

COUNCIL ON COURT PROCEDURES  
Minutes of Meeting of October 14, 1995  
Oregon State Bar Center  
5200 Southwest Meadows Road  
Lake Oswego, Oregon

Present: J. Michael Alexander John E. Hart  
Marianne Bottini Rudy R. Lachenmeier  
David V. Brewer Michael H. Marcus  
Patricia Crain John H. McMillan  
Diane L. Craine Karsten Rasmussen  
Don A. Dickey Stephen J.R. Shepard  
Stephen L. Gallagher, Jr. Nancy S. Tauman  
William A. Gaylord

Excused: Sid Brockley Nely L. Johnson  
Mary J. Deits David B. Paradis  
Susan P. Graber Milo Pope  
Rodger J. Isaacson

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

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**Agenda Item 1.** The Chairperson, John Hart, called the meeting to order at 9:40 a.m.

**Agenda Item 2.** Mr. Hart asked all members present to introduce themselves, and this was done, along with self-introductions of the Executive Assistant, Ms. Henthorne, and the Executive Director, Prof. Holland. Mr. Hart mentioned that, due to a regrettable oversight, Bruce Hamlin, whom he intended to nominate to be the Council's new Vice Chairperson, had not been reappointed as a Council member by the OSB Board of Governors, but added that this will be rectified and Mr. Hamlin officially reappointed at the Board's November meeting. Mr. Hart wondered whether there would be any objection to his proceeding with Mr. Hamlin's nomination under these circumstances, or whether this nomination should be deferred until he has been officially reappointed. The consensus of the members was that this nomination should proceed, along with those of the other new officers, at the appropriate point during this meeting.

**Agenda Item 3.** The minutes of the Council's April 22, 1995 meeting were, without objection or amendment, approved as previously distributed.

**Agenda Item 4.** Mr. Hart announced the following nominations for 1995-97 officers of the Council: Mr. Gaylord to be

Chairperson, Mr. Hamlin to be Vice Chairperson, and Mr. McMillan to be Treasurer. These nominations were seconded by Ms. Crain, and were approved by unanimous voice vote, whereupon Mr. Gaylord assumed the Chair. Mr. Gaylord then presented Mr. Hart with an inscribed gavel and stand as a token of the Council's esteem and appreciation for his leadership as Chairperson during the 1993-95 biennium, for which presentation Mr. Hart expressed his thanks.

**Agenda Item 5.** Mr. Gaylord first noted that the new Council members might have some interest in reading the write-up about the Council's history and role prepared by Prof. Holland in the form of a letter to Mr. McMillan, and asked that copies of this be distributed with the agenda of the next meeting. He then conducted a general discussion of the current situation of the Council in the wake of the 1995 legislative session, in particular HB 2228, which amended the Council's organic statute to require it to elect a five-member legislative advisory committee (hereinafter "LAC") to work closely with legislators on any proposed legislation that would amend the ORCP during future legislative sessions. He initiated this discussion by observing that HB 2228 seems to require the Council to undertake a function new to it and very different from its traditional deliberative method of carefully considering proposed ORCP amendments over the course of several meetings at which cumulative input would be obtained, not only from Council members, but from interested members of the bench, the bar, and the public in the form of testimony before the Council or written comments submitted to it. Mr. Gaylord added that he, along with what he sensed was a consensus of other Council members, has some concern that the five-member LAC, when called upon to give its position on behalf of the Council on possible ORCP amendments to legislators on very short notice, would be placed in the position of having to respond without benefit of the traditional kind of deliberation by the full Council as has tended to assure the quality of its work in the past. Mr. Gaylord urged the Council to focus in particular on §8 of HB 2228, which authorizes the LAC to act and speak on behalf of the full Council if the former so chooses.

Mr. Alexander stated his agreement with this concern, and urged that the Council formulate some internal rules that would govern the operation and functioning of the LAC, and in particular either prohibit or carefully circumscribe its authority to speak on behalf of the full Council except when expressly authorized by the latter to do so. Mr. Alexander added that he has been impressed with the deliberative processes by which the Council debates and refines ORCP amendments before promulgating them, and would strongly oppose anything being done or said in the Council's name in the absence of those processes.

Judge Marcus noted that, although he shared the concerns of other Council members, at the April 22nd meeting he had expressed some positive reactions to the concept of an active role for the Council during legislative sessions, and that he remained of the view that some good could come of such role as now mandated by HB 2228. As an example he mentioned that the full Council or the LAC could prevent serious damage that might inadvertently be done to the ORCP by amending language formulated by committee staff or others under the pressure of the close of a session.

