

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of May 11, 1996
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present: Sid Brockley
Patricia Crain
Don A. Dickey
Robert D. Durham
William A. Gaylord
Bruce C. Hamlin
John E. Hart
Rodger J. Isaacson
Rudy R. Lachenmeier
Michael H. Marcus
John H. McMillan
Karsten Hans Rasmussen
Stephen J.R. Shepard

Excused: J. Michael Alexander
David V. Brewer
Mary J. Deits
Stephen L. Gallagher, Jr.
Nely L. Johnson
Nancy S. Tauman

Absent: Diane L. Craine
David B. Paradis
Milo Pope

Karen Garst, Executive Director of the Oregon State Bar, and Charles S. Tauman, Executive Director, Oregon Trial Lawyers' Association, were 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 9:40 a.m.

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

Agenda Item 3: Adoption of revised Council Rules of Procedure (Mr. Hamlin). At the Chair's request, Mr. Hamlin gave a brief overview of proposed Council Rules of Procedure, which he had revised in response to comments made at the 4-13-96 meeting and to incorporate the rules relating to the Legislative Advisory Committee (LAC) adopted at that meeting. (See Attachment A to agenda of this meeting.) He mentioned that the specific revisions he had made consisted of neutralizing all gender references, reflecting the practice of vesting greater discretion in the Chair than is the case under the present Rules, amending the provision for election of officers to conform to the statutory requirement that the Chair be elected annually, and

incorporation of the LAC rules as Rule II D. The floor was then opened for comments and discussion.

Mr. McMillan questioned the practice of electing the public member as Treasurer, because he doubted whether the public member should chair a Council meeting in the absence of the Chair and Vice Chair. Justice Durham stated that he found some inconsistency between the second and third sentences of revised Rule II A, in that the former provides, consistently with the statute, that the Chair, along with other officers, be elected annually, while the latter seems to codify an intent that, in effect, they are elected biennially. Justice Durham, seconded by Judge Marcus, then moved that the revised Rules of Procedure be adopted as proposed, with the single exception that the third sentence of Rule II A: "It is the intent of the Council that each of the officers will be elected to two consecutive terms, and that the Vice Chair will succeed the Chair in office," be deleted. This motion was carried by a vote of 12 in favor, 1 opposed, and no abstentions.

Agenda Item 4: Possible problem re ORCP 55 I (see Attachment B to agenda of this meeting) (Prof. Holland). Prof. Holland briefly summarized the phone call he had received from Messrs. Walsh and Wiswall, of Eugene, concerning what they perceived to be some problems created by ORCP 55 I, enacted by the 1995 legislature with no consultation with the Council. He also noted that copies of a letter from Mr. Walsh, dated May 1, 1996, further explaining those problems, had been distributed at the meeting (copy attached to these minutes).

Mr. Gaylord said he thought that Messrs. Walsh and Wiswall were raising two distinct, though somewhat related, problems. The first problem had to do directly with ORCP 55 I and its possible practical effect of overriding the physician-patient privilege, and the second had to do with the asserted overbreadth of medical records subpoenas.

Mr. Gaylord then asked whether anyone wished to comment on these issues. Mr. Hart mentioned that the issue of the scope of medical records subpoenas is now working its way through the appellate courts. Mr. Gaylord noted that there was now a subcommittee charged with studying ORCP 55 I, and asked that Ms. Craine, as its Chair, be made aware of the issue, which Mr. Hart said he would do as a member of the subcommittee. Justice Durham commented that a possible defect in ORCP 55 I is in failing to distinguish between validity of service of a subpoena as opposed to its substantive effectiveness to abrogate a privilege with respect to materials subpoenaed.

Ms. Karen Garst, Executive Director of the Oregon State Bar, was then recognized by the Chair and asked whether sponsors of legislation of this kind would typically involve the Bar in their efforts. Ms. Garst replied that the Bar has several mechanisms through which other organizations can coordinate with it respecting legislative reform, such as the Government Relations Program and Law Improvement Section, but noted that of course this kind of coordination is not legally required. Mr. McMillan observed that coordination with the Bar, or with the Council when an issue involved the ORCP, would seemingly improve the chances of the final product being workable. Mr. Hamlin expressed the view that, had ORCP 55 I been referred to the Council for its input, the problems reportedly being encountered with it almost certainly would have been avoided. This discussion concluded with general agreement that any further consideration of these issues by the Council should await a report from Ms. Craine's subcommittee.

Agenda Item 5: Status report of ORCP 7 subcommittee (see Attachment C to agenda of this meeting) (Mr. Rasmussen). Mr. Rasmussen reported that this subcommittee had recently conducted a telecon, would soon be conducting another one, and was working very hard to draft some well considered proposed amendments to ORCP 7. He asked members to take a look at the various drafts and comments contained in Attachment C, and let the subcommittee know of any comments or suggestions they might have. Mr. Hart commented that he thought there exists greater clarity concerning proper service of summons at the present than at any other time in his experience.

Agenda Item 6: Report of subcommittee to review ORCP 17 and 54 E (see Attachment B to 12/9/95 agenda) (Ms. Tauman). In the absence of Ms. Tauman, Judge Brockley reported that this subcommittee had met once by telecon, was continuing its work, and expected to have a report by the next meeting of the Council.

