

Corrected

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of March 9, 1996
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present: J. Michael Alexander John E. Hart
David V. Brewer Nely L. Johnson
Patricia Crain Rudy R. Lachenmeier
Diane L. Craine Michael H. Marcus
Don A. Dickey John H. McMillan
Robert D. Durham David B. Paradis
William A. Gaylord Karsten Hans Rasmussen
Bruce C. Hamlin Nancy S. Tauman

Excused: Sid Brockley
Mary J. Deits
Stephen L. Gallagher, Jr.
Rodger J. Isaacson
Milo Pope
Stephen J.R. Shepard

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

Agenda Item 1: Call to order. Mr. Gaylord called the meeting to order at 9:30 a.m. He announced that Marianne Bottini had felt compelled by illness in her family to submit her resignation as a Council member to the Board of Governors effective immediately, and that the Board would soon appoint a new member to serve the balance of Ms. Bottini's term. He also informed members that he had sent a letter to Justice Graber thanking her for her many years of distinguished service on the Council.

Agenda Item 2: Approval of minutes. The minutes of the January 13, 1996 meeting were, without objection or amendment, approved as previously distributed to the members.

Agenda Item 3: Recommendation of Williams proposal re ORCP 39 I(4) (Mr. Alexander). Mr. Alexander invited the members' attention to the proposed amendment to ORCP 39 I(4) as it appears on page 3 of the minutes of the 1-13-96 meeting, and asked whether there were any further comments or suggestions before voting to adopt it as a tentative amendment. A consensus of members agreed, by way of clarifying the aforementioned minutes,

that it was the sense of that meeting that the proposed amendment was as modified by the second indented paragraph, shown in bold face type, as appears on page 3 of said minutes.

Mr. Rasmussen asked whether the proposed language is sufficiently clear as to whether the term "a shorter period" is intended to refer to the time when a perpetuation deposition is taken, the time by which notice of such deposition is given, or to both. Justice Durham responded that he thought the phrase "before or during trial" removes any ambiguity on that score. Mr. Hamlin noted that the modification contained in the second indented paragraph drops the final clause, "upon a showing of good cause," and questioned whether that was intended. Justice Durham suggested that the concept of "upon a showing of good cause" might be implicit in the phrase "the court may." Judge Marcus, however, noted that, to him, the words "upon a showing of good cause" convey a sense that something a bit stronger must be shown than when courts are asked to exercise their discretion regarding matters that are routinely granted. It was agreed that "upon a showing of good cause" had not been intended to be omitted, and therefore should be restored. Judge Marcus, seconded by Justice Durham, then moved tentative adoption of ORCP 39 I(4) in the following language {language added highlighted; language deleted shown in strikeover}:

I(4) Any perpetuation deposition shall be taken not less than seven days before the trial or hearing on not less than 14 days' notice ~~unless the court in which the action is pending allows a shorter period.~~ However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial upon a showing of good cause.

Mr. Lachenmeier expressed some concern about whether adoption of this amendment might have some negative impact on whatever future efforts might be made to authorize admission of "live" video testimony in jury trials by means of satellite link-ups or the like. No other members expressed a similar concern. On the call of the question, the Council thereupon unanimously voted tentatively to adopt the amendment to ORCP 39 I(4) as set forth above.

Agenda Item 4: Preliminary report of committee to study and review ORCP 7 (Judge Brewer). Judge Brewer reported on a phone conference conducted with all committee members, in addition to Prof. Holland, and summarized a "First Committee Report--March 9, 1996," copies of which were distributed at the meeting to the members. (Copy attached to these minutes.) Among the aspects of ORCP 7 practice he stated his committee is examining are whether the prerequisites for "DOT service" pursuant to 7 D(4)(a) and court-ordered service pursuant to 7 D(6), as mandated by ORCP 7

D(7), are unnecessarily onerous; whether service on the Department of Transportation (DOT), pursuant to ORCP 7 D(4)(a)(i), continues to serve any useful purpose, and whether inclusion of the phrase "or service of summons" in the second sentence of ORCP 7 G might be a source of some confusion. He added that Prof. Holland had prepared summaries of appellate court opinions handed down over the past two years to assist the committee in its work. (See copy attached to these minutes.)

