

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of December 9, 1995
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	J. Michael Alexander David V. Brewer Sid Brockley Patricia Crain William A. Gaylord	Bruce C. Hamlin Rodger J. Isaacson Michael H. Marcus David B. Paradis Milo Pope
Excused:	Marianne Bottini Diane L. Craine Mary J. Deits Don A. Dickey Stephen L. Gallagher, Jr. Susan P. Graber John E. Hart	Nely L. Johnson Rudy R. Lachenmeier John H. McMillan Karsten Rasmussen Stephen J.R. Shepard Nancy S. Tauman

Bob Oleson, Director of Public Affairs, Oregon State Bar, and Attorneys Jeff Carter and Keith Tichenor were present for part of the meeting. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: The Chairperson, Mr. Gaylord, called the meeting to order at 9:37 a.m.

Agenda Item 2: The minutes of the Council's October 14, 1995 meeting were, without objection or amendment, approved as previously distributed.

Agenda Item 3: Mr. Alexander distributed to members present a memo he had prepared, dated 12-7-95, proposing three rules for the Council's consideration regarding the functions of the Legislative Advisory Committee (LAC) and regulating its authority to act or speak on behalf of the full Council. It was agreed, and Mr. Gaylord so directed, that copies of this memo should be distributed to all members with a view to their further discussion and consideration at the 1-13-96 meeting. (See Attachment A to 1-13-96 agenda.)

Mr. Hamlin stated that the Council has Rules of Procedure, adopted early in its history, which few members are probably aware of and which might no longer accurately reflect how the Council functions. He also stated that adoption of these rules did not comply with Oregon's statutory requirements for administrative rule-making. He suggested that copies of these Rules of Procedure be distributed with the agenda of the 1-13-96 meeting, and that Prof. Holland be asked to determine whether

their adoption, or any amendments that might now or later be adopted, are subject to the requirements for administrative rule-making. It was also suggested that Prof. Holland check these requirements to determine whether they might apply to any rules adopted by the Council regarding the LAC. This was generally agreed to, and was so directed by Mr. Gaylord.

Agenda Item 4: Judge Marcus stated that he had received, and responded to, a memo from Justice Peterson regarding the latter's suggested amendments to ORCP 21 by which the defenses of lack of personal jurisdiction, insufficiency of service, and insufficiency of summons would be waived unless raised by pre-answer motion. He added that he had also received a memo from Prof. Holland with some comments. In light of the fact that none of these documents had been distributed to members prior to this meeting, any further discussion of this matter should be deferred until the next meeting. Prof. Holland said that these documents would be distributed with the agenda of the 1-13-96 meeting. (See Attachment C to 1-13-96 agenda.)

Agenda Item 5: There was general discussion as to whether, as suggested in the 9-15-94 letter of Mr. Patrick N. Rothwell and attached memo (see Attachment A to agenda of 12-9-95 meeting), the Council should undertake a study and review of ORCP 7 regarding service of summons. Prof. Holland reported that Mr. Rasmussen had asked him to inform the members at this meeting that he has in mind some possible amendments which he believes would be useful, especially relating to so-called "DMV service" pursuant to ORCP 7 D(4). Several members expressed the opinion that some confusion about one or another aspect of service of summons might have been engendered by some recent appellate opinions. There was general agreement that Mr. Gaylord should appoint an ad hoc committee to look into the question whether any significant confusion or difficulties exist with respect to ORCP 7.

At the suggestion of members present, Mr. Gaylord appointed Judge Brewer, as chair, and Justice Graber, Mr. Lachenmeir, Mr. Paradis, and Mr. Rasmussen as members of this committee. Judge Brewer and Mr. Paradis expressed their willingness to serve on this committee. Mr. Gaylord directed Prof. Holland to write a letter to Justice Graber, Mr. Lachenmeier, and Mr. Rasmussen, informing them that they are appointed to this committee, subject to their willingness to serve.

Agenda Item 6: Mr. Gaylord stated that he was open to suggestions on how best to proceed with a review of 1995 legislation amending the ORCP or effecting changes in civil practice that might have some impact upon them. Mr. Hamlin suggested that there were two distinct levels at which the

Council might conduct its review of the '95 legislation. The first would consist of looking at the ORCP amendments to see if they might contain any flaws in drafting and at other legislative provisions affecting civil practice to see if any of them might create potential problems relating to how they can be accommodated by the ORCP as amended. The second possible level of review, he said, might be to examine the '95 legislation affecting civil practice to determine whether, in the Council's view, the changes it embodied are consistent or inconsistent with sound, fair, and efficient civil procedure.

Mr. Hamlin added that the Council might decide to hold one or more public hearings focusing upon how the changes made by the '95 legislation are working out in practice. Judge Pope suggested that the Council would better proceed reactively, rather than proactively, by waiting to see whether any problems are actually encountered and reported, and not initiating a search for problems that might not exist. Judge Brockley, among others, expressed agreement with Judge Pope's thought. Several members expressed doubts about conducting a review that would range beyond the '95 legislation that amended the ORCP, or, at most, beyond any such legislation that might create problems by way of being accommodated by the ORCP.

After further discussion, there was general agreement that Mr. Gaylord, as Chair of the Council, should contact such customary bar groups as the OTLA, OADC, the OSB Procedure and Practice Committee, the chairs of the interim judiciary committees, and the presidents of the judges' associations, and invite them to bring to the Council's attention any problems they become aware of arising from the 1995 legislative amendments to the ORCP or other 1995 legislation affecting civil procedure. Mr. Gaylord said that he would promptly send letters, on Council letterhead, to each of the groups mentioned, copies of which would be furnished to Council members. It was further agreed that an appropriate notice should be published in *For the Record*. Mr. Gaylord directed that this legislative review be continued as an agenda item for the 1-13-96 meeting, so that members would have more opportunity to study the material distributed with the agenda of this meeting.

Agenda Item 7: Mr. Alexander referred to his memo dated 12-7-95, with attached letter of Mr. Michael L. Williams dated 11-23-93, which he distributed to members at the outset of the meeting (Attachment B to the 1-13-96 agenda). He called particular attention to the suggested amendment to ORCP 39 I(4), on page 2 of his memo, the purpose of which would be to remove any uncertainty as to whether trial judges have authority to permit perpetuation depositions after a trial has commenced. Judge Brewer, among others, expressed doubt whether any such

amendment was needed, and stated he believed that such discretionary authority is already provided in the existing language of this subsection. Mr. Alexander recalled that Mr. Williams' letter was considered by the Council during the 1993-95 biennium, at which time it was agreed that his other suggestion, concerning admissibility in evidence of perpetuation deposition testimony in jury trials, would almost certainly require an amendment of ORS 45.400, and would therefore be beyond the scope of the Council's authority. At the suggestion of Judge Pope, this matter was directed by Mr. Gaylord to be included as an agenda item for the 1-13-96 meeting.

Agenda Item 8: No item of new business was raised.

Agenda Item 9: Mr. Gaylord, on motion carried without objection, declared the meeting adjourned at 11:37 a.m.

Respectfully submitted,

Maury Holland
Executive Director