Agenda Item 7: Continuation of review of 1995 legislation affecting civil practice apart from statutes amending the ORCP (see Attachment B to 12/9/95 agenda) (Mr. Gaylord). Mr. Gaylord stated that he saw no problems from the Council's perspective created by H.B. 2625, but saw some possible problems in connection with the prevailing party fee provisions of S.B. 385. Mr. Lachenmeier commented that, while the Council has no authority to tinker with this or any other legislation, it might be worthwhile for it to give some thought to whether the prevailing party fee provisions of this statute dovetail with existing sanctions provisions of the ORCP. It was agreed that the subcommittee chaired by Ms. Tauman, which has already been asked to study ORCP 17, should also be asked to give some preliminary thought to the issue raised by Mr. Lachenmeier, and

in particular decide whether a thorough study of the matter should be undertaken now or whether it would be better to await the handing down of some appellate decisions, to see whether any problems actually arise. Mr. Gaylord identified ORCP 17, 46 and 68 as those as to which issues of duplication or overlap might arise. Mr. Lachenmeier agreed to serve as an additional member of the subcommittee.

Regarding S.B. 482, one or more members noted that there might be some discordance between the latter's provision for amending complaints to insert claims for punitive damages on the one hand, and the provisions in ORCP 23 about amendment of pleadings generally on the other. Judge Marcus raised a question of whether there might be need for clarifying amendment of the ORCP discovery rules to address the matter of discoverability of defendants' financial assets in the context of punitive damages. Justice Durham mentioned that he saw a potential problem with the provision of S.B. 482 which makes the Oregon Department of Justice a judgment creditor before any judgment exists or is entered.

Mr. Hart stated that, in his view, if S.B. 482 or other legislation has created problems or misalignments with existing procedures, solutions of such problems should be left to the variety of Oregon State Bar committees that exist in order to work on such matters. Mr. Gaylord said that, if the Council so approved, he would try his hand at drafting a letter to Sen. Neil Bryant that would at least apprise him of problems the Council sees, if not proposing possible solutions to them, and would then submit his draft to the Council for its formal or informal approval. Mr. Hart, seconded by Judge Brockley, moved that Mr. Gaylord be authorized to draft a letter of the kind suggested to Sen. Bryant, as the latter had invited the Council to do. This motion was carried by a vote of 11 in favor, 1 opposed, and no abstentions. Mr. Lachenmeier explained his "no" vote on the motion by saying that he believed that, before the Council starts writing letters to legislators with a view to proposing legislation, ground rules should be agreed upon similar to those that now exist for the LAC. At the conclusion of this discussion, it was agreed that review of S.B. 601 and H.B. 3098 should be placed on the agenda of a future meeting.

Agenda Item 8: Election of members of the Legislative Advisory Committee (LAC) (Mr. Gaylord). Mr. Gaylord nominated the following Council members to be members of the LAC: Judges Brockley and Dickey, and Messrs. Alexander, Hamlin and McMillan. These nominations were seconded by Mr. Lachenmeier. All the foregoing nominees were then elected by unanimous voice vote. As its first act, the LAC, on the motion of Mr. Hamlin, elected Mr.

Alexander to be its Chair. (General approbation was then expressed by all members.)

Agenda Item 9: Old business (Mr. Gaylord) In response to Mr. Gaylord's query whether there were any items of old business, Mr. Hamlin responded by referring to Attachment D to the agenda of this meeting, explaining that he thought the amendment to ORCP 68 C(4)(c)(ii) therein proposed might be useful to put attorneys on notice that, in certain instances, special findings of fact and conclusions of law in connection with attorney fee awards are required by appellate decisions when requested by a party. He added that the amendment he proposed seemed to him all the more helpful in light of the fact that the present subparagraph states flatly: "No findings of fact or conclusions of law shall be necessary," which recent appellate decisions have determined is not a correct statement of the law in all instances. Mr. Gaylord stated that he thought it would be unwise to take up this proposal as an item of old business, and directed that it be placed as a scheduled item on the agenda of a future meeting of the Council.

Agenda Item 10: New business (Mr. Gaylord). In response to Mr. Gaylord's query whether there were any items of new business, Judge Marcus referred to Prof. Holland's memo to Susan Evans Grabe dated 4-17-96 (copy enclosed with agenda of this meeting), and to his letter of 5-13-96 to Judges LaMar and Pratt (copy attached to original of these minutes), both dealing with the abolition of district court judgeships effective Jan. 15, 1998. Judge Marcus noted that some doubt exists about what entity will replace the present District and Circuit Judges Associations, and that how this is resolved might have some at least impact on the process by which trial judges are appointed to membership on the Council. He added that he did not propose any sort of action by the Council at this time, but simply wanted the Council to know that he had alerted the Circuit and District Judges Associations to some potential technical issues that might arise by his letter to the Presidents of both Associations.

Agenda Item 11: Adjournment (Mr. Gaylord). On motion unanimously agreed to, Mr. Gaylord adjourned the meeting at 11:52 a.m.

Respectfully submitted,

Maury Holland
Executive Director