COUNCIL ON COURT PROCEDURES
Minutes of Meeting of April 16, 1994
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	J. Michael Alexander	Bruce C. Hamlin
	Jack A. Billings	Bernard Jolles
	Marianne Bottini	John V. Kelly
	Sid Brockley	Rudy R. Lachenmeier
	Patricia Crain	Michael H. Marcus
	Mary J. Deits	Milo Pope
	Stephen L. Gallagher, Jr.	Charles A. Sams
	William A. Gaylord	Nancy S. Tauman
Excused:	William D. Cramer, Sr.	
	Susan P. Graber	
	John E. Hart	
	Nely L. Johnson	
	John H. McMillan	
	Michael V. Phillips	
Absent:	Stephen J.R. Shepard	

Kathy Chase, liaison from the Oregon State Bar Procedure & Practice Committee, was in attendance. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. In the absence of the Chair and Vice Chair, the meeting was called to order at 9:40 a.m. by the Executive Director, who, it was agreed might chair this meeting.

Agenda Item 2: Approval of January 15, 1994 minutes. The minutes of the January 15, 1994 meeting were, without objection, approved as previously distributed as Attachment A to the agenda of this meeting.

Agenda Item 3: Introduction of new members. Everyone present introduced themselves, including the following new members: Judge Jack Billings, Judge Mary Deits, and Judge Stephen Gallagher. Ms. Kathy Chase, liaison from the OSB Practice & Procedure Committee, also introduced herself.

Agenda Item 4: Status Report from subcommittee on Council's Future (Bruce Hamlin). The Chair recognized Mr. Hamlin, Chair of this subcommittee, for a report on its activities. For the benefit of new members he read the budget note appended to the Council's 1993-95 biennial appropriation bill. He reported that the subcommittee has held meetings with Representative Mannix, Senator Springer, and Bob Oleson of the OSB. A phone conversation was also held with Representative Parks in the absence of an interim Judiciary Committee.

Based upon these meetings and conversations, Mr. Hamlin stated that he did not think there is likely to be any concerted effort in the 1995 session to abolish the Council, or to restructure it or modify its role. He stated that, while the subcommittee had not yet reached any final conclusions, it seemed probable to him that the report it would present to the Council in response to the House budget note would recommend, in substance, that the Council continue in its present form and with its existing role. However, he cautioned that all indications are that, given Oregon's present fiscal situation, the 1995 session would see a repetition of the effort made in the 1993 session to defund the Council. Prof. Holland added a comment that many legislators, including those who have no quarrel with the Council, nonetheless believe that it is, or should be, a Bar committee and therefore supported by the Bar, or at least not supported by the taxpayers out of general fund revenues.

Mr. Alexander asked whether members could be provided with a breakdown of the Council's current biennial budget. Mr. Hamlin responded, on behalf of the subcommittee, that he would see that copies of the budget breakdown are distributed to all members. He concluded by stating that the subcommittee would present its proposed report to the Council at its July or August meeting for its approval, with any modifications it wished to make, and forwarding to the Emergency Board.

Agenda Item 5: Report on clarifying amendments to ORCP 32 F (Michael Marcus). The Chair recognized Judge Marcus to report, on behalf of the pertinent subcommittee, some draft language he had prepared by way of a clarifying amendment to subsection 32 F(2). (See Attachment B to the agenda of this meeting.) He briefly reviewed the need for such clarification inadvertently created by amendments to Rule 32 effective Jan. 1, 1994, in particular by the latters' abolition of the three discrete categories of class actions defined by the prior version of section 32 B. He noted that the present language of the rule, specifically subsection 32 F(2), could easily be read to require compliance with the claim form procedure in every kind of class

action, including those seeking only injunctive or declaratory relief. He stated that his proposed language is intended to make clear that solicitation of claim forms is required only in class actions in which money damages are individually sought for members of a plaintiff class, while also seeking to avoid revival of the heated controversy that has surrounded retention of the claim form procedure in the past. Judge Marcus further stated, however, that a communication had been received by the subcommittee from Mr. Phil Goldsmith, who has requested that no formal proposal be made to the Council until he can provide it with the results of some research he has conducted into some relevant legislative history. Specifically, he said that the subcommittee wishes to review Mr. Goldsmith's findings and further consider whether in light of them language should be devised that might exclude certain kinds of damage class actions from the purview of the claim form provision. He also stated that the subcommittee would endeavor to have some proposed language for the Council's consideration at its May meeting or as soon thereafter as possible.

A discussion then ensued as to whether the Oregon Bankers' Association or other groups that in the past have expressed special concern about the claim form procedure should be given notice that the Council will soon be considering an amendment to subsection 32 F(2). Prof. Holland mentioned that the Bankers' Association, along with many other interest groups, is included on the regular mailing list of meeting agendas, including all attachments. No objection was voiced to this practice, but there was a wide diversity of opinion concerning whether it would be appropriate to go beyond mailing agendas to groups known to be interested, such as by personally telephoning group representatives and perhaps specifically inviting them to appear at a particular meeting and present oral statements on whatever issues under consideration by the Council particularly concerned them. Some members took the position that everything that might be done by way of outreach should be done, but others expressed concern that contacting particular groups might be regarded as inconsistent with the Council's obligation of evenhandedness. Mr. Lachenmeier suggested that copies of agendas might be distributed to all courthouses for posting on bulletin boards. He also agreed with a suggestion of Mr. Gaylord that copies of meeting agendas be provided to legislators, so that they might alert constituents having an interest in a matter before the Council. Mr. Gaylord also raised the question of whether there could be some advance notice, by inclusion in meeting agendas or otherwise, of the groups or spokespersons expected to appear at a meeting to speak in support or opposition to particular items.

Mr. Hamlin mentioned that his subcommittee has been discussing some ideas along these lines.

Judge Brockley moved that any member of the Council should feel entirely free to contact or notify anyone he or she cared to. This motion was later amended to say that this advance notice issue should be taken up at a future meeting. This discussion concluded without a formal vote on the motion or consensus, except that, in accordance with Judge Brockley's motion, a sense of the meeting emerged that time should probably be set aside on some future occasion for further discussion of how most effectively and appropriately the Council might ensure the widest possible notification to all interested parties of matters being deliberated by the Council, thus minimizing the possibility of any repetition of past accusations that it operates in secret or is otherwise inaccessible.

For the benefit of new members Prof. Holland explained that the Council's procedure is that subcommittees report proposed amendments to the Council for debate and deliberation, which are usually accompanied by revisions in their language being proposed by other members. Amendments are then voted upon for tentative adoption only. At any time following a vote to tentatively adopt an amendment, the amendment can be recalled for reconsideration or further revision, at the instance of the pertinent subcommittee or of any member. He added, however, that because of an amendment to the Council's organic statute enacted by the 1993 Legislature, the October meeting will be the latest time at which tentatively adopted amendments could be revised. At the Council's final meeting prior to the 1995 session, in December, the only options available to the Council will be either finally to adopt, or not adopt, amendments in the precise form as previously published to the Bar. This is because of the new statutory requirement that the exact text of any amendments finally adopted and thus promulgated at the December meeting be published to the Bar at least thirty days prior to that meeting.

Agenda Item 6: Status report regarding ORCP 69 C (Bruce Hamlin). The Chair recognized Mr. Hamlin to report his recommendation regarding section 69 C. (See Attachment C to the agenda of this meeting.) Mr. Hamlin briefly reviewed the background which led the Council to add what is presently section 69 C. He recalled that in the course of discussion at the January 15, 1994 meeting there was general agreement that this provision is needed despite the Court of Appeals decision in Weaver and Weaver, but that it probably should be transferred to Rule 58. He therefore recommended that what is now section 69 C become section 58 C and that the comment he had drafted appear

below Rule 69 to alert the bench and bar to this transfer. Mr. Gaylord moved that Mr. Hamlin's reported draft be tentatively adopted, which Judge Marcus seconded. Several members asked whether, if this motion carried, the Council would be adopting the comment as well as the rules change. Prof. Holland and others responded that it had not been the Council's practice formally to adopt comments, but to leave those to staff. Prof. Holland assured the meeting, however, that he would include the comment drafted by Mr. Hamlin following Rule 69 as amended, where people would naturally expect to find an explanation of what had become of the present section 69 C.

