

COUNCIL ON COURT PROCEDURES  
Minutes of Meeting of January 13, 1996  
Oregon State Bar Center  
5200 Southwest Meadows Road  
Lake Oswego, Oregon

Present: J. Michael Alexander  
Marianne Bottini  
Sid Brockley  
Diana L. Craine  
Don A. Dickey  
Robert D. Durham  
Stephen L. Gallagher, Jr.  
William A. Gaylord  
Bruce C. Hamlin  
Rodger J. Isaacson  
Nely L. Johnson  
Rudy R. Lachenmeier  
Michael H. Marcus  
Milo Pope  
Stephen J.R. Shepard  
Nancy S. Tauman

Excused: David V. Brewer  
Patricia Crain  
Mary J. Deits  
John E. Hart  
John H. McMillan  
David B. Paradis  
Karsten Hans Rasmussen

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

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**Agenda Item 1: Call to order.** The Chairperson, Mr. Gaylord, called the meeting to order at 9:43 a.m. Mr. Gaylord extended a warm welcome to Justice Durham (previously a member of the Council) who had been appointed to replace Justice Graber. Mr. Gaylord expressed appreciation for Justice Graber's many years of outstanding service on the Council.

**Agenda Item 2: Approval of December 9, 1995 minutes.** In the remark attributed to him under Agenda Item 3, second paragraph, fifth line, Mr. Hamlin wished to change "did not comply with Oregon's statutory requirements for administrative rule-making" to "might not comply ..." With that amendment, the minutes were unanimously approved.

**Agenda Item 3. Status report from committee on LAC rules.** Mr. Gaylord asked for comments on the draft of three rules regarding the Legislative Advisory Committee ("LAC") prepared by Mr. Alexander and set forth in his 12-7-95 memo to Council members (Attachment A to agenda of this meeting). Ms. Tauman questioned whether "technical" was intended to modify both "analysis" and "advice" as the latter two words appear in the second sentence of the first proposed rule, and stated that her preference would be that the LAC not be authorized to provide anything beyond "technical analysis." Mr. Alexander responded

that his intent was that the LAC should be limited to advising the legislature about the purely procedural aspects of contemplated ORCP amendments. Several members commented that the line separating "technical" from "non-technical," in the sense of either procedural or substantive policy, is not easy to define or maintain. Mr. Hamlin said he was inclined against attempting to incorporate any greater precision into the proposed rule, adding that there should be considerable reliance on the good judgment of LAC members not to exceed their delegated authority.

Justice Durham expressed doubt that, when communicating with legislators, LAC members would be in a position to debate with them the distinction between "analysis" and "advice." He also asked whether the phrase "full Council," as it appears in all three of the proposed rules, might not be misunderstood to require approval by all 23 Council members, rather than by vote of a supermajority, and suggested that the word "full" be deleted. Mr. Alexander agreed with this suggestion. He also agreed with Justice Durham's suggestion that the draft rules might be improved by greater avoidance of the passive voice. Justice Durham further suggested that the last sentence of the first proposed rule might be liberalized so that the LAC would not be precluded from informing legislators of a division of opinion among them when that occurs.

Judge Marcus raised a question as to whether the LAC should feel itself free to communicate to legislators as attributable to the Council positions it might have taken over some period in the past, but which might not be submitted to the Council for its approval and authorization in specific response to a legislative query. Judge Johnson asked whether the LAC could properly rely upon positions taken by the Council without limit of time, or whether this should be limited to the current biennium. Some further discussion followed concerning this and related questions, but with no further recommendations of specific changes to Mr. Alexander. The latter said that he and the other members of his subcommittee would give careful consideration to all the foregoing comments and suggestions, and that a revised draft would be presented to the Council at a future meeting.

**Agenda Item 4: Recommendation re Williams proposal concerning ORCP 39 I(4) (see Attachment B to agenda of this meeting).** Mr. Gaylord recapitulated the background of this long-pending proposal as set forth in Mr. Michael L. Williams' letter dated 11/24/93 to Messrs. Alexander, Hart and him, and noted that he had once encountered a situation where the court did not believe it had any discretion to allow telephonic testimony by a rebuttal witness in a jury trial. Judge Gallagher asked whether the statute authorizing telephonic testimony in non-jury trials, ORS 45.400(3-6), clearly precludes it in cases tried to a jury.

