would not be popular. In order to meet the submission deadline for the advance sheets issue dated Oct. 21 and mailed about Oct. 17, the exact texts of ORCP amendments to be voted upon at the December meeting must reach OJD publications not much later than Oct. 1. As a practical matter, then, the last meeting when amendments currently in the works can be voted upon for tentative adoption, or further revised and polished, is the one scheduled for Sept. 14. The only choices the Council will have at the December meeting will be either to promulgate any amendments as previously published in the October advance sheets, or not to promulgate any one or more of them. The latter would presumably happen only if some members who had previously voted tentatively to adopt one or more amendments subsequently changed their minds prior to the December meeting, as happened a few years ago, or if serious drafting defects became apparent only after the September meeting. An unfortunate effect of the 1993 amendment to 1.735(2), which was unavailingly pointed out to the legislature that enacted it, is to reduce the number of the Council's working meetings in any biennial cycle by either two or three, depending upon whether there are 30 or more days between the issue date of the November advance sheets and the date of the December formal voting meeting

I apologize for the bum dope given at the Jan. 13 meeting, which I am writing to rectify as

promptly as possible. Even with the Council's remaining work schedule accurately in mind, I believe the decision to skip the February meeting was a sensible one. That is because, at this stage of the cycle, progress is probably most efficiently made at the subcommittee level. In that connection, subcommittee members should have in mind that Gilma and I remain available at any time to provide whatever support or assistance as might lighten your labors.

DISTRICT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
1021 SOUTHWEST FOURTH AVENUE
PORTLAND, OREGON 97204

DEPARTMENT NUMBER 12
(503) 248-3250

MICHAEL H. MARCUS
JUDGE

J. Michael Alexander
Attorney at Law
388 State Street
Suite 1000
Sale OR 97301-3571

March 4, 1996

Re: Council on Court Procedures, LAC Rules

Dear Mick:

I've followed the correspondence, and agree that your letter of January 23, 1996, seems to perfect the draft. The only suggestion I might offer (and I apologize for delay in getting it to you) is that "express" rather than "specific" more precisely captures the sort of disclaimer we want to require. In the first rule,

> absent approval the LAC "shall offer any techincal analysis with the ~~specific~~ **express** disclaimer that such technical analysis and advice does not represent the opinion of the council on court procedures"

I'm not sure "specifically" is even necessary in the second proposed rule - a position is either approved or it is not. Perhaps the point is "formally approved" as opposed to approved inferentially or informally.

In the third rule, "specifically indicate that he is expressly not authorized to speak on behalf of the council" is probably improved by "expressly indicate that he is not authorized to speak on behalf of the council."

Sincerely,

Michael H. Marcus

cc: Maury Holland, Marianne Bottini, Diana L. Craine, John Hart

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 2216~~ 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."

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.

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.

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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.

Memorandum

To: **Chair and Members, Council on Court Procedures**

From: Bruce C. Hamlin

Date: April 13, 1996

Subject: Legislative amendment to ORCP 47C

During the March 9, 1996 meeting, the Council identified the amendment to ORCP 47C as one of the actions taken by the 1995 Legislature which warranted further review. After examining ORCP 47C (amended) in light of Jones v. General Motors Corp., 139 Or App 244 (1996), I do not recommend that the Council consider any refinement to the rule.

The 1995 Legislature enacted SB 385, part of which amended ORCP 47C by adding the following underlined language:

> "The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." 1995 Or Laws, ch 618, § 5.

There is discussion in the legislative history: (1) about the need to "federalize" the summary judgment practice, (2) expressing a desire to dispose of frivolous suits, and (2) criticism of certain Court of Appeals decisions. But there is not much in the legislative history about the intended effect of the amendment.

In Jones v. General Motors Corp., supra, a majority of the Court of Appeals gave significant weight to the legislative history. It concluded that the amendment to ORCP 47C imposed the burden of production on the non-moving party, under some circumstances, and that it required the court to engage in some weighing of the evidence, at least to the extent of determining whether an objectively reasonable juror could find for the non-moving party. The Court of Appeals also suggested that in cases of conflicting evidence, the non-moving party's evidence would have to be more than a scintilla for that party to survive a the motion for summary judgment.

By contrast, the concurrence gave little or no weight to the legislative history. Judge Landau concluded that the Legislature had intended to codify the standard expressed in Seeborg v. General Motors Corporation, 284 Or 695, 588 P2d 1100 (1978), and to, in effect, overrule certain subsequent Court of Appeals decisions by saying: "We really mean it!"

The Supreme Court is likely to accept review. That court's decision will likely hinge on the appropriate techniques to be used in examining legislative history. All that the Council could do at this point would be to reach its own conclusions about the meaning of an ambiguous legislative history, and then try to express those conclusions in the text of the rule.

July 11, 1996

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland M.J.H.

Re: Item of New Business--**URGENT** if Timely Action is to be Taken

I recommend that, at its July 13 '96 meeting or as soon thereafter as this new item can be reached, the Council vote to authorize Bill Gaylord to seek the following amendment to ORS 1.735(2) (see attachment):

> (2) A promulgation, amendment or repeal of a rule by the council is invalid and does not become effective unless the ~~exact language~~ **substance and intended effect** of the proposed promulgation, modification or repeal is published or distributed to all members of the bar at least 30 days before the meeting at which the final action is taken on the promulgation, modification or repeal.

As has been discussed at several past meetings, the probably unintended effect of the "exact language" requirement of ORS 1.735(2) is to render the October and November meetings of the Council immediately preceding legislative sessions so useless that there is usually no point in even holding them. As the current biennium illustrates, the loss of meetings in October and November is unfortunate. The current cycle of work is fairly typical, in that a lot of work piles up toward the end of the biennium, as subcommittee reports and recommendations are presented for discussion and debate. The difficulty is aggravated by the apparent near impossibility of getting anything like full attendance for the July and August, even the June, meetings, because of vacations, family outings on weekends, plus quite a few important professional meetings of various sorts. With low attendance in the summer meetings, and only the September meeting available in the fall, it becomes very difficult for the Council to complete all pending work in a thoughtful and deliberative manner, if at all. Low attendance at the June, July and August meetings also means that an ORCP amendment might be tentatively adopted by the affirmative votes of as few as 7 members, which doesn't provide much of a clue about the likelihood of its getting the required minimum of 15 affirmative votes for final promulgation at the December meeting. The October and November meetings preceding legislative sessions would probably be among the most productive meetings of the biennium if they could be held for the purpose of fine-tuning, last-minute revisions that might satisfy skeptics, etc.

As some of you know, the genesis of 1.735(2) was an amendment enacted by the 1993 legislature, a time when, for whatever reasons, quite a few people were on our case. One criticism was that ORCP amendments might be promulgated by vote of as few as 12 members, and this led to a statutory amendment requiring a minimum of 15 affirmative votes. The concern which led to the "exact language" amendment was that the Council might publish a proposed ORCP amendment for comments and reactions by the bar, and then wind up promulgating an amendment which, though substantially the same as the published version, might differ in important details of language or the like. On the face of it, that concern might be a justified one. However, I can recall no instances where the Council voted to promulgate any ORCP amendment that differed significantly or in substance, if one can use that term, from the previously published version. The differences were matters of detail, relating to style, punctuation, and so forth, in the interest of greater clarity.

Of course, if the amendment I suggest here were enacted by the '97 legislature, that would open the possibility that the Council might in theory abuse the greater latitude it would restore. As a practical matter, however, I cannot imagine any Council I have known actually doing anything like promulgating an ORCP amendment the substance and effect of which had not been fairly published to the bar. That would be a very stupid thing to do, and I don't believe the Council is in the habit of doing stupid things.

If the Council votes to approve this suggestion, it seems to me it could best be left to Bill how to proceed with getting it on its way to the '97 legislative session. One obvious way would be to get the amendment to Susan Grabe as promptly as possible, so that, assuming the schedule still permits, it could start through the process whereby an appropriate bill would be officially sponsored by the OSB. As I understand it, this process involves first approval by the OSB Public Policy Committee, and then by the full Board of Governors. Another possibility would be to take advantage of Sen. Neil Bryant's invitation to Bill to get any '97 session legislation proposed by the Council to him with a view to his session pre-filing it. That route might have the advantage of underlining the fact that the Council is not a bar committee.

While no expert on predicting legislative reactions, my guess is that, whether endorsed by the OSB or Sen. Bryant, a bill to enact this amendment would pass easily unless some powerful interest groups choose to oppose it. I cannot imagine why any sensible person or organization would oppose this amendment, but I've been unpleasantly surprised in the past about that sort of thing.

1.735. Rules of procedure; limitation on scope and substance; submission of rules to members of bar and Legislative Assembly.

(1) The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The rules thus adopted and any amendments which may be adopted from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each regular session and shall go into effect on January 1 following the close of that session unless the Legislative Assembly shall provide an earlier effective date. The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.

(2) A promulgation, amendment or repeal of a rule by the council is invalid and does not become effective unless the exact language of the proposed promulgation, modification or repeal is published or distributed to all members of the bar at least 30 days before the meeting at which final action is taken on the promulgation, modification or repeal.

September 30, 1996

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

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

Re: Tentatively Adopted ORCP Amendments, 1995-97 Biennium

So that you can be the first lawyer, judge, or retired publisher on your block to have a copy of the 1995-97 tentatively adopted ORCP amendments, herewith this mailing. This is the form in which they will be published in the October judicial advance sheets.

Naturally, Gilma and I have worked hard to be sure that the amendments as shown here accurately reflect what the Council voted upon at the 9-14-96 meeting. In some instances, that was not easy, because quite a few last-minute changes appear to have been agreed to by way of "friendly amendments" offered during the course of the meeting. Also, quite a bit of drafting or redrafting was handed to Gilma during the meeting, and it was therefore sometimes not entirely clear what language had been approved by the Council, and what not.

Some of the new language apparently approved contained some obvious errors of format or the like, which I've taken the liberty of correcting myself, though in almost every instance only after consultation with the member or members most closely involved in generating the new language. Naturally, no changes have been made that would affect policy or substance, if one can use that word about rules of procedure. Changes of that kind would have required getting the Council's consent, by way of an "emergency" meeting, telecon, or some sort of mailed ballot.

One change we've had to make after consulting with the Office of Legal Counsel (OLC) is that all conversions of cross-references by one rules provision to another to the simpler form (e.g., "ORCP 7 D(4)(a)(i)"), in lieu of the traditional form (e.g., "subparagraph (i) of subsection (4) of this section"), which the Council generally thought was a good idea, will not be allowed by that office, and thus traditional forms have been restored. The OLC, which has final authority over matters of format, will not permit changing to a different form within one or more, but less than all, the rules. Before the next biennium, I can ask the OLC whether it would permit changing to the new, simpler form if done on a uniform, consistent basis throughout

the entire ORCP.