Judge Brewer also reported that the committee does not believe ORCP 7 D could, consistently with the due process clause of the Fourteenth Amendment to the U.S. Constitution and cases such as *Mullane*, be amended to preclude challenges to sufficiency of service merely because defendant receives actual notice. He further indicated that the committee was presently inclined respectfully to disagree with Mr. Pat Rothwell's suggestion that ORCP 7 D(1) is confusing with regard to the relationship between specifically authorized methods of service and the overriding standard of service being "reasonably calculated, ... to apprise the defendant of the existence and pendency of the action. ..." Apart from the specific matters he mentioned at the outset of his report, Judge Brewer stated that the present sense of the committee was that ORCP 7 is currently working reasonably well, and is not now in need of comprehensive overhaul. He concluded by saying that his committee would be conducting additional phone conferences in the future and would appreciate any comments or suggestions other Council members might have, now or in the future.

Mr. Hamlin noted that ORCP 7 H provides that summonses may be "transmitted by telegraph," which he understood to mean that they may be transmitted by telegraph to be served by some conventional method, not that they may be served by being so transmitted. He raised a question as to whether this section might be improved by some rewording that would take account of modern communication technology, such as facsimile. Judge Marcus commented that he did not believe the requirement of service on the DOT, pursuant to ORCP 7 D(4)(a)(i), serves any purpose and should perhaps be deleted. Judge Brewer remarked that, at least in the context of motor vehicle cases, he was less than certain that mailings by certified or registered mail, return receipt requested, addressed to an address given by a prospective defendant at the scene of a motor vehicle accident, or to such defendant's residence address as shown in DOT records, would necessarily be insufficient even though no signed receipt is in fact returned. Justice Durham said he thought it would be important to look into the reason why the legislature restored the provision for DOT service after the original Council dropped it from the original version of the ORCP as submitted to the legislature. This discussion concluded on a note of consensus

that the committee was doing an excellent job, and that further refinements should be undertaken in that forum until such time as specific proposed amendments might be ready for debate and discussion by the Council.

Agenda Item 5: Report of committee to draft rules relating to the Legislative Advisory Committee (LAC) (Mr. Alexander). Mr. Alexander reported that his committee had been exchanging drafts of proposed LAC rules and was very close to having a final product to present for the Council's consideration, but finality had not yet been quite achieved. Mr. Gaylord indicated that this matter would be placed on the agenda of the 4-13-96 Council meeting. Mr. Alexander declined Mr. Gaylord's offer to appoint a new committee member to replace Ms. Bottini because its work appeared to be so nearly completed.

Agenda Item 8: New business (out of order) (Judge Johnson). Because she would have to leave this meeting before its conclusion, Mr. Gaylord, without objection, asked Judge Johnson to summarize, as an item of new business taken out of order, a letter to the Council from Hon. Anna J. Brown, Circuit Court Judge (copy attached to these minutes), dated 2-16-96, requesting consideration of a rule authorizing trial judges to order disclosure of non-impeachment witnesses at trial.

Judge Johnson explained that the problem raised by Judge Brown's letter is whether, in the absence of any authorizing rule, trial judges have inherent discretionary authority to require parties to identify all of their non-impeachment witness, including expert witnesses, at the beginning of trial. She explained that the principal reason for requiring this disclosure is to minimize the possibility of having to declare a mistrial should it become known only in the course of trial that a juror has some sort of connection with a witness that would be disqualifying of the former. Judge Johnson added that, from her observations and discussions with other judges, she believes that, while most of them quite routinely ask counsel to make this disclosure, and many attorneys accede to such request without objection, some judges are in doubt whether they have the power to order this sort of disclosure over counsel's resistance.

Mr. Gaylord stated that a clarification was in order to the effect that the problem raised by Judge Brown's letter is not confined to expert witnesses, with which Judge Johnson agreed. Mr. Hamlin suggested that some sort of straw vote be taken to see whether a majority of members thought the Council should address this issue. Prof. Holland asked whether the kind of rule Judge Brown asks be considered might more appropriately be included in the Uniform Trial Court Rules. Mr. Hart commented that, on the basis of his non-scientific observation, he would estimate that

about 70% of judges believe they have inherent authority to order this kind of disclosure, whereas about 30% appear to believe that they do not in the absence of an explicit authorizing rule. Ms. Craine said that she believes that most lawyers willingly disclose their witness lists at the beginning of trial because of concern about the costs if a mistrial has to be declared.

