COUNCIL ON COURT PROCEDURES

Minutes of Meeting of November 14, 1992

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

Present:	Robert D. Durham	Winfrid K.F. Liepe
	John E. Hart	Ronald L. Marceau
	Lafayette G. Harter	Michael V. Phillips
	Bernard Jolles	William C. Snouffer
	Henry Kantor	Richard C. Bemis
	Richard T. Kropp	
Excused:	Richard L. Barron	David Kenagy
	Susan G. Bischoff	Robert B. McConville
	Susan P. Graber	Charles A. Sams
	Bruce C. Hamlin	Janice M. Stewart
	Nely Johnson	Elizabeth Welch
Absent:	William D. Cramer, Sr.	
	John V. Kelly	

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant. The following were also in attendance: Phil Emerson, Phil Goldsmith, and Charlie Williamson.

The meeting was called to order by Chair Henry Kantor at 9:35 a.m.

Prior to beginning with the noticed agenda the Chair made the following preliminary announcements. He announced that Judge Lee Johnson has resigned from the Council and is being replaced by Circuit Judge Nely Johnson. He further announced that Judge Paul DeMuniz has had to resign from the Council because of conflicting schedules, and is being replaced by Judge Robert D. Durham. The Chair welcomed Judge Durham to the Council. He also announced that the Oregon State Bar Board of Governors has appointed Associate Dean David Kenagy of Willamette University School of Law to the law-teacher Council position recently vacated by Maury Holland upon the latter's appointment as Executive Director. Finally, the Chair informed the Council that the audiotapes recorded to assist in preparation of minutes of Council meetings are subject to Oregon's Public Records Law, and

default judgment or allow the judge to take evidence, order a jury trail or reference, etc., if that seemed appropriate, and that the purpose of his proposed A(4) is to provide for mailing of notice of the date of entry of default judgment to the non-appearing party or attorney of record. The latter, he explained, is necessary in order to start the time running for appeal or seeking relief under R. 71. He said he regards it as important that judges have discretion to either order entry of default judgment on the basis of the allegations of the complaint, for example when damages are liquidated, or to require testimony or other proceedings when that seemed necessary. In response to a question from the Chair, Liepe clarified the fact that he thought the authority of a judge to require a prima facie case before ordering entry of judgment should be discretionary, not obligatory even in cases where it would serve no useful purpose.

John Hart asked whether inclusion of the words: "after notice of the date and time of trial" in proposed A (2) was necessary or helpful. He stated that if one party were present at a scheduled trial and seeking default because the other party failed to show up, that would indicate that notice of trial had been given. If not, he added, relief could always be obtained pursuant to R. 71. Skip Durham questioned the accuracy of characterizing the procedure contemplated by the Liepe proposal as default. Liepe and Jolles responded that the problem spotted by Judge Mattison, which all the Council agrees should be promptly fixed, used the terminology of default. Thus it would be difficult to overcome the problem created by Van Dyke outside the context of R. 69 and defaults. Phillips asked how the Liepe proposal might apply in a case where, because the complaint failed to state a claim for relief or other similar reason, judgment should not necessarily or invariably be entered against the non-appearing party. Liepe responded that both A(2) and A (3) of his proposal use the phrase "the court may," not "the court shall." Thus, if the judge can see that the action is barred by limitations or the like, that would be a reason why not to enter default judgment against the non-appearing party. The Chair expressed concern that the proposal as drafted might be construed to authorize judges to enter judgment against non-appearing parties even when a complaint fails to state a valid claim. Marceau commented that he did not see any problem here, because if a complaint failed to state a claim, and a defendant were defaulted for failure to appear at trial, he or she would get notice of entry of the default judgment and would then be alerted either to apply to set it aside under R. 71 or take an appeal. Hart commented that he failed to understand why there should be undue solicitude for a defendant who received notice of trial and failed to show up. Jolles reiterated his view that the problem at the moment is to deal with Van Dyke and expressed his opinion that the Liepe proposal does just that.

The Chair again raised the question of whether it might be easier simply to deal with the Van Dyke problem in Staff Comment, which might say that it is no longer the Council's intent that failures to show up at trial are intended to be defaults within the meaning of R. 69. Snouffer asked Liepe why the latter's proposal did not simply incorporate the language of B (2).

After the Chair proposed the further discussion of A (3) in the Liepe proposal be postponed until a later date, Jolles moved that Liepe's Proposal # 2 be approved without the words in A (3): "after notice of the date and time of trial," which motion was seconded by Hart. This motion was approved by unanimous voice vote.

The Chair asked whether anyone had any new business to raise, but there was none. The Chair then reminded everyone that the next meeting of the Council will be held on Saturday, December 12, at the University of Oregon School of Law (Room 375). The Chair said that there would be no Council meeting in January and suggested that the next meeting after the December 12th meeting should be held the first Saturday in February 1993.

The meeting adjourned at 12:07 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

CORRECTED 11-14-92

October 12, 1992

TO: Chair and Members, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland, Executive Director

RE: Recommended amendments to ORCP (Class Actions)

To keep the record straight, and to facilitate further discussion of the class action proposals, I was asked to provide you with the proposed amendments to ORCP that the subcommittee found "non-controversial" and unanimously recommends that the Council promulgate. They are as follows, with proposed deletions indicated by square brackets and proposed additions indicated by boldface underlining:

RULE 32
CLASS ACTIONS

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C. Determination by order whether class action to be maintained.

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether **and with respect to what claims or issues** it is to be so maintained and [, in action pursuant to subsection (3) of section B of this rule, the court] shall find the facts specially and state separately its conclusions thereon. An order under this section may be conditional, and may be altered or amended before the decision on the merits.