Without the efforts and time given by many members to help Gilma and me do our job of preparing the text for publication, the task could not have been completed on time. So all those members whom we called upon for help, and who unfailingly responded, have our sincere thanks for their patience and timely assistance.

One problem that I hope the Council might address come next biennium is created by the fact that staff comments are published only in the Butterworth (now Michie) version. During the course of the ORCP 7 subcommittee's deliberations, it was frequently debated whether to "bulk up" the wording of a proposed amendment in the interest of clarifying something, or to rely upon an apt staff comment. The latter would, I think, have been judged the better course but for the objection that many lawyers and judges probably don't have ready access to staff comments. This seems to me a very unfortunate situation, but don't know how much can be done to rectify it. My own non-scientific sense is that the majority of lawyers use the West Publishing Corp. version of the ORCP. I don't know about judges, but of course they have the official, ORS version readily accessible in chambers, as I realize is likewise true of law firm libraries. I also don't know how amenable West would be to including staff comments, although I'd have thought they'd be happy to do so if only for competitive reasons. In fact, one of the objections to the current and traditional "Michie only" arrangement is that the time and effort devoted to preparing staff comments constitute a kind of public subsidy by the Council to that publisher. West might even be under some misapprehension that staff comments constitute proprietary information to which Michie somehow acquired an exclusive claim. In any event, I'll make a point of querying the folks at West to find out whether they would be willing to include staff comments in future editions.

The ORS would probably be a tougher nut to crack, since the ORS do not even include legislative history generated by the legislature itself. On the other hand, it is nearly unheard of, as far as I know, for even annotated versions of statutes to include legislative history, although some do cite committee reports. Legislative history pertaining to statutes is, in any event, so diffuse and lengthy that its inclusion would pose nearly insurmountable practical problems. Staff comments, by contrast, are typically pithy summarizations of the Council's intent in amending an ORCP provision, and would not unduly clutter up the ORS. I've been surprised, over the years, how frequently Gilma or I get calls from lawyers, even occasionally from a judge, asking for copies of Council minutes for help in clarifying something. Perhaps the OLC might be amenable to a bit of persuasion if done by, or at least with the authority of, the Council.

I've heard from a member or two that they think the votes on final promulgation at the Dec. 14 meeting will be so pro forma that they wonder whether it is really necessary to have an actual meeting, as opposed to a telecon or possibly mail balloting. Beyond the fact that an actual, public meeting is almost certainly required by the Public Meeting Law, I anticipate considerable debate, and possibly close votes, on whether to promulgate one or more of the tentatively adopted amendments. For example, it seems to me that two of the tentatively adopted amendments, neither having anything to do with Rule 7, pose serious questions about whether they are within the Council's authority under ORS 1.735. Unless some member raises this point, I'll give the Council the benefit of my, of course, purely advisory views for whatever weight they might carry.

I'm sure I speak for Bill Gaylord when I implore all members to attend the 12-14-96 meeting. As you know, a minimum of 15 affirmative votes is needed to promulgate any amendment. It shouldn't be assumed that every member present will necessarily vote in favor of all the tentatively adopted amendments. If any amendment is defeated by votes of those present, so be it, but it would be a terrible shame if any failed because absentees will have to be counted as "no" votes, regardless of what their actual position might have been.

Enc.

PROPOSED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Highlighting (with bold underlining) denotes new language; strike-out indicates language to be deleted.

Comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent to:

Maurice J. Holland
Executive Director
Council on Court Procedures
1221 University of Oregon
School of Law
Eugene, OR 97403-1221

The Council meeting at which the Council will receive comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and place:

December 14, 1996 — Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

The Council will take final action on the proposed amendments at the December 14, 1996 meeting.

SUMMONS
RULE 7

* * * * *

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

C(1) **Contents.** The summons shall contain:

* * * * *

C(1)(c) **Subscription; post office address.** A subscription by the plaintiff or by ~~a resident attorney of this state~~ an active member of the Oregon State Bar, with the addition of the post office address at which papers in the action may be served by mail.

* * * * *

D **Manner of service.**

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D(2) **Service methods.**

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D(2)(b) **Substituted service.** Substituted service may be made by delivering a true copy of the summons and the complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon such mailing.

D(2)(c) **Office service.** If the person to be served maintains an office for the conduct of business, office service may be made by leaving a true copy of the summons and the complaint at such office during normal working hours with the person who is apparently in charge. Where office service is

used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and the complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service shall be complete upon such mailing.

D(2)(d) **Service by mail.** ~~Service by mail, when required or allowed by this rule, 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. For 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.~~

D(2)(d)(i) Generally. When required or allowed by this rule or by statute, except as otherwise permitted, service by mail shall be made by mailing a true copy of the summons and the complaint to the defendant by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail. For purposes of this section, "first class mail" does not include certified or registered, or any other form of mail which may delay or hinder actual delivery of mail to the addressee.

D(2)(d)(ii) Calculation of time. For the purpose of computing any period of time provided by these rules or by statute, service by mail, except as otherwise provided, shall be complete on the day the defendant signs a receipt for the mailing, or three days after the mailing if mailed to an address within the state, or seven days after the mailing if mailed to an address outside of the state, whichever first occurs.

D(3) **Particular defendants.** Service may be made upon specified defendants as follows:

D(3)(a) **Individuals.**

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 whom neither subparagraph (ii) nor (iii) of this paragraph applies by mailing made in accordance with paragraph (2)(d) of this section provided the defendant signs a receipt for the certified, registered or express mailing, in which case service shall be complete on the date on which the defendant signs a receipt for the mailing.

* * * * *

D(4) **Particular actions involving motor vehicles.**

D(4)(a) **Actions arising out of use of roads, highways, and streets; service by mail.**

D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehicle may be involved while being operated upon the roads, highways, ~~and~~ or streets of this state, ~~any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf who cannot be served with summons by any method specified in subsection D(3) of this rule, may be served with summons by leaving one copy of the summons and complaint with a fee of $12.50 with the Department of Transportation or at any office the department authorizes to accept summons or by mailing such summons and complaint with a fee of $12.50 to the Department of Transportation by registered or certified mail, return receipt requested. The plaintiff shall cause to be mailed by registered or certified mail, return receipt requested, a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of the action, and at the most recent address as shown by the Department of Transportation's drier records, and at any other address of the defendant known to the plaintiff, which might result in actual notice to the defendant. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon the date of the first mailing to the defendant.~~ if the plaintiff makes at least one attempt to serve the defendant who operated such motor vehicle, or caused it to be operated on the defendant's behalf, by a method authorized by subsection (3) of this section except service by mail pursuant to subparagraph (3)(a)(i) of this section and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph (2)(d) of this section addressed to that defendant at:

(A) any residence address provided by that defendant at the scene of the accident;

(B) the current residence address, if any, of that defendant shown in the driver records of the Department of Transportation; and

(C) any other address of that defendant known to the plaintiff at the time of making the mailings required by (A) and

(B) that reasonably might result in actual notice to that defendant.

Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the certified, registered or express mailings required by (A), (B) and (C) above was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by (A), (B) and (C) above is made. If the mailing required by (C) is omitted because the plaintiff did not know of any address other than those specified in (A) and (B) above, the proof of service shall so certify.

D(4)(a)(ii) ~~The fee of $12.50 paid by the plaintiff to the Department of Transportation 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.~~ Any fee charged by the Department of Transportation for providing address information concerning a party served pursuant to subparagraph (i) of this paragraph may be recovered as provided in Rule 68.

D(4)(a)(iii) The requirements for obtaining an order of default against a defendant served pursuant to subparagraph (i) of this paragraph are as provided in Rule 69.

D(4)(b) **Notification of change of address.** Every motorist or user of the roads, highways ~~and~~ or streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or other event giving rise to liability, shall forthwith notify the Department of Transportation of any change of such defendant's address occurring within three years after such accident ~~or~~, collision or event.

~~D(4)(c) Default. No default shall be entered against any defendant served under this subsection unless the plaintiff submits an affidavit showing:~~

~~(i) that summons was served as provided in subparagraph D(4)(a)(i) of this rule and all mailings to defendant required by subparagraph D(4)(a)(i) of this rule have been made; and~~

~~(ii) either, if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Department of Transportation accessible to plaintiff, that the plaintiff not less than 14 days prior to the application for default caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or~~

~~certified mail, return receipt requested, or that the defendant's insurance carrier is unknown; and~~

~~(iii) that service of summons could not be had by any method specified in subsection D(3) of this rule.~~

* * * * *

D(6) **Court order for service; service by publication.**

D(6)(a) **Court order for service by other method.** On motion upon a showing by affidavit that service cannot be made by any method otherwise specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of the defendant~~, return receipt requested, deliver to addressee only~~ by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail; or posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

* * * * *

D(6)(c) **Where published.** ~~I~~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 calendar weeks. If the plaintiff knows of a specific location other than the county where the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff shall so state in the affidavit required by paragraph (a) of this subsection, and the court may order publication in a comparable manner at such location in addition to, or in lieu of, publication in the county where the action is commenced.

D(6)(d) **Mailing summons and complaint.** ~~If service by publication is ordered and defendant's post office address is known or can~~ If the court orders service by publication and the plaintiff knows or with reasonable diligence can ascertain the defendant's current address, the plaintiff shall mail a copy of the summons and the complaint to the defendant at such address by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail. ~~When the address of any defendant is not known or cannot be ascertained upon diligent inquiry,~~ If the plaintiff does not know and cannot upon diligent inquiry ascertain the current address of

any defendant, a copy of the summons and the complaint shall be mailed by the methods specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and cannot ascertain upon diligent inquiry, the ~~present~~ defendant's current ~~or~~ and last known address~~es of the defendant~~, mailing of a copy of the summons and the complaint is not required.

* * * * *

~~D(7)~~ D(6)(g) **Defendant who cannot be served.** Within the meaning of this subsection, A ~~a~~ defendant cannot be served with summons by any method ~~specified~~ authorized ~~in~~ by subsection ~~7~~ D(3) of this ~~rule~~ section if: (i) service pursuant to subparagraph (4)(a)(i) of this section is not authorized, and if the plaintiff attempted service of summons by all of the methods ~~specified~~ authorized ~~in~~ by subsection ~~7~~ D(3) of this section and was unable to complete service, or (ii) if the plaintiff knew that service by such methods could not be accomplished.

* * * * *

F Return; proof of service.

F(1) **Return of summons.** The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that the defendant cannot be found. The summons may be returned by first class mail.