Mr. Hart commented that the only way of responding promptly to legislative inquiries without compromising the role of the full Council might be to schedule several public meetings during sessions, contrary to past practice. Mr. Lachenmeier suggested that, to facilitate timely consultation and input, key legislators might be contacted in advance of a session and asked to provide the Council with as much specific information as possible regarding possible legislation impacting upon the ORCP.

Mr. McMillan stated that, as the public member, he felt wholly incompetent to serve as a member of the LAC, as HB 2228 requires. He asked whether the participation of Mr. Alexander, Mr. Hart and Prof. Holland in some of the consultations between various bar groups and committee staff had achieved anything by way of improving any language that finally was enacted by the legislature. The general response was that this participation had been reasonably beneficial and that some damaging draftsmanship had been eliminated or made less damaging as a result of this participation. However, Mr. Alexander emphasized how difficult it was for him and others who participated to keep in mind that they were not authorized to speak on behalf of the Council, yet at the same time not permitted to advocate their own personal views or the positions of any group, such as OTLA or OADC, with which they might be affiliated or associated in other settings. The effect of this ambiguous role was, he reported, quite stultifying, since it was difficult to know what one could properly say.

Mr. Gaylord suggested that the discussion might usefully turn to the future, in particular what steps the Council should consider in order to act in compliance with the new legislative mandate while not compromising the role of the Council or the quality of its work product. Mr. Hart noted the inconsistency between the amendment passed by the 1993 legislature, which required that the Council act by vote of a fifteen-member "supermajority," and the 1995 amendment now under discussion, which seems intended to force the Council to act by a five-member committee.

Mr. Alexander stated that he could envision no circumstances where the LAC should properly purport to represent or speak on behalf of the Council, and suggested that some internal rules should be adopted to clarify and limit the role and authority of the LAC in a manner not inconsistent with §8. Judge Marcus expressed the view that, merely because the Council's governing statute requires an affirmative vote of a supermajority of fifteen members in order to promulgate ORCP amendments is not necessarily controlling on whether internal rules of procedure along the lines suggested by Mr. Alexander would require a supermajority, or ordinary majority, vote of the Council to authorize the LAC to speak or act in its name. He added that his understanding is that the Council's organic statute permits it to take any action apart from official and final promulgation of ORCP amendments by vote of a simple majority of members, including adoption of internal rules governing the relationship between the Council and the LAC. Prof. Holland confirmed this understanding.

Mr. McMillan moved that a committee be appointed by the Chair to work on a set of rules regulating the functioning of the LAC, as suggested by Mr. Alexander. On the basis of a broad consensus in favor of this action rather than a formal vote on Mr. McMillan's motion, Mr. Gaylord appointed the following members, who indicated a willingness to serve, to an ad hoc committee to draft a set of rules and present them in due course to the Council for its consideration, possible modification, and adoption: Mr. Alexander, Ms. Bottini, Ms. Craine, Mr. Hart, and Judge Marcus. Mr. Gaylord stated that he saw no reason for this committee to rush its work, but asked that an item for the next Council meeting's agenda be included for the purpose of receiving the committee's preliminary status report.

Mr. McMillan asked what, if any, action was taken by the 1995 Legislative Assembly with reference to the ORCP amendments promulgated by the Council at its December 1994 meeting. Prof. Holland responded that the legislature had done nothing to modify or disapprove any of those amendments, although it did by statute enact several ORCP amendments of its own devising. Mr. Hart suggested that the Council should perhaps devote some time to reviewing the work product of the 1995 legislative session bearing upon the ORCP, to see whether any problems might be anticipated. Prof. Holland invited the members' attention to the fact that his July 15, 1995 memo, "Legislative Summary," on pp. 3-14, set forth all of the ORCP amendments enacted by the 1995 legislature. Mr. Lachenmeier suggested that a full meeting of the Council should be devoted to carefully reviewing the ORCP amendments enacted by the 1995 legislature to see if any of them might have created any drafting or other technical problems. There was general agreement with this suggestion, on the basis of

which Mr. Gaylord indicated that the next following meeting of the Council should be reserved primarily for the purpose of carefully reviewing the legislature's ORCP amendments. He asked all Council members to spend some time prior to that meeting studying those amendments so that the discussion on that occasion could proceed efficiently and productively. He also reminded members to bring to all meetings a copy of the current ORCP for reference. Prof. Holland asked Mr. Gaylord whether, in addition to the ORCP amendments set forth in his 7-15-95 memo, he should prepare and distribute other statutory amendments, apart from those amending the ORCP, that made significant changes in civil practice and procedure and therefore might have some impact upon the ORCP. Mr. Gaylord responded that these additional materials should be distributed with the agenda of the next meeting.

