COUNCIL ON COURT PROCEDURES
Minutes of Meeting of June 8, 1996
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

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

Also present was Maury Holland, Executive Director.

Agenda Item 1: Call to order. The Chairperson, Mr. Gaylord, called the meeting to order at 9:41 a.m.

Agenda Item 2: Approval of May 11, 1996 minutes (Mr. Gaylord). A motion carried by unanimous consent to approve the minutes of the May 11, 1996 meeting as previously distributed to the members. Before proceeding with the balance of the agenda, Mr. Gaylord welcomed Professor Stephen Kanter as the newest member of the Council.

Agenda Item 3: Proposed amendment of ORCP 68 C(4)(c)(ii) (see Attachments A and D to agenda of this meeting) (Mr. Hamlin). Mr. Hamlin briefly recounted as background the Council's decision during the 1993-95 biennium not to promulgate an amendment to ORCP 68 C(4)(c)(ii) that would have required findings and conclusions in connection with attorney fee awards in every case where they are requested by an interested party. He stated that he would not have raised the issue again, even in the form of the narrower amendment now proposed, except that *Long v. Oceanway Motors, Inc.*, 139 Or App 469, 473, __P2d__ (1996) had recently held that appellate courts will require such findings and conclusions in certain kinds of cases. This decision, along with the previously decided *Mattiza v. Foster*, 311 Or 1, 10, 803 P2d 723 (1990), he added, meant that the present assertion in

68 C(4)(c)(ii), that "[n]o findings of fact or conclusions of law shall be necessary," is in some instances incorrect and misleading. He further added that the amendment he proposed did not undertake to specify the areas of law or kinds of cases where findings and conclusions are required, since these are likely to change over time.

Prof. Kanter asked whether the Council had a view on whether findings and conclusions in this context are desirable, and also suggested that a good solution might be simply to delete the final sentence of C(4)(c)(ii), thus leaving the matter entirely to the courts. Justice Durham explained that appellate courts have become quite frustrated in discharging their obligation to review fee awards when required to do so. He added that, in his view, attorney fee awards often implement important public policies, and hence call for carefully reasoned review exposed to public scrutiny, something that is extremely difficult when the facts relied on by trial judges in ruling on fee petitions are not included in the record. Judge Marcus commented that he personally favored findings and conclusions when requested, but noted that the preference of many trial judges is to say as little as possible. Judge Brewer suggested that ORCP 62 should be taken into account, as that rule might be read to require findings and conclusions when requested in connection with fee awards independently of 68 C(4)(c)(ii). Mr. Alexander then suggested that the discussion might better return to the narrower issue posed by Mr. Hamlin's proposed amendment as to whether the present language of C(4)(c)(ii) is misleading.

Judge Brewer stated that, in his view, the final sentence of C(4)(c)(ii) is misleading and should be corrected. Judge Brockley said that he remained of the same view as when the issue was raised in the 1993-95 biennium, namely, that requiring findings and conclusions in connection with fee awards would divert too much time from other more important things that trial judges must do, and would be a waste of public resources. Mr. Alexander questioned whether, if 68 C(4)(c)(ii) is amended to make its final sentence not misleading, it might be useful also to add words such as "notwithstanding Rule 62."

Mr. Gaylord noted the absence of any motion on the floor, in response to which Mr. Hamlin, seconded by Mr. Alexander, moved adoption of the proposed amendment as shown in Attachment A, but without adopting the suggested Staff Comment, which he stated he did not intend the Council formally to adopt. Justice Durham said that he appreciated the effort by Mr. Hamlin to deal with a genuine problem, but would nonetheless oppose the motion because it would merely tell litigants that they must research pertinent case law. Mr. Lachenmeier stated he would oppose the motion because, in his view, it did not adequately deal with the

possible application of ORCP 62. Upon a call of the question, the motion was agreed to by a vote of 7 in favor, 5 opposed and 2 abstaining.

Mr. Gaylord then asked how many members would favor the Council giving more comprehensive consideration to broader issues that might be posed by ORCP 68 C(4)(c)(ii), and pointed out that anyone can place an item on the agenda. Eleven of the 14 members present indicated that they favored the Council doing this. Judge Brockley requested that, if the broader issues are to be revisited, the topic be scheduled for a single specific time. Mr. Alexander suggested that it might be helpful if the minutes of discussions concerning this topic during the previous biennium were distributed to all members, with which there was general agreement, and Prof. Holland said he would see that this was done.

Agenda Item 4: Report of subcommittee to review 1995 legislative amendments to ORCP 17 and 54 E (see Attachment B to 12-9-95 agenda) (Ms. Tauman). In the absence of Ms. Tauman, Mr. Alexander reported on behalf of the subcommittee that there had been some discussion among its members concerning ORCP 54 E as amended, and the conclusion reached that this section did not present any problems requiring the Council's attention. He added that the subcommittee had not yet completed its review of ORCP 17 D.