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G Disregard of error; actual notice. Failure to comply with provisions of this rule relating to the form of summons, issuance of summons, ~~and~~ or ~~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~~ The court 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. If service is made in any manner complying with subsection D(1) of this section, the court shall also disregard any error in the service of summons that does not violate the due process rights of the party against whom summons was issued.

* * * * *

SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS RULE 17

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D Sanctions.

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D(4) Sanctions under this section must be limited to amounts sufficient to reimburse the moving party for attorney fees and other expenses incurred by reason of the false certification, including reasonable attorney fees and expenses incurred by reason of the motion for sanctions, and **upon clear and convincing evidence of wanton misconduct** amounts sufficient to deter future false certification by the party or attorney and by other parties and attorneys. The sanction may include monetary penalties payable to the court. The sanction must include an order requiring payment of reasonable attorney fees and expenses incurred by the moving party by reason of the false certification.

* * * * *

DEPOSITIONS UPON ORAL EXAMINATION RULE 39

* * * * *

I Perpetuation of testimony after commencement of action.

I(1) After commencement of any action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice.

* * * * *

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~~. However, the court in which the action is pending ~~allows~~ **may allow** a shorter period **for a perpetuation deposition before or during trial** upon a showing of good cause.

* * * * *

POSTPONEMENT OF CASES
RULE 52

A Postponement. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a postponement. At its discretion, the court may grant a postponement, with or without terms, including requiring ~~the party securing the postponement~~ **any party whose conduct made the postponement necessary** to pay expenses incurred by an opposing party.

* * * * *

SUBPOENA
RULE 55

I Medical records.

* * * * *

I(2) **Manner of service.** If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient at least ~~24 hours~~ **15 days** before the subpoena is served on a custodian or other keeper of medical records. **Upon a showing of good cause, the court may shorten or lengthen the 15-day period.** Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by ~~ORCP~~ **Rule** 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient at least ~~24 hours~~ **15 days** before the subpoena is served on the custodian or other keeper of medical records. **Upon a showing of good cause, the court may shorten or lengthen the 15-day period.** Service on a patient or health care recipient under this section must be made in the manner specified by ~~ORCP~~ **Rule** 7 D(3)(a) for service on individuals.

* * * * *

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS RULE 68

A. Definitions. As used in this rule:

* * * * *

A(2) **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; any fee charged by the Department of Transportation for providing address information concerning a party served with summons pursuant to subparagraph D(4)(a)(i) of Rule 7; the compensation of referees; the expense of copying of any public record, book, or document admitted into evidence at trial; recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

* * * * *

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

* * * * *

C(4) **Procedure for seeking attorney fees or costs and disbursements.** The procedure for seeking attorney fees or costs and disbursements shall be as follows:

* * * * *

C(4)(c) **Hearing on objections.**

* * * * *

{Note: The Council is considering alternative versions of amendments to Rule 68 C(4)(c)(ii), shown below as *Alternative A* and *Alternative B*, for promulgation at its Dec. 14, 1996 meeting. *Alternative B* will be considered for promulgation only in the event it is decided not to promulgate *Alternative A*.

Alternative A:

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 court shall make material findings of fact and conclusions of law regarding an award or denial of attorney fees if requested by a party. A party waives the right to request that the court make findings of fact and conclusions of law if the party fails to incorporate the request in the caption of the statement or objection filed under paragraph (a) or (b) of this subsection.

Alternative B:

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 to support a determination as to the amount of attorney fees. Where a party's liability for, or entitlement to, an award of attorney fees depends upon contested facts, the court shall make any material findings of fact and conclusions of law if requested by any party. A party waives the right to request such findings and conclusions of law if the party fails to incorporate the request in the caption of the party's initial statement or objection under paragraph (a) or (b) of this subsection.

* * * * *

DEFAULT ORDERS AND JUDGMENTS
RULE 69

A Entry of order of default.

A(1) In general. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise

defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such showing, the clerk or the court shall enter the order of default.

A(2) Certain motor vehicle cases. Notwithstanding subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to subparagraph D(4)(a)(i) of Rule 7 unless the plaintiff submits an affidavit showing:

A(2)(a) that the plaintiff has complied with subparagraph D(4)(a)(i) of Rule 7; and

A(2)(b) either, if the identity of the defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Department of Transportation accessible to the plaintiff, that the plaintiff not less than 30 days prior to the application for default mailed a copy of the summons and the complaint, together with notice of intent to apply for an order of default, to the insurance carrier by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail; or that the identity of the defendant's insurance carrier is unknown to the plaintiff.

* * * * *

STAY OF PROCEEDINGS TO ENFORCE JUDGMENT RULE 72

A Immediate execution; discretionary stay. Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court directing entry of the judgment, in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs. ~~No stay of proceedings to enforce judgment may be entered by the trial court under this section after the notice of appeal has been served and filed as provided in ORS 19.023 through 19.029 and during the pendency of such appeal.~~ The court shall have authority to stay execution of a judgment temporarily until the filing of a notice of appeal and to stay execution of a judgment pending disposition of an appeal, as provided in ORS 19.040 or other provision of law.

* * * * *

December 1, 1996

To: **Chair and Members, Council on Court Procedures**

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

Re: Proposed Staff Comments to 1996 ORCP Amendments

Attached is a draft of Staff Comments I've prepared to accompany tentatively adopted ORCP amendments promulgated at the 12-14-96 Council meeting. It has not been the past practice of the Council formally to vote to adopt or approve Staff Comments, primarily, I assume, because of the inordinate amount of time that might take. However, any and all comments and suggested revisions will be gratefully received. The main purpose of Staff Comments, as I understand it, is to provide lawyers and judges with succinct statements of the Council's purpose and intent with regard to particular amendments, sometimes including mention of whatever difficulty was sought to be overcome by them. Therefore, I am functioning here as the Council's scrivener, which means that any pride of authorship is wholly out of place.

Speaking of Staff Comments, I believe there is general agreement on the Council that it would be helpful if they appeared in the West Publishing and official ORS versions of the ORCP, rather than merely in the Michie (formerly Butterworth) Handbook as heretofore. In consultation with Bill Gaylord, I have been in contact with the editor of West's annual OREGON RULES OF COURT: STATE, and, as I suspected, she has been under the mistaken impression that Staff Comments are prepared under contract with Michie for the latter's exclusive benefit. I should add that this mistake was no fault of Michie, which has never claimed any exclusive publication right. In any event, the West editor seemed pleased to commit to inclusion of Staff Comments beginning with its 1998 edition. No decision has yet been made whether to include all the Staff Comments that have accumulated since the beginning of the Council, as Michie's version does, or only those beginning with the 1996 amendments effective 1-1-98.

As far as the official ORS volumes are concerned, that appears will be a tougher nut to crack. I've spoken with Bill Taylor in the Office of Legislative Counsel about the possibility of the ORS version including Staff Comments. In that quarter, however, I've encountered the usual resistance, which I assume is owing to the fact that the Legislative Counsel takes his marching orders exclusively from the legislature, and perhaps fears that any departure from that would create a slippery slope finally leading to including ads for pizza delivery.

If that is indeed the problem, an effort should probably be made to take Sen. Bryant up on his offer to try to help the Council in any way during the 1997 session. The same thing applies to the refusal of Legislative Counsel to include ORCP amendments promulgated by the Council, along with any enacted by the legislature, in the legislative advance sheets published at the end of each session. Barbara Fishleder, of the PLF, has urgently asked me to suggest to the Council that it do everything possible to rectify what she sees as an open invitation to possible malpractice claims against lawyers who rely exclusively on legislative advance sheets to learn about ORCP amendments. It's hard to believe there are many such lawyers, but there seem to be enough to worry Barbara.

Draft of Staff Comments to 1996 ORCP Amendments

RULE 7

Section **B** and paragraph **C(1)(c)** are amended to provide that summonses may be subscribed by an active member of the Oregon State Bar, regardless of residence. This amendment achieves consistency with subsection 17 A regarding subscription of pleadings.

Paragraphs **D(2)(b)** and **(c)** are amended to clarify that the follow-up mailing required with substituted and office service may be made by first class mail, and to provide that the date of this mailing is the date of completion of service by such methods for purposes of any statute requiring service of summons on or before a specified time, *see, e.g.*, ORS 12.020, as well as for calculating any time period prescribed or allowed under the ORCP.

Former paragraph **D(2)(d)** is divided into subparagraphs **D(2)(d)(i)** and **(ii)**. The former changes the method of effecting service by mail by requiring that, except as otherwise permitted, the summons and complaint be mailed to the defendant *both* by first class mail *and* by certified *or* registered mail, return receipt requested, *or* by express mail.

New subparagraph **D(2)(d)(ii)** retains the rule that service by mail is compete 3 days after mailing if to an address in Oregon, or 7 days after mailing if to an address outside Oregon, but adds an alternative rule that, if the defendant signs a receipt for the mailing prior to 3 or 7 days thereafter, service by mail is complete on the date of such signature. Whichever rule applies, this completion date is the date on which service

by mail is effected for purposes of any statute requiring service of summons on or before a specified time, as well as for computing any time period prescribed or allowed under the ORCP.

Subparagraph **D(3)(a)(i)** is amended to provide that, as an alternative to personal delivery and substituted service, an individual who is neither a minor as defined in subparagraph D(3)(a)(ii), nor an incapacitated person as defined in subparagraph D(3)(a)(iii), may be served by mailing in the manner prescribed by subparagraph D(2)(d)(i). This amendment codifies the core holding in *Lake Oswego Review, Inc. v. Steinkamp*, 298 Or 607, 695 P2d 565 (1985). Service by this method is effective only if the defendant signs a receipt for the certified, registered, or express mail, on which date it is complete for purposes of any statute requiring service of summons on or before a specified time, as well as for computing any time period prescribed or allowed under the ORCP. The alternative rule for determining the completion date--3 or 7 days after the date of mailing, as provided in subparagraph D(2)(d)(ii)--is not pertinent to service by mail on an individual defendant.

Subparagraph **D(4)(a)(i)** is amended to remove the former requirement of mailing or delivering a copy of the summons and complaint to the ODOT as serving no purpose. This amendment also adds a new alternative method of serving defendants in actions arising out of the operation of a motor vehicle on the roads, highways, or streets of this state. This alternative method may be used only if one of the primary methods of service authorized by subsection D(3), apart from mail service pursuant to subparagraph D(3)(a)(i), is first unsuccessfully attempted. It requires that the mailings prescribed by (A), (B), and (C) each be made by first class mail *and* by certified *or* registered mail, return receipt requested, *or* by express mail. However, the

mailing prescribed by (C) need not be made if, at the time of making the other mailings, the plaintiff knows of no address, other than those prescribed in (A) and (B), mailing to which might reasonably provide actual notice to the defendant, and so certifies in the return of service.