Discussion then turned to when the next Council meeting, and those to follow, should be scheduled. It was agreed that the next following meeting should be on December 9, 1995, and that a room should be reserved at the Bar Center for subsequent Council meetings throughout 1996 for the mornings of the second Saturday of each month, but with the understanding that one or more of such meetings might be canceled or re-scheduled if warranted by the Council's workload.

**Agenda Item 6: Status Reports on items continued from the 1993-95 biennium.** Mr. Alexander was asked whether he had anything to report concerning item 6 a (see Attachment A to the agenda of this meeting), a proposal that the ORCP be amended in some manner to provide trial courts with discretionary authority to permit live, telephonic testimony in jury-trial cases. He responded that he was not prepared to report anything at this time, but would draft a proposed rule or amendment for presentation to the Council at some future meeting.

Mr. Lachenmeier was then asked whether he had anything to report concerning item 6 b (see Attachment B to the agenda of this meeting), which was a proposal of retired Chief Justice Ed Peterson that ORCP 21 be amended to provide that the defenses of want of subject matter and personal jurisdiction, as well as insufficiency of service or summons, be waived unless raised in a pre-answer motion. Mr. Lachenmeier responded that, in his opinion, this proposal merited some careful consideration, but also suggested that it might present some problems that would have to be resolved. He noted that, in almost all cases, competent defense counsel will have every reason to raise these defenses at the earliest possible time, i.e., by pre-answer motion, at least when only a pure question of law was presented. But he also noted that there are some situations where these defenses will require adjudication of factual issues and, therefore, where at least a limited amount of discovery will

often be necessary. To accommodate such cases the present option provided in ORCP 21 G(1)(b) to raise the defenses of want of personal jurisdiction, and insufficiency of summons or service, in the answer unless omitted from a pre-answer motion, might be regarded as useful or even essential. Mr. Lachenmeier also noted that, as applied to want of subject matter jurisdiction, waiver by omission in either responsive pleadings or motions would represent a major departure from long-established practice as exemplified by ORCP 21 G(4). Mr. McMillan mentioned that he would soon be meeting with Justice Peterson for lunch, and asked whether it would be useful for him to discuss this proposal with the latter. In response, it was suggested to Mr. McMillan that he might tell Justice Peterson that the Council is genuinely interested in this proposal, that it is under active consideration, and that any views he might have about the perceived occasional need for factual development by discovery in connection with these defenses following filing of the answer would be most welcome.

**Agenda Item 7. Proposed amendments to ORCP 7 and 15 (see Attachment C to agenda of this meeting).** Prof. Holland was asked briefly to explain each of these two proposed amendments. There was general agreement that his proposed amendment to ORCP 7 B, which would provide that a summons may be subscribed by any active member of the Oregon State Bar rather than by "a resident attorney of this state," seemed clearly to be a sound one, and that it should be placed on the agenda of some future meeting when the time is ripe for the Council's full consideration of it. Regarding his proposed amendment to ORCP 15 A, however, there was less agreement that it was either necessary or sound. On the basis of this reaction Mr. Gaylord stated that some further thought seemed needed as to whether it would be useful to place this proposal on the agenda of some subsequent meeting for full dress consideration.

**Agenda Item 8. Open discussion: Suggested priorities for 1995-97 biennium.** Mr. Gaylord invited suggestions or comments from all members as to specific things the Council should consider or undertake in the course of the 1995-97 biennium. Prof. Holland stated that, as one small step toward meeting the perennial criticism that the Council activities and functions are not made well enough known to the bench and bar, he would be forwarding for publication by *For the Record* a roster of the Council's current officers and members, together with a schedule of its projected meetings and an invitation for submission of proposed ORCP amendments.

Mr. Lachenmeier said that he thought the Council should perhaps give some attention to ORCP 7 D(4)(c) having to do with the prerequisite showing for taking defaults in cases where DMV

service has been used, as well as the showing required for service by publication pursuant to ORCP 7 D(6)(a). Mr. Rasmussen agreed that these, and perhaps other provisions of ORCP 7, might stand in need of some clarification.

Mr. Gaylord concluded this discussion by suggesting that if members have specific ideas about possible ORCP amendments the Council should consider during this biennium, it would be helpful if they were put in written form and forwarded to Prof. Holland for distribution so that all members could give them some considered thought between meetings, as this would conserve meeting time.

**Agenda Item 11: Adjournment.** There being no items of old or new business (Agenda Items 9 and 10), the meeting was adjourned at 11:32 a.m.

Respectfully submitted,

Maury Holland  
Executive Director