Agenda Item 5: Report of subcommittee to review ORCP 55 I (see Attachment B to 12-9-95 agenda and Attachment B to 5-11-96 agenda) (Ms. Craine). Mr. Gaylord read and placed in the record Ms. Craine's letter of June 7 confirming that, in the subcommittee's view, the insertion of ORCP 55 I by the '95 legislature appears to have created "some serious practical problems." (A copy of this letter is attached to the file copy of these minutes.) Mr. Gaylord stated that the Council's best course of action would be to defer further consideration of this item pending a full report from the subcommittee.

Agenda Item 6: Conclusion of review of 1995 legislation: S.B. 601, H.B. 3098 (see Attachment B to 1209-95 agenda) (Mr. Gaylord). In the interest of reaching the next item on the agenda, Mr. Gaylord decided, without objection, to defer this item to the agenda of a future meeting.

Agenda Item 7: Report of subcommittee to review ORCP 7 (see Attachment B to agenda of this meeting) (Judge Brewer). Judge Brewer began his report by running through and briefly summarizing each of the amendments to ORCP 7 now being considered by the subcommittee. Specifically, he explained that the amendment proposed in lines 11-12, p. 2, was intended to conform

to an identical amendment to ORCP 7 B already tentatively adopted by the Council; that the amendment in lines 4-15, p. 5 was intended to clarify and improve the generic service-by-mail provision of the rule; that the amendment to D(3)(a)(i) in line 26, p. 5 to line 6, p. 6 was intended to codify the holding in *Lake Oswego Review v. Steinkamp,* 298 Or 607, 695 P2d 565 (1985), except that restricted delivery mailing is not required; that the amendment proposed to D(4)(a)(i) in line 25, p. 8 to line 3, p. 11 was intended to jettison the amorphous prerequisite for use of this service method--that defendant could not be served by any other method--in favor of a the more clear-cut prerequisite that plaintiff first at least once attempt service by a primary method, to eliminate service on the DOT as useless, and to eliminate the "moving target" by requiring mailing to another address that might result in actual notice only if known by plaintiff at the time of the other two mailings; that the amendment to D(4)(c)(ii) proposed in line 7, p. 12 was intended to give greater protection to insurers in light of the probable greater use of alternative service under D(4)(a)(i) as proposed to be amended; that the amendment proposed to D(6)(c) in lines 7-15, p. 14 was intended to authorize publication of summons at a location other than where the action is commenced when that provides greater likelihood of giving actual notice; that the amendment proposed to D(7), which would become D(6)(g), was intended to make clear that its requirements apply only to court-ordered service pursuant to D(6); and that the amendment proposed to 7 G in line 17, p. 20 was intended to clarify that service not consistent with the "reasonably calculated" standard of D(1) cannot be excused pursuant to this section.

Judge Brewer then took up each amendment in turn, as shown in Attachment B, and asked for comments and suggestions from members present. Mr. Alexander asked whether he correctly understood the amendment proposed to D(4)(a)(i) on lines 6 - 12, p. 10, as meaning the service would be sufficient even if all mailings were returned to sender unreceipted. Judge Brewer confirmed that this understanding was correct, but emphasized that this method of service would be authorized only in the limited context of motor vehicle cases, that its conformity both with fourteenth amendment due process and the "reasonably calculated" standard of D(1) was premised on the special legal obligation of motorists to provide address information at accident scenes and, on the part of Oregon motorists, to notify the DOT of any changes in record address occurring within three years of accidents, and that it would be an alternative service method available only after plaintiffs had first attempted service by a primary method under D(3). Justice Durham remarked that, in proposing this and other amendments to 7 D, it was no part of the subcommittee's purpose to diminish the utility of personal service.

Mr. Lachenmeier then raised two questions regarding the proposed amendments to D (4)(a)(i). The first was whether it might be better to require three, rather than just one, attempts to effect service by a primary method before authorizing resort to the three certified or registered mails that need not yield a receipt. His second question was whether it made good sense to allow plaintiffs to resort to this alternative method merely on the basis of one prior certified or registered mailing, return receipt requested, returned as undeliverable. The amendment as presently drafted, he pointed out, would allow plaintiffs who first failed with one mailing simply to repeat the same futile effort. Judge Brewer responded that he thought Mr. Lachenmeier's point a good one meriting further serious consideration by the subcommittee.

Mr. Rasmussen pointed out that the draft as distributed prior to this meeting failed to reflect the subcommittee's agreement to add "and by first-class mailings" on line 25, p. 9, following "return receipts requested, ..." He explained that this was proposed to be added because sometimes first-class mail is more likely to reach an addressee than is registered or certified mail. Prof. Holland said he would amend the draft to show this change as having been already agreed upon by the subcommittee.