Regardless of whether the defendant signs a receipt for any of the mailings prescribed by (A), (B), or (C) if applicable, service pursuant to this alternative method is complete, for purposes of any statute requiring service of summons on or before a specified time and for computing any time period prescribed or allowed under the ORCP, on the latest date on which any such mailing is made, not either 3 or 7 days thereafter, and not on the date on which any receipt might be signed.[1] This is believed warranted by the legal obligation of motorists, pursuant to ORS 811.700(a)(C) and 811.705(c), to exchange current

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[1]Naturally, I've tried to get this right, but ask that everyone, especially members of the ORCP 7 subcommittee, check this carefully. If it is right, then wouldn't it be better to provide that if the defendant signs a receipt, service is complete on the date on which he or she does so; if he or she does not, then 3 or 7 days after the last mailing? That would be more commonsensical, consistent with D(2)(d)(ii), and would simplify the overall structure of the 7 D amendments. If I'm right, I'm as "guilty" as anyone else for not having seen this earlier.

I suppose that, because of the damnable "exact language" requirement of ORS 1.735(2), the Council is prohibited at this point from making what would be a minor, but useful, change. For what it's worth, my opinion is that this flaw, regrettable as it may be, is definitely not serious enough to justify not promulgating this amendment. A fix, I suppose, can wait until the next biennium which, come to think of it, would also be the next millennium if one goes by the effective date of Council amendments! Could we prevail on one of the Council's judicial members to grant a nice little declaratory judgment that ORS 1.735(2) is as unconstitutional as it is baneful? Isn't is clearly a prior restraint on the Council's right of free speech? One possibility would be sheepishly to ask the '97 legislature to fix this, to return the favor the Council did it by fixing 55 I. But that does have its downside. The best news would be that I'm simply wrong, although that only happens about once a millennium.

residence addresses at the scene of an accident. *Semble,* Harp v. Loux, 54 Or App 840, 636 P2d 976 (1981).[2]

Subparagraph **D(4)(a)(ii)** is amended to transfer the provision--that any fee charged by ODOT for providing address information regarding defendants served pursuant to D(4)(a)(i)--to subsection **68 A(2)**, where it more appropriately belongs. The requirement that the ODOT maintain a record of summons and complaints served pursuant to subparagraph D(4)(a)(i) is discontinued, since copies of summonses and complaints need no longer be delivered or mailed to that agency.

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[2]You probably don't like "*semble*"--it sounds pretty law reviewish. In my citation form book, it means the case cited might have held whatever proposition it follows, but actually did not. Of course if one goes too far afield, the word becomes "*dissemble*." I'm not wedded to it, and will delete at the slightest murmur. In fact, maybe the entire last sentence should come out. It's a bit argumentative, even defensive, in tone. The only reason I've put this in, which might or might not be convincing to you, is as follows:

Sooner or later, the constitutionality of this amended service method is likely to be challenged. One cannot simply cite *Harp*, where Mick Alexander's use of a service method substantially identical to what this amendment would authorize, was sustained against a due process challenge, as authority for that method's constitutionality. That is because it was the defendant's insurer, not the defendant, who appeared in *Harp* to set aside default judgment. Judge Richardson's opinion for the Court of Appeals held that the insurer lacked standing to raise any due process contentions that could have been raised by the defendant--whether successfully or not, the opinion naturally did not say.

The ORCP 7 subcommittee concluded that this amended service method should be upheld against a due process challenge, not so much on the authority of *Harp*, but based on its own considered judgment that, in the limited circumstances of motor vehicle accidents, given that it is an alternative method that may be used after a primary method has been unsuccessfully attempted, and given further the obligation of motorists to exchange addresses, its validity would be sustained.

The purpose of the final sentence of this comment is to signal to lawyers, and perhaps more importantly, to any judges who might have to rule on constitutional challenges to this amendment, that the Council did indeed consider the question of constitutionality and reached a judgment that it is constitutional, rather than just blundering its way past the question. While judges, obviously, are not bound by the Council's conclusions about the constitutionality of ORCP amendments, I'd nonetheless suppose it would be at least moderately useful for them to know the Council saw the issue and resolved it according to its best lights. In any event, we certainly have plenty of judges on the premises who can say whether there is any validity to this point, or whether it is just my latest fit of professorial theorizing. If any say the latter, I'm sure they'll do so politely out of respect for my advanced age.

New subparagraph **D(4)(a)(iii)** transfers to new subsection **69 A(2)** the requirements for obtaining a default when the defendant is served pursuant to subparagraph D(4)(a)(i), since Rule 69 should deal comprehensively with the subject of default orders and judgments. Former paragraph **D(4)(c)** is therefore deleted from Rule 7.

Paragraph **D(4)(b)** is reworded for greater clarity, but with no intent to change its meaning.

Paragraph **D(6)(a)** is amended to add a requirement that, when summons is served by court-ordered mailing, the mailing must, consistently with subparagraph D(2)(d)(i) as amended, be by first class mail *and* by certified *or* registered mail, return receipt requested, *or* express mail.

Paragraph **D(6)(c)** is amended to add a requirement that, if the plaintiff knows of a specific location other than the county where the action is pending where publication might reasonably give the defendant notice of the action, the plaintiff must so state in the affidavit required by paragraph D(6)(a). In this event, the court has discretionary authority to order publication

at that specific location, in lieu of, or in addition to, publication in the county where the action is pending.[3]

Paragraph **D(6)(d)** is amended to clarify its requirements regarding the mailings that must supplement court-ordered publication regardless of whether the order itself requires mailings.

New paragraph **D(6)(g)** replaces former subsection **D(7)** to clarify that the definition of "a defendant [who] cannot be served" applies only to service pursuant to subsection D(6).

Subsection **F** is amended to clarify that a summons may be returned by first class mail.[4]

Section **G** is amended to correct any inference possibly suggested by its former language that actual notice to the defendant necessarily validates service regardless of any errors occurring therein. This section is not authority for the court's disregarding any error in the method of service causing it to fall below the "reasonably calculated . . . to apprise the defendant" standard of subsection D(1), which is also the standard required by the due process clause of the fourteenth

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[3]This might be one instance where no Staff Comment is needed, or even useful. I've included it primarily for the sake of completeness, so that every amendment is accounted for by a comment. I'd be inclined to delete this, and perhaps other comments, if you agree that the only real purpose of Staff Comments is to elucidate the text of amendments, usually by stating the Council's intent or purpose, not to merely paraphrase amendments. This particular amendment seems to me to be about as clear in meaning as the English language is capable of being. Why gild the lily?

[4]This might be another example of an unnecessary and unhelpful comment.

amendment, even if the defendant receives actual notice of the action. *See, e.g., Baker v. Foy,* 310 Or 221, 797 P2d 349 (1990).

RULE 17

Subsection **D(4)** is amended to provide that, when sanctions are awarded exceeding the amount necessary to reimburse a party for expenses incurred by reason of a false certification and expenses relating to the sanction motion, for the purpose of deterring future false certification, such award should be only be made on the basis of clear and convincing evidence of wanton misconduct by the sanctioned party, his or her attorney, or both. This amendment is intended to achieve substantial consistency between the standard for awarding punitive sanctions and the standard for awarding punitive damages set forth in ORS 18.537(1).[5]

RULE 39

Subsection **I(4)** is amended to clarify that the discretionary authority it confers extends both to the time during or before

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[5]I hate to be the one who says this, but this amendment seems to me on the borderline of the Council's authority as limited by ORS 1.735(1). First, it looks suspiciously like a rule of evidence, though I'm not sure it really is one. Secondly, the standard of conduct justifying awards of punitive sanctions might well be regarded as just as substantive a matter as the standard for awarding punitive damages, the latter clearly being a matter of substance for the legislature. On the other hand, in possible defense of this amendment, it does not change any standard which the legislature formulated in its '95 statutory amendments of Rule 17; rather it supplies a standard where none is stated.

trial perpetuation depositions may be taken, and to the required notice period.

RULE 52

Section **A** is amended to resolve the doubt noted, but not resolved, in *Gottenberg v. Westinghouse Electric Corp.*, 142 Or App 70, 74-5, 919 P2d 521, 524 (1996), whether the phrase "the party securing the postponement" refers to the party requesting it or the party whose conduct is the basis for the court granting it. The latter party is the intended reference.

RULE 55

Subsection **I(2)** is amended to change from 24 hours to 15 days the minimum period a copy of a medical records subpoena must be served on the patient, health care recipient, or his or her attorney, before such subpoena is served on the custodian or other keeper of such records. This amendment is prompted by concern that requiring only 24 hours advance notice to the patient, etc., will often afford an inadequate opportunity for objection to a medical records subpoena, in the absence of which waiver of the patient-physician privilege might inappropriately be inferred. This subsection is not intended to modify or affect the patient-physician privilege provided for in the Oregon Rules of Evidence 504, 504-1, 504-2, 504-4, and 507.

Because, under some circumstances, a party issuing a medical records subpoena might be unduly delayed by having to wait a full 15 days for production, courts are given discretionary authority to shorten the waiting period for good cause shown.

RULE 68

Subsection **A(2)** is amended to transfer to it the provision formerly contained in subparagraph 7 D(4)(a)(ii) for taxation as costs any fee charged by the ODOT for providing to the plaintiff address information pertinent to a defendant served pursuant to subparagraph 7 D(4)(a)(i).

Alternative A

Subparagraph **C(4)(c)(ii)** is amended to require the court to make findings of fact and conclusions of law material to an award of attorney fees upon request of any party, provided such party incorporates the request in the caption of any statement filed pursuant to subparagraph C(4)(a)(i), or any objection served pursuant to paragraph C(4)(b). This amendment is prompted by the need to facilitate appellate review of trial courts' rulings on attorney fee awards.

Alternative B

Subparagraph **C(4)(c)(ii)** is amended to require the court to make findings of fact and conclusions of law material to a party's entitlement to, or liability for, an award of attorney fees when such entitlement or liability depends upon contested facts, and provided the party requesting the findings and conclusions incorporates the request therefor in its initial statement filed pursuant to subparagraph C(4)(a)(i), or its initial objection served pursuant to paragraph C(4)(b). This subparagraph does not require the court to make findings or conclusions that are material only to the amount of attorney fees

awarded. This amendment is prompted by the need to facilitate appellate review of trial courts' rulings on attorney fee awards.[6]

RULE 69

Section **A** is divided into subsections **A(1)** and **A(2)**. Subsection **A(1)** in no way changes the requirements under former section A for obtaining default orders generally, *i.e.*, against defendants served by any method other than pursuant to subparagraph 7 D(4)(a)(i). Regarding the latter, new subsection **A(2)** transfers from former paragraph 7 D(4)(c) requirements, in addition to those contained in amended subsection A(1), which must be complied with to obtain a default order against a defendant served pursuant to subparagraph 7 D(4)(a)(i).