Judge Johnson expressed agreement with suggestions of other members that the problem is not really so much disclosure at the beginning of trial as disclosure prior to trial. Mr. McMillan asked how much time prior to trial would likely be involved with a new rule authorizing judges to require disclosure of witnesses. Mr. Gaylord cautioned that any disclosure rule that would operate prior to the beginning of trial would almost certainly plunge the Council into the thicket of pretrial disclosure of experts, contrary to the reluctance expressed by many members in the recent past to reopen that vexed question. When Mr. Gaylord asked how many members present favored the Council addressing this issue, two responded affirmatively if a prospective rule would involve disclosure at trial, and none responded affirmatively if it would involve disclosure prior to trial.

This discussion concluded with an observation by Justice Durham to the effect that if there are some trial judges who doubt their authority to, if necessary, order disclosure of witnesses at trial, the better solution might be by means of judicial education rather than amending the ORCP. Judge Marcus then asked that these minutes reflect his continued belief that the existing *de facto* prohibition in Oregon practice against pretrial discovery of expert witnesses should be codified in the ORCP or wherever else might be thought appropriate.

Agenda Item 6: Continuation of review of 1995 session legislation amending the ORCP or otherwise affecting civil practice (see Attachment B to agenda of 12-9-95 Council meeting) (Mr. Gaylord). Mr. Gaylord asked Mr. Hamlin and Judge Marcus to run down the ORCP amendments by the 1995 Legislative Assembly as listed in the aforementioned Attachment B, to state whether either of them detected any problems that might be created by each amendment in turn, and to ask whether other members detected any such problems. Beginning with the amendment to ORCP 4 J, Mr. Hamlin stated it did nothing more than change the reference to the correct state official, and therefore created no problems. He added that the amendment to ORCP 4 K(3) merely changed an ORS reference to the currently correct section, and similarly created no problem. Judge Marcus said that the amendments to ORCP 7 D, all involving modified references to state officials or ORS sections, were all correctly done.

Mr. Hamlin characterized the extensive amendment to ORCP 17 as one reflecting substantive policy decisions by the legislature arguably outside the Council's statutory jurisdiction. He added that this amendment seemed to him clumsily worded.

Justice Durham commented that, given the limited time available for legislative review, the meeting should expeditiously reach a threshold determination as to what, if any, role the Council can properly perform with reference to ORCP amendments of this sort that have been enacted by the legislature. Mr. Gaylord responded that, in his view, the Council has at least limited authority and responsibility to address any problems it discerns in the ORCP, whether residing in provisions enacted by the legislature or in those promulgated by the Council. Mr. Alexander and Judge Marcus added their opinions that it would not exceed its authority for the Council to identify legislative amendments of the ORCP as constituting bad procedural policy when that reflects its considered judgment, and should not confine its review to mere scrivener's errors. Mr. Rasmussen, however, cautioned the Council against amending any ORCP provision as recently amended by the legislature, especially if such amendment occurred in the immediately preceding session.

The legislative review then resumed with Judge Marcus stating that the amendment to ORCP 27 B was merely a housekeeping amendment tracking some statutory changes. Mr. Hamlin summarized the amendment to ORCP 47 C, and said that it was intended to incorporate the directed verdict standard into summary judgment practice. Differences of opinion were expressed as to what, if any, divergence from established practice this amendment would accomplish. Judge Brewer mentioned that some judges apparently believe this amendment was intended to codify the standard established in *Seeborg v. General Motors Corporation*, 284 Or 695, 588 P2d 1100 (1978). Justice Durham suggested that further consideration of this amendment seemed premature until more appellate opinions come down construing it.

Continuing the legislative review, Judge Marcus stated that he saw no problems with the amendment of ORCP 54 adding a new subsection D(2), while expressing doubt about what purpose it serves. He added that new section 54 F might be useful in authorizing trial courts to order settlement conferences. Mr. Alexander asked whether this section might not duplicate UTCR 6.010(1)(g), and also how this provision would work in the smaller counties. Mr. Hamlin questioned where and how the term "prevailing party fee," added to section 54 E by this amendment, is to be defined. Justice Durham noted that this section, as amended, is not clear about its bearing on attorney fee awards pursuant to 42 U.S.C. §1988. There emerged general agreement that section 54 E, as amended, warranted further study.