Judge Marcus suggested that, with reference to the proposed amendments referring to "registered or certified mail," the subcommittee might do well to check with the Postal Service, to find out exactly what the differences between these two kinds of mailing are, whether there is any need for the rule to continue to refer to both in the alternative, and also whether something should be said about including a "Please Forward" endorsement on envelopes in which mailings are made. Judge Brewer agreed that these matters should be checked with the Postal Service.

There followed a lengthy discussion as to why the proposed amendments did not require "restricted delivery," a feature that had been emphasized in the opinion in *Steinkamp*. Judge Brewer explained the subcommittee's thinking on this matter to the effect that it should be left to plaintiffs' attorneys to decide whether to restrict delivery to increase the chances of getting defendants signatures on receipts, and since the amendments required such signatures, there seemed no point in adding a requirement that delivery be restricted. Mr. Alexander observed that signatures on receipts are sometimes illegible, and that unless delivery were restricted, it might sometimes be unclear whether it was the defendant or someone else who had signed. Judge Marcus expressed his opinion that requiring restricted delivery might be useful symbolically, because it would help

impress on defendants that the mailings were both important and specifically directed to them.

Mr. Kanter asked, with reference to the amendment proposed to D(4)(a)(i) on lines 3-6, p. 10, what was contemplated if a plaintiff learned where defendant might actually be found after the mailings required by (1) and (2). Judge Brewer responded that the subcommittee had concluded it would unduly complicate the amendment if plaintiffs were confronted by a "moving target," by which he meant that, unless a time certain were stated for purposes of mailing (3), if sufficiency of service were challenged, the evidentiary determination of what plaintiffs might have learned after making the mailings might become unduly wide ranging. He added that the subcommittee wanted to make all provisions as to timing as clear-cut as possible.

Justice Durham asked whether anyone had a problem with the phrase "if the plaintiff first at least once attempts to serve ..." on lines 19-20, p. 9. There was general agreement that the phrase "if the plaintiff makes one attempt ..." would be an improvement. Mr. Hamlin raised the question whether the elimination in the amendment proposed to D(4)(a)(i) of the requirement of service on the DOT might prompt objections on grounds of loss of fee revenue. Judge Brewer replied that he had been in contact with the individual at the DOT in charge of recording service of summons, and learned that the DOT had no objection to its being discontinued.

Judge Marcus suggested that the subcommittee should carefully check the language of the relevant statute to ensure that the language of D(4)(b), as proposed to be amended, tracks that language. Judge Brewer agreed with this suggestion. He similarly agreed with Judge Marcus' suggestion that the language of D(4)(c) concerning preconditions for taking defaults be double-checked for consistency with the amendments proposed to D(4)(a)(i). Also agreed to was Mr. Hamlin's request that the subcommittee reconsider the requirement of D(4)(c)(ii) that, not less than 30 days prior to applying for defaults, plaintiffs must mail a copy of the summons and of the complaint to defendants' insurers. Mr. Hamlin explained that his concern was that any language adopted not lend itself to an interpretation that service on, as opposed merely to notice to, insurers is required.

This discussion concluded with Judge Brewer saying that the subcommittee would soon be conducting another phone conference during which, among other things, all comments and suggestions made during the course of this meeting would be reviewed and carefully considered. Mr. Gaylord, joined by several members, commended the subcommittee for the hard work it was devoting to this difficult and challenging project.

Agenda Item 8: Old business (Mr. Gaylord). There was no response to Mr. Gaylord's query whether any member had an item of old business to propose.

Agenda Item 9: New business (Mr. Gaylord). Mr. Gaylord asked whether all members had received a copy of Mr. Jim Nass's letter of 5-22-96 requesting, on behalf of the OSB Appellate Practice Section, the Council to express its view regarding sections of a proposed bill that would amend ORCP 82 and make reference to other rules. Receiving an affirmative reply, Mr. Gaylord directed that Mr. Nass's inquiry be placed on the agenda of a future meeting.

There was general agreement with Mr. Gaylord's statement that the volume of work presently facing the Council meant that the Council meeting scheduled for July 13 would have to be held. Only one member present indicated that, because of a longstanding commitment to be out of state at the time, he would be unable to attend that meeting. Mr. Gaylord reported that eight members had responded to a questionnaire that they would not be able to make an August meeting rescheduled to August 3 to avoid conflict with the OTLA annual meeting. It was thus agreed that the August meeting would be held on August 10 as scheduled.

Agenda Item 10: Adjournment (Mr. Gaylord). There was unanimous consent for Mr. Gaylord declaring the meeting adjourned at 12:35 p.m.

Respectfully submitted,

Maury Holland
Executive Director