Those requirements are changed in two respects: First, if the plaintiff knows the identity of the defendant's liability insurance carrier, or can ascertain it from ODOT records accessible to the plaintiff, the latter must mail to such carrier a copy of the summons and complaint, by first class mail *and* by certified or registered mail, return receipt requested, *or* by express mail, at least 30 days before applying for a default order, rather than 14 days as formerly provided. Secondly, in addition to a copy of the summons and of the complaint, the mailing to the insurance carrier must include notice of intent to apply for a default order. Note that the mailings to the insurance carrier are a form of notice, not service.

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[6]Both of these alternative versions seem to me absolutely clear on their face as to their meanings, and therefore wonder whether my draft comments are either needed or helpful. Possibly the final sentence alone would be worthwhile, sort of by way of pr, since we know this amendment, in either version, will not be popular in all quarters.

RULE 72

Section **A** is amended, at the suggestion of the OSB Appellate Practice Section, to achieve consistency with ORS 19.140, and with what appears to be currently accepted practice, by clarifying that trial courts have discretionary authority to stay execution of their judgments both before and after a notice of appeal is filed.

February 10, 1997

To: Chair and Members, Legislative Advisory Committee (Mick Alexander, Chair; Don Dickey, Bruce Hamlin and John McMillan, members)

Fm: Maury Holland M.J.H.

Re: Query re S.B. 268

This is the first item on the LAC's docket. Fortunately, I think it is one that can be easily disposed of. Enclosed are: 1. a copy of James M. Kennedy's 1-24-97 letter to me, 2. a copy of my reply dated 2-7-97, and 3. a short memo by me setting forth the basis for my conclusion that enactment of S.B. 268 would not require an amendment to ORCP 67 E or any other ORCP provision.

If you agree with my conclusion about there being no need for an amendment, you could adopt it as the position of the LAC, authorize me to forward a copy of the memo to Mr. Kennedy, and then consult it if the LAC's input is called for by legislators or staff. The latter, I think, is fairly likely since, unlike Mr. Kennedy, someone in Salem will probably see that, if an amendment to 67 E were needed, action by the Council during the 1997-99 biennium, after enactment of this bill, would not be timely. In other words, if you were to disagree with my judgment that no ORCP amendment is needed, a "gap period" between Jan. 1, 1998, when S.B. 268 would take effect, and Jan. 1, 2000, when a Council-promulgated, after-the-fact ORCP amendment would take effect, should probably be avoided, even though few cases involving S.B. 268 would be likely to reach the courts during the first two years of its effectiveness.

As far as S.B. 268 is concerned, this bill is 39 pages long and comprises 95 sections. If you feel you need to read the text and do not have a copy readily available, just phone me ((541) 346-3834) and I'll have Gilma make one and send it to you. Otherwise, maybe you will take my word for it that this bill would create a relatively new business organization, to be known as a "limited liability partnership" ("LLP"), in which all partners are treated as limited partners and hence not liable, except under certain specified circumstances, on liabilities or obligations of the partnership. In other words, all partners in a LLP will, in contrast to general partners in a traditional partnership, be treated, as regards personal liability for partnership debts or obligations, like shareholders in a business corporation except as otherwise specifically provided.

Whether this is good or bad legislation, of course, does not concern us. Our concern is only whether its enactment would require one or more ORCP amendments. My conclusion is that it clearly would not.

If the LAC is subsequently consulted by legislators or staff, another issue would arise as to whether your response would be on behalf of the LAC or of the Council. Unless you disagree with my conclusion and analysis, my own opinion is that, since your response would not involve any ORCP amendment, the question presented is so straightforward and clear-cut that you could properly respond on behalf of the Council. But that, of course, is for you to decide. On the other hand, as Mike Marcus commented, the people to whom you respond will probably not press the distinction between the LAC and the Council.

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January 24, 1997

Maury Holland
University of Oregon
School of Law
Room 331
1101 Kincaid Street
Eugene, OR 97403

Re: Council on Court Procedures

Dear Professor Holland:

I am the Chairperson of a Task Force of the Business Law Section of the Oregon State Bar which drafted Senate Bill 268, a copy of which is enclosed. Senate Bill 268 rewrites the Oregon Uniform Partnership Law, ORS Chapter 68. The Bill becomes effective for limited liability partnerships and foreign limited liability partnerships on January 1, 1998 and provides for a five-year transition period for other partnerships.

Section 15 of Senate Bill 268 changes existing law by providing that a creditor with a judgment against the partnership and the partners cannot proceed directly against a partner or a partner's individual assets until the creditor has attempted to satisfy the judgment against the partnership. Section 15 provides exceptions to this exhaustion requirement if circumstances exist which would make it fruitless or inequitable to delay proceeding against a partner. As a result of this exhaustion requirement, partners become more like guarantors than principal obligors with respect to partnership obligations.

The Task Force believes that the enactment of Section 15 of Senate Bill 268 may require an amendment to Oregon Rule of Civil Procedure 67E. We understand that the Council on Court Procedures will review the impact of legislation on the Oregon Rules of Civil Procedure after the 1997 Legislative Session has ended.

Please call if you have any questions.

Very truly yours,

James M. Kennedy

Enclosure

cc: David Amesbury, Committee Counsel
Senate Judiciary Committee

Ted Reutlinger
Legislative Counsel

Susan Grabe
Oregon State Bar

JMK\3430.ltr

COUNCIL ON COURT PROCEDURES

Established by the Oregon Legislature in 1977

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February 7, 1997

Mr. James M. Kennedy
Kennedy & Kennedy LLP
Attorneys at Law
Pioneer Tower, Suite 1170
888 S.W. Fifth Avenue
Portland, Oregon 97204-2098

Dear Mr. Kennedy: Re: S.B. 268

Many thanks for your thoughtfulness in sending me a copy of Senate Bill 268. The Council on Court Procedures has concluded its work for the 1995-97 biennium, but I shall provide copies to Mick Alexander, Chair of the Legislative Advisory Committee ("LAC"), and to its members. They can determine whether enactment of S.B. 268 would require any amendment to ORCP 67 E and, if so, recommend to the current Legislature an appropriate amendment.

If an ORCP amendment is recommended, it would presumably be more efficient if such amendment were included in the bill. If that is not possible because of the Legislature's procedures, or because of the timing of committee hearings and work sessions, I

assume that a separate bill, or some other kind of arrangement, could be worked out to ensure that the ORCP could accommodate S.B. 268 if the latter is enacted. I would guess the chances of this bill being enacted are very high.

I shall keep you informed of whatever action is taken by the LAC or the Council, provide you with a copy of any ORCP amendment that is recommended, and coordinate with David Amesbury in an effort to see that the necessary pieces fall into place.

Sincerely,

Maurice J. Holland
Executive Director

cc: Mr. J. Michael Alexander
Mr. David Amesbury
Hon. Don A. Dickey
Mr. William A. Gaylord
Ms. Susan Evans Grabe
Mr. Bruce C. Hamlin
Mr. John H. McMillan
Mr. Ted Reutlinger

January 31, 1997

To: The Legislative Advisory Committee

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

Re: Senate Bill 268: 69th OREGON LEGISLATIVE ASSEMBLY--1997 Regular Session

This memo responds to the query posed in Mr. James M. Kennedy's 1-24-97 letter to me asking whether enactment of S.B. 268 would require any amendment to the ORCP, section 67 E in particular.[1] My opinion is that it would not and that the question is not doubtful.

S.B.268 would signficantly amend the Oregon Uniform Partnership Law to authorize creation of new, limited liability partnerships ("LLP's"), a 5-year transition period for existing partnerships, and recognition of LLP's created under the law of other jurisdictions. Mr. Kennedy's question is whether enactment of S.B. 268, in particular Sec. 15 thereof,[2] would call for an ORCP

---

[1] **"E. Judgment in Action Against Partnership, Unincorporated Association, or Parties Jointly Indebted.**

"E(1) *Partnership and Unincorporated Association.* Judgment in an action against a partnership or unincorporated association which is sued in any name which it has assumed or by which it is known may be entered against such partnership or association and shall bind the joint property of all of the partners or associates.

"E(2) *Joint Obligations; Effect of Judgment.* In any action against parties jointly indebted upon a joint obligation, contract, or liability, judgment may be taken against less than all such parties and a default, dismissal, or judgment in favor of or against less than all of such parties in an action does not preclude a judgment in the same action in favor of or against the remaining parties.

[2] SECTION 15. Actions by and against partnership and partners. (1) A partnership may sue and be sued in the name of the partnership.

(2) An action may be brought against the partnership and. to the extent not inconsistent with section 14 of this Act, any or all of the partners in the same action or in separate actions.

(3) A judgment against a partnership is not by itself a judgment against any partner.

(4) Except as provided by subsection (5) of this section, a creditor may proceed against one or more partners or their property to satisfy a judgment based on a claim that could have been successfully asserted against the partnership only if:

(a) The partner is personally liable for the claim under section 14 of this Act;

(b) A judgment is also obtained against the partner; and

(c) A judgment based on the same claim is obtained against the partnership that:

(A) Has not been reversed or vacated; and

(B) Remains unsatisfied for 90 days after:

(i) The date of entry of the judgment; or

(ii) The date of expiration or termination of the stay, if the judgment is contested by appropriate proceedings and execution on the judgment has been

amendment, specifically to ORCP 67 E. My conclusion is that it would not.

First, there is clearly no problem under 67 E(1), which is entirely consistent with S.B. 268 Sec. 15(1). If any problem would be created by enactment of S.B. 268, it would relate to 67 E(2). However, my conclusion is that not even the shadow of a problem would exist. 67 E(2) is substantively neutral, as good rules of procedure should be, and fully accomodates the substantive law of joint obligations as it finds it. It changed the common law rule that judgment for or against joint, as opposed to joint and several obligors, must be entered against all or none. *See, Jefferson State Bank v. Welch,* 70 Or App 635, 690 P2d 1107 (1984), *affirmed* 299 Or 335, 702 P2d 414 (1985). It does not purport to determine when obligations or liabilities are single, joint, or joint and several. That is wholly a matter of substantive law which Sec. 15 of S.B. 268 would significantly change by modifying the traditional rule that obligations and liabilities of partnerships are always, as a matter of law, obligations and liabilities of general partners. Under circumstances where Sec. 15 of S.B. 286 would make partnership liabilities joint liabilities of some or all LLP partners, ORCP 67 E(2) could perfectly well accomodate and implement that substantive law outcome.

It seems to me that, like most important and complex new legislation, S.B. 268, perhaps including Sec. 15 thereof, is likely to raise some problems of interpretation or construction for the courts. However, as far as I can see, none of the likely problems would concern ORCP 67 E or would be affected by it. For example, Sec. 15(2) is confusingly drafted, and probably should be revised to read: "A claim may be brought . . . [,]" rather than: "An action may be brought . . . in the same action or in separate actions." Similarly, in providing that an action may be bought against "any or all of the partners in the same action or in separate actions[,]" Sec. 15(2) might raise issues relating to how, if at all, existing claim preclusion law might have to be adjusted. But again, that would pose no difficulties about applying ORCP 67 E.

My conclusion, therefore, is that the prospect of enactment of S.B. 268 ought not prompt the LAC to take the initiative to contact the current Legislature to suggest that an ORCP amendment is needed and should be incorporated into the bill. If the Legislature should take the initiative to contact the LAC, its response could be based upon this memo assuming the LAC agrees with it.

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(5) Subsection (4) of this section does not prohibit a creditor from proceeding directly against one or more partners who are personally liable for the claim under section 14 of this Act or against their property without first seeking satisfaction from partnership property if:

(a) The partnership is a debtor in bankruptcy;

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A16

February 10, 1997

To: Chair and Members, Legislative Advisory Committee (Mick Alexander, Chair; Don Dickey, Bruce Hamlin and John McMillan, members)

Fm: Maury Holland M.J.H.

Re: Query re S.B. 268

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If you agree with my conclusion about there being no need for an amendment, you could adopt it as the position of the LAC, authorize me to forward a copy of the memo to Mr. Kennedy, and then consult it if the LAC's input is called for by legislators or staff. The latter, I think, is fairly likely since, unlike Mr. Kennedy, someone in Salem will probably see that, if an amendment to 67 E were needed, action by the Council during the 1997-99 biennium, after enactment of this bill, would not be timely. In other words, if you were to disagree with my judgment that no ORCP amendment is needed, a "gap period" between Jan. 1, 1998, when S.B. 268 would take effect, and Jan. 1, 2000, when a Council-promulgated, after-the-fact ORCP amendment would take effect, should probably be avoided, even though few cases involving S.B. 268 would be likely to reach the courts during the first two years of its effectiveness.

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January 24, 1997

Maury Holland
University of Oregon
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Room 331
1101 Kincaid Street
Eugene, OR 97403

Re: Council on Court Procedures

Dear Professor Holland:

I am the Chairperson of a Task Force of the Business Law Section of the Oregon State Bar which drafted Senate Bill 268, a copy of which is enclosed. Senate Bill 268 rewrites the Oregon Uniform Partnership Law, ORS Chapter 68. The Bill becomes effective for limited liability partnerships and foreign limited liability partnerships on January 1, 1998 and provides for a five-year transition period for other partnerships.

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Please call if you have any questions.

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Enclosure

cc: David Amesbury, Committee Counsel
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February 7, 1997

Mr. James M. Kennedy
Kennedy & Kennedy LLP
Attorneys at Law
Pioneer Tower, Suite 1170
888 S.W. Fifth Avenue
Portland, Oregon 97204-2098

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cc: Mr. J. Michael Alexander
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Hon. Don A. Dickey
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Mr. Bruce C. Hamlin
Mr. John H. McMillan
Mr. Ted Reutlinger

January 31, 1997

To: The Legislative Advisory Committee

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

Re: Senate Bill 268: 69th OREGON LEGISLATIVE ASSEMBLY--1997 Regular Session

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PROFESSIONAL LIABILITY FUND
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DOCUMENT TRANSMISSION: (503) 684-7250

KIRK R. HALL
CHIEF EXECUTIVE OFFICER

February 12, 1997

Maury Holland
University of Oregon
School of Law
1101 Kinkaid Street, Room 331
Eugene, OR 97403-1221

Dear Maury:

I recently received a copy of your letter to Bill Taylor requesting that the legislative advance sheets include ORCP amendments and requesting that the ORS include ORCP comments.

I just wanted to take this opportunity to thank you for following up and remembering to contact legislative counsel about these issues. We appreciate your assistance and dedication to these issues.

Sincerely,

Barbara S. Fishleder
Director of Loss Prevention

BSF:mak

March 14, 1997

To: **Chair and Members, Council on Court Procedures**

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

Re: News Items Regarding the Council

1. Attached is a copy of LC 4243, which would abolish the Council and establish a new arrangement whereby the Supreme Court would, every two years, make "recommendations" to the Legislature regarding amendments to the ORCP. The Court's recommendations would be "formulat[ed]" by a new advisory committee constituted just as the Council now is.

This draft came to me as a "bolt from the blue," and I haven't yet been able to find out who originated it or what inspired it, except that the Legislative Counsel was directed to prepare it by the "leadership" of both houses. If it is voted out of the full Ways & Means Committee, it will receive a bill number and go to the President and Speaker for assignment to the appropriate "policy" committee, presumably one of the judiciary committees, where any hearings would be held. I'll let you know what develops.

I wonder where this particular idea came from. In my opinion, it is hard to imagine anything sillier. If implemented, it would restore the situation that existed before the Council was created, because it would make amending the ORCP dependent upon legislation. It was precisely this dependence on legislation prior to 1980 that convinced so many people, including many leading legislators at that time, that the primary responsibility for updating the ORCP and reforming them to meet new problems, had to be located elsewhere, though with the legislature retaining ultimate authority.

Of course, the arrangement proposed by LC 4243 differs from what pre-existed the Council in that, under the former, the Supreme Court would be authorized and directed to make "recommendations" to the legislature concerning the ORCP every two years. Big deal! Anyone can make recommendations to the legislature every two years, or more often if they choose. LC 4243 gives no assurance that the legislature would take any more seriously, or accord any more deference to, recommendations from the Supreme Court than it would to any coming from the OBA, OTLA, or OADC. No one needs statutory permission to make recommendations to the legislature. Why is the Supreme Court alone *mandated* to make recommendations. Frankly, I think this feature of LC 4243 is demeaning to the Court, which is already as free as anyone else to make recommendations to the legislature whenever it is moved to so, although on matters pertaining to the ORCP, the Court would presumably and sensibly address its recommendations in the first instance to the Council.

The most important reason the Council has performed as well as it has, in my view, is because it combines the concentrated expertise of trial judges and trial lawyers with the kind of painstaking effort that only comes from awareness that its handiwork is quite likely to become law. Anyone having the experience of working on the Council knows how grueling a process it is to develop and promulgate sound ORCP amendments. Council members are motivated to engage in this grueling process in no small part because they know that

their work product will probably be final, in the sense of producing amendments which Oregon lawyers and judges will have to live with for at least two years. While the advisory committee that would replace the Council might well have just as much expertise as the latter, it would not likely be as painstaking as the Council typically is because it would be making only recommendations to the Court.

While, of course, I cannot speak for the justices of the Oregon Supreme Court, I cannot believe they would be either pleased or well served by LC 4243. Rather, I'd guess their reaction would be much like the attitude increasingly expressed by justices of the U.S. Supreme Court, who have frequently noted their unease about being forced to take nominal responsibility for federal rules amendments which they do not have the time to study with the care they would prefer for anything that carries their endorsement. I doubt whether the justices of the Oregon Supreme Court have the time to do the "heavy lifting" now done by the Council, or even if they do, question whether that would be the best use of such time. So, as with the U.S. Supreme Court, the Oregon Supreme Court justices would probably let the advisory committee do the heavy lifting, but would then be placed in the position of putting their names to work not having received their own best efforts and careful scrutiny. And all of this for the mere sake of making "recommendations" to the legislature. In the case of the U.S. Supreme Court, the justices at least have the satisfaction of knowing that the federal rules amendments they promulgate become law unless Congress acts affirmatively to prevent it.

2. Judge Anna J. Brown and Judge Allan H. Coon have been appointed to membership on the Council by the Executive Committee of the Circuit Judges Association to replace Judge Brockley, who is leaving the bench, and Judge Gallagher, who has resigned from the Association and the Council.

3. A few comments and suggestions respecting the ORCP, including the 1996 amendments, have come in. None is especially startling, and none has to do with the just promulgated, far-reaching amendments to ORCP 7. Two comments have suggested that, in amending ORCP 55 I to provide 15 days advance notice in lieu of 24 hours, the Council might have gone a bit too far. Copies of all comments received prior to the first meeting in the fall will be attached to the agenda of that meeting.

4. The LAC has not yet, to my knowledge, been summoned to attend upon the Legislature during the current session, to share its procedural expertise. Although this has probably not caused any noticeable despair or disappointment among LAC members, I hasten to point out that most of the committee hearings and work sessions of this session remain to occur.

5. As attested by the attached Feb. 19 memo, the Council has been awarded a *SFR*Gold Star '96* for maintaining excellent financial records. Some of the initial thrill I felt on first reading this abated somewhat upon noticing that 89 out of the 121 state agencies eligible for this accolade were awarded it. Bill Gaylord will have to decide what should be done with the brand new Lexus 400 which comes with this award. My assumption is that it will become the Council Chair's official limousine for use in riding to and from Council

meetings, chauffered by the Executive Director, who will have the use of the car between meetings. In any event, if any credit attaches to this, it belongs entirely to Gilma Henthorne, who has long done everything by way of keeping Salem's watchdogs happy with the Council.

LC 4243
3/7/97 (DH/ps)

D R A F T

SUMMARY

Abolishes Council on Court Procedures. Provides that Legislative Assembly, by statute, may amend, repeal or add to Oregon Rules of Civil Procedure. Directs Supreme Court to make recommendations on changes to Oregon Rules of Civil Procedure. Requires creation of advisory committee.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to the Oregon Rules of Civil Procedure; creating new provisions; amending ORS 174.580 and 174.590 and ORCP 1D; repealing ORS 1.725, 1.730, 1.735, 1.740, 1.742, 1.745, 1.750, 1.755 and 1.760; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) The Supreme Court shall make recommendations once every two years to the Legislative Assembly on proposed changes to the Oregon Rules of Civil Procedure. The recommendations shall be made in a report submitted in the manner specified in ORS 192.245.

(2) For the purposes of formulating recommendations on changes to the Oregon Rules of Civil Procedure, the Supreme Court shall appoint an advisory committee. The advisory committee shall consist of the following members:

(a) One judge of the Supreme Court, chosen by the Supreme Court.

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

(c) Eight judges of the circuit court, chosen by the Executive Committee of the Circuit Judges Association.

