COUNCIL ON COURT PROCEDURES
Minutes of Meeting of September 14, 1996
Oregon State Bar Center
Lake Oswego, Oregon

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

The following guests were in attendance: Mr. Charles S. Tauman, Executive Director, Oregon Trial Lawyers' Association; Attorney James K. Walsh. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Mr. Gaylord). Mr. Gaylord called the meeting to order at 9:40 a.m.

Agenda Item 2: Approval of minutes (Mr. Gaylord). The minutes of the July 13, 1996 meeting, as previously distributed, were approved without objection or correction, except it was noted that in the third line of the first full paragraph on p. 3 thereof, "Justice Durham stated ..." should be corrected to read: "Justice Durham had previously stated on an earlier occasion ..."

Agenda Item 3: Report and recommendations of subcommittee to review ORCP (*see* Attachment A to agenda of this meeting) (Judge Brewer). Judge Brewer presented a brief synopsis of the various amendments proposed by the subcommittee to review ORCP 7 as set forth in Attachment A, including a number of replacement pages. Mr. Hamlin asked whether the subcommittee regarded the amendments to 7 D adding the phrase "or by statute" following "[f]or purposes of computing any period of time allowed or prescribed by these rules, ..." as being an essential component of the amendments proposed to Rule 7 generally. