COUNCIL ON COURT PROCEDURES
Minutes of Meeting of July 13, 1996
Oregon State Bar Center
Lake Oswego, Oregon

Present: J. Michael Alexander, David V. Brewer, Sid Brockley, Diane L. Craine, Mary J. Deits, Don A. Dickey, Stephen L. Gallagher, Jr., William A. Gaylord, Bruce C. Hamlin, John E. Hart, Rodger J. Isaacson, Nely L. Johnson, Rudy R. Lachenmeier, Michael H. Marcus, David B. Paradis, Karsten Rasmussen, Nancy S. Tauman

Excused: Patricia Crain, Robert D. Durham, Stephen Kanter, John H. McMillan, 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 No. 1: Call to order (Mr. Gaylord). Mr. Gaylord called the meeting to order at 9:40 a.m.

Agenda Item No. 2: Approval of Minutes (Mr. Gaylord). Without objection or amendment, the minutes of the Council's June 8, 1996 were approved as previously distributed to all members, except that Mr. Gaylord noted that it had not been finally agreed, as stated in the minutes at the end of the second paragraph under New Business, to hold the August 10, 1996 meeting as scheduled. He said that his recollection was that a final decision about the August 10 meeting was deferred to the present meeting, with which there was general agreement.

Agenda Item 3: Report and recommendations of subcommittee to review ORCP 7 (See Attachment A to 7-13-96 agenda) (Judge Brewer). Judge Brewer reported that the subcommittee had conducted two teleconferences since the last Council meeting, as a result of which much progress was made toward reporting a finished product for the Council's consideration. He also mentioned that he had been in contact with Mr. Dwight Apple, the individual at the Department of Transportation (DOT) having supervisory responsibility for recording and filing summonses served pursuant to ORCP 7 D(4)(a)(i), to find out whether the amendment to this provision now under consideration, which would eliminate any service on, or notice to, the DOT, would cause any

problems, or raise objections there. Judge Brewer reported that he had been assured by Mr. Apple that the DOT would be pleased to see this function ended, and would probably save some money as a result, which assurance had been confirmed by letter from Mr. Dwight Apple dated July 12, 1996 (copies distributed at this meeting; original filed with these minutes).

Judge Brewer continued by noting that a few issues remained not finally decided by the subcommittee about which it wished to get any guidance or suggestions members might have before it proceeds further. He stated that one such issue was whether to move present paragraph 7 D(4)(c), dealing with defaults when service is pursuant to subparagraph 7 D(4)(a)(i), to Rule 69, which governs defaults generally. A second important issue remaining undecided, he added, was whether to delete the phrase "or service of" in section 7 G as it appears on line 16, p. A-18 of Attachment A. He further stated that another important unresolved question was whether, at each place in 7 D where the phrase: "For the purpose of computing any period of time prescribed or allowed by these rules, ..." appears, there should be an amendment adding the words: "or by statute" following "rules." Judge Brewer explained that the purpose of such amendment would be to make completion dates of various modes of service as prescribed in section 7 D effective for purposes of statutes of limitations as well as for purposes internal to the ORCP. He added that, while there was unanimous agreement within the subcommittee that this amendment would be good policy, some doubt existed about whether this would be within the Council's authority under ORS 1.735 because of statements in several appellate court opinions, including one by the Supreme Court, that the Council may not, by rule, affect the running or tolling of limitations.

Ms. Tauman said that she found paragraph D(2)(d), in lines 7-18, p. A-5, difficult to understand, and thought its clarity might be improved by changing "but not later" to "but in no event later." Judge Brewer responded that the subcommittee would consider this suggestion.