On the call of the question, the motion tentatively to adopt Mr. Hamlin's reported draft, as set forth in Attachment C, carried unanimously.

Mr. Hamlin then reported that, as previously suggested, he had contacted Judge Liepe and stated that the latter had recommended the addition of language as set forth on p. 7 of Attachment C. Mr. Hamlin stated that he did not think such additional language is needed, with which there was general agreement.

Agenda Item 7: Status report from Subcommittee on Hospital Records--ORCP 55 H. In the absence of Mr. Phillips, Mr. Alexander indicated that little progress had been made since the January meeting of the Council and that there had been no meetings of this subcommittee and only one conference call. Prof. Holland stated that Mr. Phillips had suggested to him that, owing to the heavy demands of his new practice, it might be advisable to reassign the responsibilities of subcommittee chair. Prof. Holland said that he would promptly bring this situation to the attention of Mr. Hart. Judge Brockley said that, on the basis of the single conference call in which he had participated, he believes the issues presented by the effort to make section 55 H more workable are numerous and complex.

Ms. Tauman asked to be provided with the packet of background information earlier furnished to the members of the subcommittee, in response to which it was agreed that the Executive Director would distribute copies of this packet to all members for their information and for any suggestions or ideas they might have.

Mr. Lachenmeier stated that the responses of some hospitals to subpoenas of patient records appear to be at present highly confused, largely because various federal and state regulations are being interpreted, not only to shield certain records, but

also to prohibit even disclosure of their existence or that some are being withheld.

Agenda Item 8: Amendment to ORCP 15 A as Proposed by the Practice & Procedure Committee of the Oregon State Bar (see Attachment D to the Agenda of this meeting). This proposed amendment was reported by the Chair as being recommended by the OSB Practice & Procedure Committee for tentative adoption by the Council (see p. D-1 of Attachments to meeting agenda). Mr. Hamlin moved the tentative adoption of the proposed amendment and Judge Pope seconded the motion. Some members questioned whether the ambiguity to which this proposed amendment seems addressed is one that causes problems with any frequency. Judge Marcus stated that extending filing times inevitably slows the pace of litigation to some extent, and pointed out that the problem of ambiguity could be just as well resolved by providing that all replies to counterclaims and answers to cross-claims must be filed within ten days as by providing, as this proposed amendment would do, that all must be filed within thirty days. In other words, he said, any possible doubt could be just as effectively dispelled in favor of ten rather than thirty days. Some members replied to this point that they didn't believe that the difference between ten and thirty days would have significant impact on the overall speed with which litigation is conducted. Mr. Lachenmeier asked Ms. Chase how broadly support for this amendment was shared among members of the Practice & Procedure Committee. The latter responded that only a few such members regarded the amendment was especially important, but that no members appeared to think it was a bad idea. Judge Billings stated that, from a District Court perspective, the difference between ten and thirty days would have no significant impact. Judge Brockley and others noted that, in federal practice, the uniform period for filing responsive pleadings is twenty days. On the call of the question, this motion was adopted by a vote of 13 in favor, 3 opposed and no abstentions.