Mr. Hamlin stated that the amendments to ORCP 55 D raise no concerns in his mind, but the amendment tacking on a new section 55 I does, because, in his opinion, it is poorly drafted and might be inconsistent with other provisions of law. Mr. Lachenmeier reported that section 55 I is being read by some lawyers as providing carte blanche authority for reviewing doctors' records. Prof. Holland said he has been trying to contact the lawyer who drafted this amendment on behalf of the Oregon Medical Association, in an effort to find out what prompted it, and would persist in doing so.

At the conclusion of this review, as requested by Mr. Gaylord, Ms. Tauman agreed to chair a subcommittee to further study ORCP 17 and 54 E as amended, with Mr. Alexander and Judge Brockley serving as members. Ms. Craine agreed to serve as chair of a subcommittee to further study new section 55 I, with Messrs. Hart and Lachenmeier serving as members. Mr. Hamlin agreed to be a subcommittee of one to further study ORCP 47 C as amended. Mr. Gaylord directed that this legislative review be continued as an item on the agenda of the 4-13-96 Council meeting, at which time the focus would be on the amendments to 57 D, 63 E, 69 B, 78 C, 79 E and 82 G, after which the Council can decide whether to extend this review to statutory changes by the 1995 legislature apart from those amending the ORCP. Ms. Tauman requested that the agenda for the 4-13-96 meeting list the ORCP provisions that, as amended, would be the focus of review.

Agenda Item 7: Executive Director's suggested ORCP amendments (see Attachment C to agenda of this meeting) (Prof. Holland). Judge Marcus, seconded by Justice Durham, moved that the proposed amendment to ORCP 7 B as shown on p. C-1 of Attachment C be tentatively adopted. This would amend the last sentence of section 7 B as follows:

A summons is issued when subscribed by plaintiff or a ~~resident attorney of this state~~ **an active member of the Oregon State Bar.**

The above amendment was thereupon tentatively adopted by unanimous vote.

Prof. Holland then said that, in view of the time, he would withdraw the other two ORCP amendments suggested in Attachment C, and would place them on the agenda of some future meeting when sufficient time appears to be available for the Council's preliminary consideration of them.

Agenda Item 8: Old business. No item of old business was raised.

Agenda Item 9: New business. Prof. Holland stated that he had received a letter from the Oregon State Bar asking whether the Council wished to schedule a meeting in connection with the OSB Annual Meeting in Medford at the end of September. There was unanimous consensus that the regularly scheduled meeting on 9-14-96 being the last meeting at which proposed ORCP amendments could be tentatively adopted and those already tentatively adopted revised, the September meeting date should not be changed. Justice Durham inquired why the 1993 legislature had seen fit to amend the Council's organic statute in a manner that effectively prevents further work being done on prospective ORCP amendments after the September meeting. Mr. Hart responded by briefly recounting the event which prompted the legislature to take this action.

Mr. Hamlin said that he had distributed at the beginning of this meeting copies of a redlined draft revision of the Council's Rules of Procedure. He noted that his draft incorporates in his suggested revision of the Rules of Procedure the proposed new internal rules relating to the LAC as presently drafted. He asked that this draft be included as a related agenda item at the Council meeting when the proposed LAC rules are considered.

Mr. Hamlin also noted that the Federal Rules of Civil Procedure had recently been amended to clarify how post-judgment motions for new trial or judgment as a matter of law should be made in terms of serving and filing. He added that he was not aware whether there is any similar doubt under the counterpart provisions of the ORCP, but suggested that if there were, a comparable amendment to them might be worth consideration.

Mr. Gaylord reported that he had received a letter from Sen. Neil Bryant, Chair of the Senate Judiciary Committee, stating that if the Council wishes to propose any legislation in the 1997 session relating to the ORCP or other related aspects of civil practice, he would need to receive such proposals by October of 1996 so that any implementing bills could be pre-filed by him.

Agenda Item 10: Adjournment. Mr. Gaylord, on motion, declared the meeting adjourned at 12:30 p.m.

Respectfully submitted,

Maury Holland
Executive Director