Regarding subparagraph 7 D(4)(a)(i), Prof. Holland mentioned that he had checked ORS 801.305 for the statutory definition of "highway" with a view to possibly substituting that single word for the existing "roads, highways and streets of this state." The question was then considered whether the existing language of the provision should be retained, with a staff comment making reference to ORS 801.305. Judge Brockley said he thought the coverage of D(4)(a)(i) ought to be symmetrical with that of the Motor Vehicle Code. Mr. Rasmussen stated that the subcommittee had not considered whether D(4)(a) should, or validly could, contain a wider scope of coverage than does the Motor Vehicle

Code, such as by extending to premises open to the public, but not necessarily as a matter of right. Judge Gallagher suggested that perhaps the language should not be cast in terms of geography, but instead say something like "operated within this state." Mr. Alexander, seconded by Mr. Hamlin, then moved to table further discussion of this issue, but subsequently withdrew the motion without a vote. Mr. Hamlin then suggested that the language from line 22, p. A-9 to line 21, p. A-10 would be improved in terms of readability if it were pulled apart and reformatted, a suggestion with which there was general agreement. Judge Brewer expressed agreement with this suggestion.

Judge Brewer then asked for some reactions to the proposed deletion of "or service of" from section 7 G as shown on line 16, p. A-18. Justice Durham stated he would be concerned that such deletion might be understood by trial judges to mandate hypertechnicality in dealing with even the most inconsequential, non-prejudicial deviations from prescribed service methods. Judge Brewer commented that the subcommittee was considering breaking down or reformatting section 7 G along the lines Mr. Hamlin suggested in connection with subparagraph D(4)(a)(i). Judge Brockley suggested caution in adding new language to 7 G. Discussion of this point concluded with Judge Brewer asking any member who had a better idea about how best to clarify section 7 G to fax his or her proposed language to the subcommittee.

Discussion then turned to the phrase "certified or registered mail, return receipt requested, ..." as it appears in several places throughout section 7 D. Judge Brewer summarized what he had learned from the U.S. Postal Service about the differences between certified and registered mail, about another form of mailing called "express mail," and about the inadvisability of requiring that envelopes in which mailings are made show "Please Forward," or the like, on the outside. Judge Brockley suggested that adding express mail to certified or registered mail would seem to work best. Judge Isaacson raised the question whether the amended language should authorize use of some or all means of private mailing. Judge Brewer responded that the subcommittee would give some thought to that question.

Judge Brewer then asked for guidance on the question of whether "or by statute" should be added following "by these rules" where the former phrase appears in section 7 D. Prof. Holland was asked to summarize a memo he had written for the subcommittee in which he concluded that the addition of "or by statute" probably would be sustained by the Supreme Court as within the Council's power, despite several statements by way of dicta in appellate court opinions that the Council is prohibited by ORS 1.735 from prescribing when service is effective for

purposes of statutes of limitations, ORS 12.020(2) in particular, and did so with characteristic brevity.

Mr. Gaylord and Judge Marcus both raised the question whether, in view of whatever doubt exists about the validity of an amendment adding "or by statute," some way might be found to get the legislature to ratify it. Mr. Hamlin commented that it was a source of some concern to him that doubt about the validity of this amendment might spawn several years of prolonged litigation before the issue was finally settled one way or the other. He also recalled that, on past occasions, when the Council has promulgated a package of related ORCP amendments, it had asked the legislature to enact other related provisions which the Council deemed beyond its authority, and the legislature had never failed to act. Mr. Rasmussen, however, expressed reservations about approaching the legislature on this matter.

Mr. Lachenmeier asked for clarification as to whether any of the reservations being expressed reflected doubt on the part of any members that this amendment would constitute good policy. Mr. Hamlin and others responded that their only concerns were some doubt about whether this amendment would be within the Council's power and the time it would take to settle the matter in litigation unless the legislature ratifies this change. Discussion of this issue then concluded without any decision about the possibility of approaching the legislature.

Judge Marcus stated that he questioned the change from "any" to "the" on line 6, p. A-10 following "(2)." He added that, if a plaintiff knows or learns of multiple current residence addresses, he thought that mailings to all should be required. Mr. Rasmussen explained why he preferred staying with "the."

