

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

Present: J. Michael Alexander Bruce C. Hamlin
 David V. Brewer Michael H. Marcus
 Sid Brockley John H. McMillan
 Diana L. Craine David B. Paradis
 Don A. Dickey Milo Pope
 Stephen L. Gallagher Karsten Rasmussen
 William A. Gaylord Nancy S. Tauman

Excused: Patricia Crain
 Mary J. Deits
 Nely L. Johnson
 Robert D. Durham

Absent: John E. Hart
 Rodger J. Isaacson
 Rudy R. Lachenmeier
 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. The Chairperson, Mr. Gaylord, called the meeting to order at 9:30 a.m.

Agenda Item 2: Approval of March 9, 1996 minutes. With two corrections on pages 5 and 8 as noted by Justice Durham in writing prior to the meeting, the minutes were unanimously approved as previously circulated. Corrected copies of the minutes were distributed at the meeting and placed in the Council files in lieu of the uncorrected minutes.

Agenda Item 3: Proposal from committee to draft rules regarding Legislative Advisory Committee ("LAC") (Mr. Alexander). Mr. Alexander invited the members' attention to Attachment A Supp. to the agenda of this meeting as distributed under cover of the Executive Director's memo dated 4-1-96, in particular to the "First Rule" as it appears on p. 4, and an "alternative rule" on p. 5, thereof. At the request of Mr. McMillan, Mr. Alexander briefly summarized the background of these alternatively proposed LAC rules, including the concern generally shared among members that the LAC should avoid being placed in a position, during the course of a legislative session, of speaking on behalf of the Council or giving the appearance of doing so. He then noted that, as stated in his covering letter of 3-29-96, the LAC

committee unanimously recommends adoption of the "First Rule" as set forth on p. 4 of Attachment A Supp. He stated that, in drafting the proposed First Rule, the committee had been guided by tracking each of the three distinct functions assigned to the LAC by HB 2228 (amending ORS 1.730), namely, giving legislators technical advice on matters affecting the ORCP, taking positions on issues of civil procedure purportedly on behalf of the Council, and giving testimony before committees of the legislature.

Mr. McMillan asked whether the LAC would have any sort of staff support in carrying out its functions, and also why the Council's public member was designated to be a member of the LAC. To the first question, Mr. Holland responded that, in past legislative sessions the Executive Director and Executive Assistant had provided staff support, and would do likewise in support of the LAC. To the second question, Mr. Holland responded that it had been his sense that the public member was included in order to give the LAC a kind of political legitimacy.

Judge Pope commented that he was skeptical whether legislators would pay any attention to the disclaimers in the proposed First Rule about the LAC's very limited authority to speak on behalf of the Council. Judge Marcus stated that this was true, but added that these disclaimers are nonetheless important because they will govern the relationship between the LAC and the Council. In response to a question of Judge Brewer to Mr. Rasmussen about how legislators might react to disclaimers or limitations on the LAC's authority, the latter stated that caution should be employed lest legislators gain an impression that the Council is too grudging about the assistance and support the legislature obviously expects to get from the LAC. Many members remarked that it was important that the Council preserve the integrity of its deliberative process.

Mr. Alexander, seconded by Ms. Craine, then moved adoption of the aforementioned First Rule. After brief discussion, this motion was agreed to by a vote of 10 in favor, 3 opposed and 1 abstention. Mr. Gaylord asked whether there was any need to publish the rule just adopted, in response to which there was general agreement that the statute requires that only tentatively adopted ORCP amendments be published.

Mr. Gaylord then asked Mr. Hamlin what he proposed to do about his draft of revised Council Rules of Procedure with the LAC rule incorporated. (See Attachment A to the agenda of this meeting.) Mr. Hamlin pointed out that the existing Rules of Procedure, adopted at the inception of the Council, are inconsistent with the statutory requirement that the Council's Chair be elected annually, but are consistent with the Council's

practice of electing other officers, together with the Chair, at the beginning of each biennium to serve until their successors are elected at the beginning of the next biennium. Judge Marcus stated that, in his view, the Rules of Procedure should be made consistent with the statutory requirement of annual election of Chairs. He then moved, seconded by Judge Brewer, that all gendered references in the current Rules of Procedure, such as to "Chairman," be revised to become gender neutral. This motion was unanimously agreed to by voice vote.

Mr. McMillan commented that the existing Rules of Procedure confer many functions on the Executive Committee that, from his observation, tend to be performed by the Chair and, in his view, should be. He raised the question whether the Executive Committee should continue to have the authority to employ staff. Mr. Gaylord stated that he believed that past Chairs had closely consulted with the Executive Committee concerning staff members, and that he favored continuing to do so. Discussion of this item concluded when Mr. Hamlin said that he would prepare a further revised, "clean" draft of a proposed set of Rules of Procedure for discussion and voting upon at the next Council meeting.

Mr. Gaylord then stated that he did not think much more time should be allowed to pass before members of the LAC are elected, or at least agreement is reached on the process by which they are chosen. After lengthy discussion, there was general agreement with Judge Brockley's suggestion that Mr. Gaylord, as Council Chair, present at the next meeting a slate of nominees for election to membership on the LAC. Mr. Gaylord said that he would undertake the consultations necessary to prepare a slate of nominees that would conform to the requirements of the statute.