Mr. Hamlin pointed out that Mr. Williams' letter raised two distinct issues, the first being whether a court may permit a perpetuation deposition during trial, and the second being whether telephonic testimony might be admitted in a jury trial at the court's discretion.

Mr. Hamlin further commented, regarding Mr. Alexander's proposed amendment of ORCP 39 I(4), that there might be some ambiguity as to whether the "shorter period" that the court "may allow" applies to the 14-day notice period, the seven-day period before trial for the taking of the deposition, or both. Judge Marcus pointed out that the issue of under what circumstances deposition testimony, whether telephonic or not, is admissible at trial is different from the issue whether telephonic testimony is admissible at trial. He added that he thought ORCP 39 I(4) has some ambiguities in it which he believed the Council should seek to resolve, such as whether perpetuation depositions during trial should be allowed only with respect to witnesses also giving live testimony. Mr. Hamlin, seconded by Judge Marcus, moved that Mr. Alexander's proposed amendment be tentatively adopted as follows:

**Any perpetuation deposition shall be taken not less than seven days before the trial or hearing, on not less than 14 days notice. However, the court in which the action is pending may allow a shorter period for a pretrial deposition, or may allow a perpetuation deposition during trial, upon a showing of good cause.**

Discussion of this amendment then followed. Mr. Lachenmeier questioned the wisdom of not limiting the discretion that would be conferred by this amendment, such as to rebuttal witnesses, which was the situation instanced by Mr. Williams. Some members questioned whether the phrase "in which the action is pending" was needed. Justice Durham stated that the second occurrence of the phrase "may allow" seemed duplicative. There was expressed considerable support for deleting both "in which the action is pending" and the second occurrence of "may allow," but no motion was offered for either purpose. Mr. Alexander then suggested that the second sentence of the proposed amendment might be changed to read as follows:

**However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial.**

Mr. Gaylord then received an affirmative response to his query whether the Council was ready for the call of the question on Mr. Hamlin's pending motion, which was adopted by a vote of 10 in favor, 2 opposed, and 0 recorded abstentions. It was left unclear whether the amendment tentatively adopted by this vote

was as originally proposed by Mr. Alexander or as changed by his subsequent suggestion, a point that will remain for clarification at a subsequent meeting. Mr. Lachenmeier reiterated his doubts as to whether the language as tentatively adopted was adequate, to which Mr. Gaylord responded that, as a tentatively adopted amendment, this item would remain open on the agenda of any future meeting at which any member wished to recall it for further consideration.

**Agenda Item 5: Status report of subcommittee to study and review ORCP 7.** Mr. Gaylord said that substantive discussion of this matter would be premature, and that the only issue needing resolution was whether Justice Durham was agreeable to replacing Justice Graber as a member of this subcommittee. Justice Durham so agreed. Mr. Lachenmeier expressed willingness to serve as a member of this subcommittee, whereupon Mr. Gaylord thus appointed him.

**Agenda Item 6: Status report of subcommittee to consider Justice Peterson's suggested amendments to ORCP 21 (see Attachment C to agenda of this meeting)--Mr. Lachenmeier.** Mr. Lachenmeier briefly summarized the background of this item, including some of the possible difficulties about implementing the amendments to ORCP 21 proposed by Justice Peterson identified in the Council's previous discussion of the item. Judge Marcus stated that his involvement with this issue had been somewhat tangential, and that after receiving memos from Justice Peterson (Attachment pp. C-7 - C-9) and Maury Holland (Attachment pp. C-1 - C-4), he had heard nothing further. Mr. Hamlin moved to table this item, and was seconded by Justice Durham. Mr. Hamlin said that, while he agreed with Justice Peterson's point that questions relating to personal jurisdiction and sufficiency of summons and service should be settled at an early point in litigation, he did not favor an amendment to ORCP 21 to further that purpose. Judge Johnson commented that she was not aware of any basis for thinking that ORCP 21 is causing problems for judges, lawyers or litigants. On the call of the question, Mr. Hamlin's motion was adopted by vote of 14 in favor, one opposed, and two abstentions. Following some discussion of how Justice Peterson should be informed of this action, Maury Holland stated that he would soon be in contact with him about a related matter and would explain the Council's action to him.

**Agenda Item 7: Continuation of 1995 session legislative review (see Attachment B to 12-9-95 meeting agenda)--Mr. Gaylord.** Mr. Gaylord informed the Council that, as agreed at the 12-9-95 meeting, he was in the process of sending letters to bar leaders asking them to alert the Council to any problems that might arise in connection with any ORCP amendment enacted by the 1995 Legislative Assembly, as well as any difficulties that might be

encountered in applying any provision of the ORCP in light of the many statutes enacted in the 1995 session having impact on civil trial practice. At Mr. Gaylord's request, Mr. Hamlin briefly summarized the point he had made at the 12-9-95 meeting about the different levels at which the Council might conduct its legislative review. Mr. Gaylord stated that, rather than asking individual members to review one or more specific ORCP amendments or statutes, he thought the process would work better if all members were asked to review a limited, specified number of amendments or statutes, to see whether anyone spots any potential problems that might warrant discussion. It was agreed that, in preparation for the Council's next meeting, all members would review the 1995 session's amendments to ORCP 4 J through and including ORCP 55 I as set forth in Attachment B to the agenda of the 12-9-95 meeting. Mr. Gaylord directed that an item be reserved on the agenda of the next meeting for any discussion that might be prompted as a result of this review.

**Agenda Item 8: Old business--Mr. Gaylord.** In response to inquiry by the Chair, no item of old business was raised by any member.

**Agenda Item 9: New business--Mr. Gaylord.** In response to inquiry by the Chair whether any member had any item of new business to propose, Judge Johnson said, merely as an information item, that Judge Anna Brown intends to write a letter to the Council raising the question of whether the names and addresses of witnesses should be released prior to the day before trial, and also about perpetuation depositions.

Judge Marcus mentioned that the ORCP and the relevant statutes leave unclear whether there exists any barrier to deposing expert witnesses apart from the work product or trial preparation immunity provided in ORCP 36 B(3), which does not literally apply to deposition questions. He added that, from his experience, it seems to be generally assumed among judges and lawyers that opponents' expert witnesses may not be deposed, but there appears to be no authority for that proposition in the ORCP, the ORS, or elsewhere. No sense on the part of members present was expressed, however, that this is a matter the Council need now address, unless perhaps it were to be somehow raised in the letter from Judge Brown which Judge Johnson mentioned the Council could soon expect to receive.

Justice Durham stated that he wished the Council to know that the Supreme Court very much values its work, and would always welcome any communications from the Council if, from the latter's perspective, any of the Court's opinions should pose problems relating to construction or application of the ORCP. He made clear that, while of course he could not, and was not,

committing himself or other members of the Court to agree with such comments as received from the Council, he could say that he and his colleagues would always be glad to have them and would give them careful consideration.

Judge Gallagher referred to Maury Holland's recent memo, "More Than Anyone Ever Wanted to Know about the Council on Court Procedures," as readable, informative and entertaining, and suggested that a copy of it be attached to the minutes as part of the Council's legislative history.

Mr. Gaylord asked the members whether, in light of the amount of work now going forward in subcommittees relating to a variety of matters, it might be sensible to omit the meeting scheduled for Feb. 10, 1996 and instead meet next on the scheduled date, March 9, 1996. There being general agreement with this suggestion, Mr. Gaylord announced that the Council would meet next on March 9, 1996, adding that members should be prepared for a possibly somewhat longer meeting on that date than usual should the agenda so warrant.

**Agenda Item 10: Adjournment.** Without objection, Mr. Gaylord declared the meeting adjourned at 11:52 a.m.

Respectfully submitted,

Maury Holland  
Executive Director