Mr. Lachenmeier said he had some concern about how people served by mail would learn that service was complete three or seven days after mailing rather than on the date they signed the receipt, assuming the latter happens after the former. He explained that he worried that people served by mail for which they sign a receipt would probably assume that the service was completed on the date they signed the receipt, whereas, if that event occurred more than three or seven days after mailing, the 30 days within which to appear and defend would have begun to run three days after mailing if to an address in Oregon, or seven days after mailing if to an address outside Oregon.

Agenda Item No. 4: Report of subcommittee to review ORCP 17 and 54 E (see Attachment B to 12-9-95 agenda and Attachment B to this agenda) (Ms. Tauman). Ms. Tauman reported that the subcommittee had found no problems with ORCP 54 E presently requiring action by the Council. Mr. Alexander said that the

subcommittee had identified some issues relating to ORCP 17 warranting further consideration. Two of these, he said, were what the burden of proof is when sanctions under ORCP 17 D(4) are awarded in the form of monetary penalties payable to the court and what procedures should be followed. He stated that the corresponding changes to FRCP 11 in 1993 failed, in his opinion, to provide much guidance. He said that he thought the burden of proof should be the same as for punitive damages, i.e., clear and convincing. He concluding by noting that, especially since the PLF policy has a blanket exclusion for punitive sanctions, a real problem appears to have been created, and offered, as a subcommittee member, to try to draft some language to ameliorate it. There was general agreement with the idea of the subcommittee attempting to draft some apt language that at some point could either be recommended to the legislature or possibly incorporated in an amendment promulgated by the Council.

Agenda Item No. 5: Report of subcommittee to review ORCP 55 I (see Attachment B to 12-9-95 agenda, Attachment B to 5-11-96 agenda, and Attachment C to 7-13-96 agenda) (Ms. Craine). Ms. Craine confirmed that the subcommittee agreed with the point made in Mr. James Walsh's letter that the 24 hours notice-to-patient period provided by 55 I is totally inadequate and is often likely to have the practical effect of violating the patient-physician privilege. She added that Prof. Holland had learned from a conversation with Mr. Tom Cooney, who played an important role on behalf of the Oregon Medical Association (OMA) in getting section 55 I enacted by the 1995 legislature, that the OMA had no intention of narrowing or undermining the patient-physician privilege. Mr. Gaylord added that it was his understanding that the OMA's purpose was to take the burden off doctors and other health care providers, when served with a patient records subpoena, of determining whether the patient had waived, or was then willing to waive, the privilege. Ms. Craine confirmed that that was her understanding as well. She added that perhaps the Council, or the subcommittee, should have some interaction with the Procedure & Practice Committee, and Judge Marcus suggested there might be some consultation with the OMA.

Mr. Hart suggested that a window of 15 days, as opposed to only 24 hours, might best protect everyone's interests. Several members commented that the notice period would have to be different for trial, as opposed to discovery, subpoenas. Mr. Gaylord noted that the issue of what the notice period should be was separate and distinct from the effect of a subpoena on the privilege. This discussion concluded without any action on the Council's part.

Agenda Item No. 6: Discussion of "broader issues" pertaining to ORCP 68 C(4)(c)(ii) (see Attachment B to 7-13-96

agenda)(Mr. Gaylord). Mr. Gaylord stated that the floor was open for suggestions from any member about how and when to proceed. Judge Brockley noted that he had prepared a memo restating the basis for his continued opposition to requiring findings of fact and conclusions of law in connection with fee awards. Judge Marcus commented that effective appellate review is precluded in the absence of findings. Judge Brockley responded that his opposition to findings was not motivated by any desire to insulate trial judges from appellate review, but by his sense of priorities in the use of trial judges' time. Mr. Gaylord reiterated that feelings by various members about this issue were strong enough to prompt him to designate it as an agenda item which, it was decided by general agreement, should be continued to the next meeting. Mr. Gaylord also directed that a copy of Judge Brockley's memo be attached to the agenda of the next meeting so that members not present at the present meeting would have it, and because Judge Brockley had a conflict that will prevent him from attending the September 14 Council meeting.