D. Dismissal or compromise of class actions; court approval required; when notice required. **Any action filed as a class acation in which there has been no ruling under subsection C.(1) of this rule and any action ordered maintained as a** [A] class action shall not be **voluntarily** dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to **some or** all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise [to give any] **of** such compensation has been made. If the statute of limitations has run or may run

against the claim of any class member, the court may require appropriate notice.

E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument, **including precertification determination of a motion made by any party pursuant to Rules 21 or 47 if the court concludes that such determination will promote the fair and efficient adjudication of the controversy and will not cause undue delay**;

E.(2) Requiring, for the protection of [the members of the class] **class members** or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all [of the] **class** members of any step in the action, [or] of the proposed extent of the judgment, [or] of the opportunity of **class** members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses[,] or otherwise to come into the action**, or to be excluded from the class**;

E.(3) Imposing conditions on the representative parties**, class members,** or [on] intervenors;

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F. Notice required; content; statements of class members required; form; content; effect of failure to file required statement.

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[F.(4)] **F.(3)** [Except as otherwise provided in this subsection, the] **P**laintiff[s] shall bear [the expense] **costs** of [notification] **any notice ordered prior to a determination of liability**. The court may, [if justice requires] **however, order** that [the] defendant bear [the expense of notification] **all or a specified part of the costs of any notice** [to the current customers or employes of the defendant included with a regular mailing by the defendant] included with a regular mailing by [the] defendant **to its current customers or employes**. The court may hold a [preliminary] hearing to determine how the costs of such notice shall be apportioned.

[F.(5)] **F.4** No duty of compliance with due process notice requirements is imposed on a defendant by reason of the defendant including notice with a regular mailing by the defendant to

current customers or employes of the defendant under this section.

[F.(6)] **F.(5)** As used in this section, "customer" includes a person, including but not limited to a student, who has purchased services or goods from a defendant.

G. Commencement or maintenance of class actions regarding particular issues; [division of class;] subclasses. When appropriate[: G.(1)] **[A]**an action may be brought or **ordered** maintained as a class action (1) with respect to particular **claims or** issues[;]**,** or **(2) by or against multiple class or subclasses. Each subclass must separately satisfy all requirements of this rule except for subsection A.(1)**.

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M. [Judgment; inclusion of class members; description; names] Form of judgment. The judgment in an action **ordered** maintained as a class action [under subsections (1) or (2) of section **B** of this rule], whether or not favorable to the class, [include and] shall **specify or** describe those [whom the court finds] **found** to be members of the class[. The judgment in an action maintained as a class action under subsection (3) of section **B** of this rule, whether or not favorable to the class, shall include and specify by name those to whom the notice provided in section **F** of this rule was directed, and who have not requested exclusion and whom the court finds to be members of the class, and the judgment shall state the amount to be recovered by each class member] **or who, as a condition of exclusion, have agreed to be bound by the judgment. If a money judgment is entered in favor of a class it shall when possible identify by name each member of the class and the amount to be recovered thereby**.

AD HOC COMMITTEE'S SUBSTITUTE PROPOSED DRAFT - NOVEMBER 10, 1992

(Compare the following with that committee's proposed amendment submitted with its letter to the Council dated December 14, 1992, commencing on page 4.)

F. Notice and exclusion.

F.(1) When ordering that an action be maintained as a class action under this rule, the court **shall direct that notice be given to some or all members of the class under subsection E.(2) of this rule,** shall determine [whether, when, and] how **this** notice should be given [under subsection E.(2) of this rule] and **shall determine** whether, when, how, and under what conditions putative members may elect to be excluded from the class. The matters pertinent to these determinations ordinarily include: (a) the nature of the controversy and the relief sought; (b) the extent and nature of any member's injury or liability; (c) the interest of the party opposing the class in securing a final resolution of the matters in controversy; (d) the inefficiency or impracticality of separately maintained actions to resolve the controversy; (e) the cost of notifying the members of the class; and (f) the possible prejudice to members to whom notice is not directed. When appropriate, exclusion may be conditioned on a prohibition against institution or maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separately maintained action of any judgment rendered in favor of the class from which exclusion is sought.

The words scratched out were deleted at the meeting, so no need to show them struck through or otherwise

(Win Liepe Draft Proposal #2) -

Note: Judge Mattison called attention to the Van Dyke problem. After he received my letter of October 28, 1992, he strongly recommended dealing with default judgment on failure to appear for trial as set out in A.(3) below.

Rule 69
DEFAULT ORDERS AND JUDGMENTS

A. Entry of order of default; failure to appear for trial.

A.(1) Default order. When a party against whom a judgment for affirmative relief is sought has been served with a 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 the 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 or 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 a showing, the clerk or the court shall enter the order of default.

A.(2) Default order on failure to appear for trial. When a party who has filed an appearance fails to appear for trial ~~after notice of the date and time of trial~~ the court may enter an order of default against the non-appearing party without further notice.

A.(3) Default judgment on failure to appear for trial. When an order of default has been entered pursuant to subsection A.(2), the court may, without taking evidence, enter a judgment by default against the non-appearing party on the basis of the pleadings filed by the appearing party or parties; provided that the court, in its discretion, may require evidence in support of a judgment by default by hearing, jury trial, order of reference, affidavits, or other proceedings. The judgment by default may be entered on the trial date or at such later time as the court may deem appropriate.

A.(4) Notice of default judgment on failure to appear for trial. The clerk shall mail notice of the date of entry of the judgment in the register as required by Rule 70B(1) also to attorney of record for the non-appearing party, or if there is no such attorney, to the non-appearing party.