Agenda Item 4: Report of committee to study and review ORCP 17 and 54 E (Ms. Tauman). Ms. Tauman stated that she had no report to make on behalf of this committee at this meeting, and asked that this item be deferred to a future meeting.

Agenda Item 5: Report of committee to review study and review ORCP 55 I (Ms. Craine). Ms. Craine stated that she had no report to make on behalf of this committee at this meeting, and asked that this item be deferred to a future meeting.

Agenda Item 6: Continuation of 1995 legislative session review (see Attachment B to 12-9-95 agenda) (Mr. Gaylord). Upon review of the 1995 legislative amendments to ORCP 57 D, 63 E, 69 B, 78 C, 79 E and 82 G, there was general agreement that each of these amendments merely conformed references to state officers or other statutes as required by other legislative changes, that all the conforming references were accurate, and hence that none of them presents any issue the Council need address. There was

general agreement with Mr. Hamlin's suggestion that the statutory amendments shown under "Other 1995 Legislation Affecting Civil Practice" in the aforementioned Attachment B be placed on the agenda of the next meeting. Prof. Holland mentioned that the statutory amendments included in the aforementioned Attachment B merely reflected his own best guess as to which among the many statutes enacted by the 1995 Legislative Assembly affecting civil practice might cause difficulties related to the ORCP. He therefore asked that any member believing that one or more other statutes might usefully be included in the Council's review bring them to his attention so that the text of such statutes could be distributed with the agenda of the next meeting.

Agenda Item 7: Amendments to ORCP 7, 9, 15 and 21 proposed by Executive Director for preliminary consideration (see Attachment B to agenda of this meeting) (Mr. Gaylord). Mr. Gaylord asked Mr. Holland to summarize these proposed amendments, following which there was general agreement that these proposed amendments did not warrant consideration. It was specifically noted by many members that the amendment proposed to ORCP 21 A might cause unfairness if a motion to dismiss for failure to state a claim were, suddenly and without prior notice, treated by the court as an ORCP 47 motion for summary judgment. After some further discussion, Mr. Holland withdrew these proposals.

Agenda Item 8: Old business (Mr. Gaylord). Mr. McMillan, seconded by Judge Brockley, moved approval of Mr. Hamlin's report (copy attached to the original of these minutes) regarding ORCP 47 C as amended by the 1995 Legislative Assembly, recommending no action by the Council on this amended section at this time. This motion was agreed to by unanimous voice vote.

Agenda Item 9: New business (Mr. Gaylord). Reference was made to Mr. Hamlin's 4-3-96 memo to Mr. Holland (copy attached to the original of these minutes) regarding the Court of Appeals decision in *Long v. Oceanway Motors, Inc.*, 139 Or App 469, P2d (1996), reversing and remanding to the trial court for special findings in connection with an award of attorney fees. In this memo, Mr. Hamlin raised the question whether, in light of this decision, consideration should be given to amending ORCP 68 C(4)(c)(I) as follows [language to be added highlighted; language to be deleted by strikeout]:

C(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. ~~No findings of fact or conclusions of law shall be necessary.~~ The trial court shall make findings of fact and conclusions of law on awards of attorney fees if requested by any interested party.

Mr. Hamlin recalled that the Council had declined to adopt this amendment when it was proposed during the 1993-95 biennium (it was voted upon but did not pass by a supermajority). He added that his suggestion was not that finding and conclusions be required upon request in all cases, but only in those cases where they have been required by decisions of appellate courts. A difference of opinion was expressed among members as to whether this suggestion should be placed on the agenda for future consideration. Mr. Gaylord stated that he was inclined to exercise the discretion of the Chair to place this matter on the agenda of some future meeting.

Mr. Gaylord then asked members whether they had any thoughts or suggestions relating to Mr. Holland's 4-3-96 memo to Susan Evans Grabe of the OSB (see copy attached to these minutes) relating to the status of district court judge membership on the Council after the abolition of the district courts, and to the possibility of districting the Council's practitioner-membership geographical distribution requirement by reference to bar regions as opposed to U.S. House districts. In response to this query, the following points were unanimously resolved: 1) Eight members of the Council should continue to be trial court judges and, if possible, matters should be arranged so that Judges Marcus and Hickey continue to serve on the Council despite their change of status to "judges in the circuit court" effective 1-15-98; 2) the geographical distribution requirement applicable to practitioner-members of the Council should continue to be defined with reference to U.S House districts because changing to bar regions would foster the misapprehension that the Council is a committee of the Oregon State Bar; 3) the relating clause of any bill on this subject should, if possible, avoid reference to the Council on Court Procedures, but should make such other reference as to the status of judgeships. Mr. Holland stated that he would promptly forward these resolutions to Ms. Grabe so that she and the Board of Governors would be informed of the views of the Council.

Agenda Item 10: Adjournment (Mr. Gaylord). On motion unanimously agreed to, Mr. Gaylord adjourned the meeting at 11:55 a.m.

Respectfully submitted,

Maury Holland
Executive Director