(d) Twelve members of the Oregon State Bar, at least two of whom shall be from each of the congressional districts of the state, appointed

NOTE: Matter in boldfaced type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in boldfaced type.

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 the lawyer members of the advisory committee shall be broadly representative of the trial bar.

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

(3) All meetings of the advisory committee appointed under this section shall be held in compliance with the provisions of ORS 192.610 to 192.690.

(4) Members of the advisory committee appointed under this section shall serve for terms of four years and shall be eligible for reappointment to one additional term, provided that, where an appointing authority has more than one vacancy to fill, the length of the initial term shall be fixed at either two or four years by that authority to accomplish staggered expiration dates of the terms to be filled. Vacancies occurring shall be filled by the appointing authority for the unexpired term.

(5) Members of the advisory committee appointed under this section shall not receive compensation for their services, but may receive actual and necessary travel or other expenses incurred in the performance of their official duties as members of the advisory committee, as provided in ORS 292.210 to 292.288.

SECTION 2. ORS 174.580 is amended to read:

174.580. (1) As used in the statute laws of this state, [*including provisions of law deemed to be rules of court as provided in ORS 1.745,*] "Oregon Rules of Civil Procedure" means the rules [*adopted, amended or supplemented as provided in ORS 1.735*] **published in the 1995 Edition of the Oregon Revised Statutes, as amended, repealed or added to by subsequent act of the Legislative Assembly.**

(2) In citing a specific rule of the Oregon Rules of Civil Procedure, the

designation "ORCP (number of rule)" may be used. For example, Rule 7, section D, subsection (3), paragraph (a), subparagraph (i), may be cited as ORCP 7 D(3)(a)(i).

SECTION 3. ORS 174.590 is amended to read:

174.590. References in the statute laws of this state, including [*provisions of law deemed to be rules of court as provided in ORS 1.745, in effect on or after January 1, 1980*] **references in the Oregon Rules of Civil Procedure**, to actions, actions at law, proceedings at law, suits, suits in equity, proceedings in equity, judgments or decrees are not intended and shall not be construed to retain procedural distinctions between actions at law and suits in equity abolished by ORCP 2.

SECTION 4. ORCP 1 D is amended to read:

D "Rule" defined and local rules. References to "these rules" shall include Oregon Rules of Civil Procedure numbered 1 through 85. General references to "rule" or "rules" shall mean only rule or rules of pleading, practice and procedure [*established by ORS 1.745, or promulgated under ORS 1.006, 1.735, 2.130 and 305.425*] **published in the 1995 Edition of the Oregon Revised Statutes, as subsequently amended, repealed or added to by act of the Legislative Assembly, and rules adopted under ORS 1.006, 2.130 and 305.425**, unless otherwise defined or limited. These rules do not preclude a court in which they apply from regulating pleading, practice and procedure in any manner not inconsistent with these rules.

SECTION 5. ORS 1.725, 1.730, 1.735, 1.740, 1.742, 1.745, 1.750, 1.755 and 1.760 are repealed.

SECTION 6. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

RECEIVED
FEB 25 1997
OCA

Oregon

DEPARTMENT OF
ADMINISTRATIVE
SERVICES

STATE CONTROLLER'S
DIVISION

SFR☆Gold Star '96

Date: February 19, 1997

To: Maurice J Holland
Council on Court Procedures
Judicial Department
1163 State Street
Salem OR 97310

From: John J. Radford, Administrator
State Controller's Division

James McAdler, Manager
Statewide Accounting and Reporting Section

Don Lew, Accounting Analyst
Statewide Accounting and Reporting Section

Subject: **1996 GOLD STAR CERTIFICATE**

It's a great pleasure to inform you that your agency has earned the 1996 Gold Star Certificate. Of 121 state agencies, your agency is one of 89 Gold Star agencies this year.

The State Controller's Gold Star Certificate is a challenge to earn. It requires timely and accurate preparation of your agency's statewide financial reports (SFR) and federal assistance schedules. We're happy to recognize your agency's hard work, as it is an integral part of the 1996 Oregon Comprehensive Annual Financial Report and the statewide Schedule of Federal Financial Assistance.

We particularly want to commend your agency's lead SFR accountant, **Mary Hoge**, who worked directly with us to ensure accurate and timely year end reporting. We have forwarded your agency's Gold Star Certificate in care of your SFR accountant.

Thank you for a job well done. The efforts of your staff truly make a difference in the SFR process and in attaining related Oregon Benchmarks.

cc: Mary Hoge w/Certificate

155 Cottage Street NE
Salem, OR 97310-0310
(503) 378-3156
FAX (503) 378-3518

To Bill Gaylord, Bruce Hamlin and John McMillan by FAX. To all other members by regular mail.

April 8, 1997

To: **Chair and Members, Council on Court Procedures**

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

Re: News Items about Council during Legislative Session

1. There has just been a sudden turn of events in the Senate regarding LC 4243 and the future of the Council, which on the face of it appears quite ominous. LC 4243 has been voted out of Ways & Means and assigned a bill number, which is SB 1189. Normally, the next step would be for the Senate President to send the bill for hearings by the appropriate "policy committee," which in this instance would be Business, Law and Government (Neil Bryant, Chair; Randy Miller, Vice-Chair; Brown, Derfler, Leonard and Nelson, members).

The ominous thing I hear, however, is that there is some real possiblity that SB 1189 will be routed back by Senate President Adams to the Ways & Means Subcommittee on Public Safety and Regulation. The significance of this short-circuiting of the policy committee would be, according to the best information I can get, that Sen. Adams has concluded that the cost-savings merits of SB 1189 are so obvious as not to need hearings before such committee. If referral back to Ways & Means happens, the Subcommittee on Public Safety and Regulation might well vote a "do pass" recommendation to the full Ways & Means, which would then presumably send it to the Senate floor with that recommendation, which would almost certainly be followed on a floor vote, all without any hearings where opposition could be heard and considered. Were this to happen, that would be the end of the Council as far as the Senate is concerned, and opposition would then have to be mounted on the House side, where in the past there has tended to be more opposition to, or at least less support for, the Council. Whatever Gov. Kitzhaber and his counsel might think of SB 1189 should it pass in both houses, I don't think we could count very heavily on a gubernatorial veto, because this is not a "Governor's issue."

All of this means that the time is probably at hand for any lobbying against SB 1189 that can be done. Bill Gaylord, Bruce Hamlin and John McMillan, as the Council's current officers and members of its Executive Committee, will, I'm sure, be doing whatever they can, but I also assume that all Council members should feel free to weigh in as best they can without awaiting requests or instructions. Fortunately, the OSB Board of Governors has just formally voted to oppose what has now become SB 1189, which means that its expert lobbyist, Bob Oleson, will be putting his shoulder to the

legislative wheel. Bob has, on more than one past occasion, saved the Council's bacon, or, more bluntly, its continued funding. I've also picked up intimations that the Supreme Court is opposed to SB 1189, though I've heard nothing official, and all of us associated with the Council will obviously have to let the Court speak for itself, if and as it chooses to do.

Might we enlist support from the State Court Administrator? From AG Hardy Myers who, as a legislator, played a key role in establishing the Council? From the Papal Nuncio? Most, if not all of you receiving this memo, will know better than I how best to proceed. Apart from the leadership and the co-chairs of the Ways & Means Subcommittee on Public Safety and Regulation, I have yet to find any organization or individual who is pushing this proposal or who regards it as anything other than a bad idea

2. On Thursday, April 10 at 8:30 a.m. in Rm. H174, there will be a hearing before the same Ways & Means Subcommittee on Public Safety and Regulation, on the Council's proposed 1997-99 biennial budget. Bill Gaylord has, according to my latest word, cleared his calendar so that he can testify in support. I shall be there in a supporting role, as will Larry Niswender, who has done all the technical work on our budget and has been extremely supportive of the Council. I'm quite sure Bob Oleson will be on hand as well.

It is extremely difficult to predict how rough this hearing will be. In the past, even during sessions when there has been no effort to abolish the Council, the initial attitude on the part of the pertinent Ways & Means subcommittee has been to discontinue the Council's state funding, usually on the ground that the Council should be wholly funded by the OSB, like a bar committee. In the 1993 session, the subcommittee vote actually went against continued funding of the Council, and we were saved only by the last-minute intervention of the House Speaker, plus the willingness of the OSB to "chip in" up to $8,000 for reimbursement of members' mileage and lodging expenses. In striking contrast, when John Hart and I appeared for the Council's budget hearing in the 1995 session, the wholly unanticipated reaction of subcommittee members was: "The Council is a great bargain--are you sure the funding you've requested is enough?" John must have cast a spell on those legislators. Two years earlier I was lucky to get out of the capitol without being held in contempt because of my heated reaction to what seemed to me a slighting comment about Fred Merrill; Bob Oleson had to throw a sheet over me.

If SB 1189 is referred back to this same subcommittee with no hearings before the relevant policy committee, the only issue likely to be in play is the Council's cost effectiveness, with little focus upon its value or contributions. You might be struck by the irony that, immediately after one legislative session wherein the legislature insisted upon enhancing the role of the Council, by mandating creation of the LAC, it now *seems*--this still could prove a tempest in a teapot--possibly serious about getting rid of the whole shebang.

PUBLIC SAFETY/REGULATION SUBCOMMITTEE WORKPLAN

(Tentative -- Subject to change without notice)

Chair: Senator Hamby

Senator Hamby, Chair
Senator Gordly
Senator Stull

Meets at 8:30 a.m. in Hearing Room H-174
As of 1/23/97

Representative Johnston
Representative Kruse
Representative Oakley
Representative Prozanski
Representative Watt

DATES	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
Jan 13-17	Full Committee Budget Overview	Full Committee Budget Overview	Full Committee Budget Overview	Full Committee Budget Overview	Full Committee Budget Overview
Jan20-24	Full Committee Budget Overview	Full Committee Budget Overview	Full Committee Budget Overview	Full Committee Budget Overview	Full Committee Budget Overview
Jan 27-31	Prison Tours OSCI/OWCC	Prison Tours OSP	Prison Tours SCI/MCCF	BPSST	BPSST
Feb 3-7	BPSST	DA's & Deputies	State Police Field Trip	Military	Military
Feb 10-14	Crim. Just. Comm.	Crim. Just. Comm.	Dept. of Justice	Dept. of Justice	Dept. of Justice
Feb 17-21	Dept. of Justice	Dept. of Justice	Dept. of Justice	Dept. of Justice	No Meeting
Feb 24-28	Parole Board	Parole Board	Judicial Dept.	Judicial Dept.	Judicial Dept.
Mar 3-7	Judicial Dept.	Judicial Dept.	No Meeting	State Police	State Police
Mar 10-14	State Police	State Police	State Police	State Police	State Police
Mar 17-21	Public Defender	Public Defender	No Meeting	McClaren Tour	Hillcrest Tour
Mar 24-28	Youth Authority	Youth Authority	Youth Authority	Pop Forecast	Youth Authority
Mar 31-Apr 4	Youth Authority	Youth Authority	Youth Authority	Youth Authority	No Meeting
Apr 7-11	Dispute Resolution	Dispute Resolution	Dispute Resolution	Judicial Fitness Court Procedures	No Meeting
Apr 14-18	Corrections	Corrections	Corrections	Corrections	Corrections
Apr 21-25	Corrections	Corrections	Corrections	Corrections	Corrections
Apr 28-May 2	Corrections	Corrections	Corrections	Corrections	Corrections
May 5-9					

STAFF

Larry Niswender:
Corrections
Court Procedures
DA's & Deputies
Dispute Resolution
Judicial Dept.
Judicial Fitness
Dept. of Justice
Public Defender
State Police
Pub Safety Stds Trn
Military Department

Ann Glaze:
OR Youth Authority

Sue MacGlashan:
Board of Parole/PPS

Susie Jordan:
Crim Just Svcs Com

1/13/97

April 16, 1997

To: **Chair and Members, Council on Court Procedures**

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

Re: Legislative Session News Regarding the Council

The prospects for the Council's continued existence and funding now appear much better than when I reported to you early last week. If the Council should ever find itself in need of a code name, "Pauline," as in "The Perils of . . ." would be the obvious choice. Although it's not over 'til it's over, every present indication is that, once again, the Council will be released from the tracks before the legislative locomotive runs over it.

On the morning of April 10 there was a hearing before the Public Safety/Regulation Subcommittee of the Joint Ways & Means Committee to consider the Council's 1997-99 budget as prepared and recommended by the Legislative Fiscal Office, in particular by Larry Niswender, who has been extraordinarily helpful and supportive throughout this process. The first person to testify was Mark Gardner, of the Office of the Attorney General, who appeared at the direction of General Hardy Myers and who was a member of the 1977 legislature which created the Council. Bill Gaylord took the initiative to request this appearance. Mr. Gardner's testimony was very effective. Next to testify was Bill who, as you would expect, made a fine presentation. He had been authorized to state on behalf of OTLA that that organization strongly supports the Council's continued existence. Bruce Hamlin was also present in his capacity as Vice Chair and also to provide living proof that OADC also supports the Council. Likewise Bob Oleson, who was prepared to testify to the OSB's continuing support. John McMillan was not present on this occasion, but I have reason to know that he had been busy, and continues so, making discreet inquiries to key legislators with whom he is on good terms. My guess is that John's queries have a way about them of suggesting the responses he would prefer. I, for once, kept my mouth shut, which appeared to be highly effective.

We were all prepared for a bout of heavy weather before the subcommittee, but the outcome could not have been better. Co-Chair Sen. Jeannette Hamby, who presided, was very cordial. At the conclusion of Bill's testimony, a motion by Rep. Bryan Johnston, who has always been a stalwart supporter of the Council, to approve the budget as recommended was unanimously agreed to. There was not a single unfriendly comment or question from any member of the subcommittee.

Of course a favorable subcommittee vote is not quite the end of the process of refunding the Council. But normally the full Ways & Means Committee agrees to the recommendations of its subcommittees and the floor votes in both chambers almost invariably adopt the budget recommendations of Ways & Means, although neither of these steps is absolutely guaranteed.

That leaves SB 1189 (which, as previously described, would abolish the Council and have the Supreme Court make biennial "recommendations" to the legislature regarding ORCP amendments) having been reported out of the same

subcommittee that agreed to the Council's budget. I've just received word by coded message from John McMillan that SB 1189 has been referred to the Senate Committee on Business, Law and Government (Neil Bryant, Chair; Randy Miller, Vice Chair; Kate Brown, Gene Derfler, Randy Leonard and David Nelson, members). Senators Bryant and Brown are, I believe, solid supporters of the Council. I don't know how the other Senators might be predisposed, although John has been in touch with Sen. Derfler. The assignment of SB 1189 to this particular committee therefore seems to be a favorable sign, and at the least indicates my earlier concern about a possible "short-circuiting" of the normal committee process has proved unfounded.

As of this writing, no committee hearing on SB 1189 has been scheduled. This bill might well die in committee, as many do, unheralded and unmourned, with no hearing. However, if and when a hearing is scheduled, naturally I'll alert Bill, Bruce and John immediately, although one or more of them might get word of this before I do. I'm relying on Lexis bill-tracking to keep informed, plus a couple of people who are at the legislature every day.

I don't mean to burden you with alot of gruesome details, but thought you ought to know the likelihood of the Council staying in business looks pretty good at this juncture.

April 28, 1997

By Fax

To: Mr. Dave Amesbury (503-986-1814)
Hon. Neil Bryant, State Senator (503-986-1958)
Hon. Gene Derfler, State Senator (" " ")
Hon. Jeanette Hamby, State Senator (" " ")
Hon. John Minnis, State Representative (" " ")

Fm: Maury Holland, Professor of Law, University of Oregon*

Re: SB 1115

This is an unabashed plug for SB 1115 in the hope that all of you will see fit to support this bill, which I understand is sponsored by Senator Hamby. My reasons are as follows:

1. The reconstituted and revitalized Oregon Law Improvement Commission (OLIC) would not cost the State any money, and the dedication of a small amount of staff support that SB 1115 would require would "leverage" a great deal of value in the form of donated, volunteer time and effort on the part of members who would be neither legislators nor State employees.

2. With four legislators among its members, the revamped OLIC could be depended upon to exercise sound and prudent judgment about what matters to take on. It would be sensible enough not to pester the Legislature with issues that have no practical consequences. At the same time, the legislator-members could, if necessary, steer the OLIC away from any temptation to enmesh itself in matters having partisan overtones or involving broad public policy questions, concerning which the Legislature probably already gets more advice than it needs or can assimilate.

3. The OLIC would propose non-controversial statutory solutions to a variety of pesky, more or less technical problems usually created by archaic legislation, inconsistent statutes, or statutes not clearly drafted. My favorite example is ORS 12.220, which has been around in one form or another since the 19th century, and might as well be written in Sanskrit. Technical problems of this kind can usually be gleaned from the appellate reports, where judges confront recurring statutory problems, perhaps for the umpteenth time, and reiterate their plea to the Legislature to clarify its intent, or to choose which of two or more inconsistent ORS provisions it wishes to prevail.

Problems of this technical kind, though presumably no greater in number or more serious in Oregon than most other U.S. jurisdictions, are unlikely to be addressed by the Legislature of

*Title and institutional affiliation included for identification only.

its own initiative, given the enormous time pressure of modern sessions. Similarly, the Legislature is unlikely to be prompted to act on these problems by any of the usual array of interest-group lobbyists, because seldom would any interest group be benefitted enough to justify room for them on their legislative agendas. Because these problems are almost invariably statutory, the judges cannot resolve them by themselves, and the Legislature tends not to act since there are few political incentives for doing so, thus they tend to persist for decades, engendering needless litigation and costs to the State and litigants, taking away court time, in a low visibility manner, that would otherwise be available to handle questions that must be adjudicated.

4. The OLIC would, unlike so many other groups and organizations, bring to the Legislature, not just problems and difficulties for legislators to resolve, but would also bring well considered solutions, arrived at after broad participation, in the form of proposed statutory amendments. If well done, its proposals would typically be non-controversial and would require a minimum of legislative committee and staff time to get to the point of being ready for floor voting.

5. Three OLIC members would be the deans of the three Oregon law schools or their designees. My guess, and hope, is that each dean would assign the responsibility for OLIC participation to an interested faculty member who, in turn, would involve law students in taking the first crack at the necessary research and preliminary drafting, perhaps as part of a seminar or workshop for which academic credit could be earned. In addition to its obvious educational value, law student involvement in OLIC projects would give these future lawyers an enhanced understanding of the legislative process and the workings of the Oregon Legislature in particular, something which all too many lawyers sorely lack. For some of the involved students, these projects would be an excellent preparation for legislative internships. It might even plant the seed that some day would germinate by running for the Legislature themselves.

I know that, at this point in the session, you are terribly pressed for time, and therefore greatly appreciate your taking the time to read this memo and for your consideration of SB 1115.

Respectfully submitted,

Maury Holland

Maury Holland

May 26, 1997

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

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

Re: Legislative News

1. At some very slight risk of counting chickens before they are fully hatched, it now seems nearly certain that the Council has survived another legislative session intact. SB 1189, which would have abolished the Council and transferred its rules-amending function to the Supreme Court and an advisory committee, died in the Senate Committee on Business, Law and Government, where it was not called up for hearing. My guess is that result was largely attributable to the goodwill and support for the Council on the part of Sen. Neil Bryant, chair of that committee. The Council also enjoyed the strong implied support of the Supreme Court, for which Justice Durham must have been instrumental. I say "implied,' because my understanding of what the Court authorized Chief Justice Carson to do on its behalf was to express to the Legislature its opposition to SB 1189. As always, the support of the Oregon State Bar has been critically important throughout this session. John McMillan kept a close watch on this bill.

Although the General Fund budget has not yet been finally voted on, the Council's 1997-99 biennial funding is included in the budget of Ways & Means, as it was in the Governor's budget, so continued funding of the Council now seems assured. Here the support of both OTLA and OADC, arranged by Bill Gaylord and Bruce Hamlin, respectively, was gratifying and certainly helped the cause.

2. In marked contrast to the 1995 session, the current one seems to have been a relatively quiet one as far as the ORCP, and civil practice generally, are concerned. Ironically in light of all the wailing and gnashing of teeth occasioned by the 1995 legislature's creation of the LAC, to my knowledge that estimable body has not been called to slide down the pole even once during this session.

Right now I'm trying to track down one bill that would reportedly close ODOT's driver information to the public, to see whether it has been enacted and, if so, what impact it might have on ORCP 7 D(4)(a)(i) as amended by the Dec.'96 promulgation. If this become a statute, I'll include its text with the agenda for the Council's first meeting in the fall.

The *likely* date of that meeting, incidentally, is October 11, since the Council has traditionally met on the second Saturday of the month.* However, that tradition is subject to occasional modification by direction of the Chair, so I cannot confirm this date until consulting with Bill Gaylord. October 11 happens to be Yom Kippur. If any member of the Council would prefer, for that or any other reason, not to meet on that date, please let Bill know. In the meantime, my best wishes for an enjoyable summer.

*For the benefit of new members, Council meetings are held at the Oregon State Bar Center, begin at 9:30 a.m., and are usually adjourned about noon.

May 26, 1997

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