Agenda Item No. 7: Discussion of inquiry of Mr. Jim Nass on behalf of the OSB Appellate Practice Section pertaining to proposed bill that would amend ORCP 72 (see Attachment E to 7-13-96 agenda) (Mr. Gaylord). Mr. Gaylord noted that Mr. Nass's letter does not ask the Council to take any action respecting ORCP 72 other than to line up behind the amendment to that rule contained in the Appellate Practice Section's proposed bill. There was general agreement with the substance of the proposed amendment. Judge Marcus, seconded by Mr. Rasmussen, moved that the Council formally inform the Appellate Practice Section that it approved the proposed amendment to ORCP 72. Judge Brockley stated he did not believe the Council should allow itself to be put in the position of endorsing or approving rules amendments prepared by others, with which there was general agreement. He therefore moved, seconded by Judge Brewer, to amend the Marcus motion to the effect that the Council tentatively adopt the ORCP 72 amendment as contained in Mr. Nass's letter. On unanimous voice vote, the Marcus motion, as amended by the Brockley motion, was agreed to. The amendment to ORCP 72 as thus tentatively adopted reads as follows:

RULE 72

A. Immediate Execution; discretionary stay. Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court directing entry of judgment, in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs. ~~No stay of proceedings to enforce judgment may be entered by the~~

~~trial court under this section after the notice of appeal has been served and filed as provided in ORS 19.023 through 19.029 and during the pendency of such appeal.~~ **The court shall have authority to stay execution of a judgment temporarily until the filing of a notice of appeal and to stay execution of a judgment pending disposition of an appeal, as provided in ORS 19.040 and Section 7 of this Act or other provision of law.**

Agenda Item No. 8: Old business (Mr. Gaylord). In response to Mr. Gaylord's inquiry whether anyone wished to raise an item of old business, none was raised.

Agenda Item No. 9: New business (see attached 7-11-96 memo from Prof. Holland re possible amendment to ORS 1.735(2)) (Mr. Gaylord). Prof. Holland gave some background on the 1993 amendment to ORS 1.735(2) requiring that the exact text of any ORCP amendment promulgated by the Council be published to the bench and bar no less than 30 days prior to the meeting at which the vote to promulgate was taken. He added that the unintended, but unfortunate, effect of that amendment has been to make the October and November Council meetings prior to legislative sessions so useless that they are generally not held. He therefore suggested to the Council that it might want to vote to authorize Mr. Gaylord, as Chair, to seek an amendment to ORS 1.735(2) in the 1997 legislative session that would substitute "substance and intended effect" for "exact language." He added that the legislature might be approached either through the OSB if time permitted, or through the good offices of Senator Neil Bryant.

Mr. Hamlin suggested instead that there might be arranged a change in publication dates. Mr. Chuck Tauman was recognized by the Chair, and he suggested that publication of tentatively adopted amendments might be accomplished more quickly by use of inserts in the *OSB Bulletin* as opposed to the Judicial Advance Sheets. Messrs. Hamlin and Lachenmeier suggested a possible solution by way of breaking up tentatively adopted amendments, in the form published, into separate proposals in the manner that was done with the ORCP 22 amendments in the 1993-95 biennium. This discussion concluded with no motion or any other definite action taken respecting Prof. Holland's suggestion.

There followed brief discussion about the advisability of holding the scheduled August 10 meeting of the Council, at the conclusion of which it was generally agreed not to hold that meeting. Prof. Holland mentioned that, in light of the large number of items the Council would likely have to complete at the September 14 meeting, members should be prepared for the

possibility that that meeting might have to extend into the afternoon, in which event box lunches would be ordered.

Agenda Item No. 10: Adjournment (Mr. Gaylord). Without objection, Mr. Gaylord declared the meeting adjourned at 1:00 p.m.

Respectfully submitted,

Maury Holland
Executive Director