Agenda Item 9: Report regarding trial court findings in connection with fee awards; ORCP 68 C(4)(c)(ii): Mick Alexander. Mr. Alexander was recognized to report on any early conclusions reached by the subcommittee appointed at the Council's Jan. 15, 1994 meeting to consider whether subparagraph 68 C(4)(c)(ii) should be amended to require findings of fact in connection with trial court rulings on attorney fee petitions and objections. This matter was raised at that meeting by Justice Durham. Mr. Alexander reported that this subcommittee had had one lengthy discussion of this question, from which it became apparent that the issues involved are quite difficult ones, that no consensus had yet formed within the subcommittee, but that there was a

general sense that the problem raised by Justice Durham seemed important enough to warrant more thought and attention. Ms. Crain and Judge Deits both commented that any requirement of findings would necessarily increase the judicial workload, at both the trial and appellate court levels. Messrs. Alexander and Gaylord responded that the increased workload was fully understood to be involved, and therefore the question is whether such increase would be worth that cost in terms of greater clarity and more principled decisionmaking. Judge Marcus noted that the considerable number of AWOP decisions in the Court of Appeals is suggestive of that Court's limited existing capacity to publish articulated reasoning in the process of resolving all the issues that come before it. Judge Sams stated that his practice is always to provide findings and conclusions even in the absence of any mandate in the rules. Ms. Tauman said that her experience suggests that there might be some value to practitioners in being able to request formal findings. She also volunteered to serve as a member of this subcommittee, to which the meeting agreed on behalf of Mr. Hart. This discussion ended without any formal action by the Council, but with general agreement that the subcommittee should continue its deliberations on the premise that this issue should not at this point be summarily dismissed from the current biennial agenda.

Agenda Item 10: Report regarding ORCP 22 (Rudy Lachenmeier). Mr. Lachenmeier stated that he had no formal report or recommendations to present at this meeting, but expects to recommend some clarifying amendments to this rule at the May meeting or subsequently. He reiterated the concern expressed at the January meeting that there appear to be some confusingly inconsistent word usages in the present text of subsection 22 C(1), in particular the use of "shall" in contrast to "may" elsewhere in the subsection, which might lead to the inference that third-party counterclaims against third-party plaintiffs are compulsory, as opposed to the general rule in Oregon practice that all counterclaims are permissive only. Mr. Lachenmeier added that he had had some conversations with authors of relevant CLE materials, which left him more persuaded that the possibilities of confusion are real. He said that, in drafting his proposed amendments, he would obtain more information respecting pertinent legislative history.

Mr. Lachenmeier went on to say that, in the course of his examination of subsection 22 C(1), he discovered something else that might constitute a problem worth addressing. That is the wording that requires both leave of court and agreement of existing parties in order for a third-party complaint and summons to be served on a prospective third-party defendant more than 90

days after service of plaintiff's complaint and summons on the third-party plaintiff. He asked whether any members knew the origins of this dual requirement and its rationale. Mr. Hamlin responded that during the period when ORCP 1 through 64 had been promulgated for comment, but not yet effective, many people came forward to urge some important changes, including some who urged total disallowance of third-party practice. The existing 90-day limit, with the two requirements for its being overcome, was a compromise deemed necessary in order to preserve the entire device of third-party practice. Mr. Hamlin expressed the opinion that, since those early days, the Bar has become very much less uneasy about third-party practice, and therefore he would be inclined to perhaps get rid of the 90-day limitation or at least make it easier to surmount in appropriate cases. It was then pointed out that there was no need to thrash out all these issues now, but that Mr. Lachenmeier should be given a sense of the meeting whether the Council wished him to continue with this work or not. The sense of the meeting was that Mr. Lachenmeier should so proceed, and he stated that he would attempt to have a formal report with some recommendation at the May meeting.

Agenda Item 11: Other matters for consideration. In response to an inquiry from the Chair, no members proposed additional matters for the Council's consideration during the 1993-95 biennium.

Agenda Item 12: Old business. There was no response to the Chair's inquiry whether any member wished to raise an item of old business.

Agenda Item 13: New business. There was no response to the Chair's inquiry whether any member wished to raise an item of new business.

Agenda Item 14: Adjournment. The meeting was adjourned at 11:40 a.m.

Respectfully submitted,

Maurice J. Holland

Maurice J. Holland
Executive Director and
Chair Pro Tem.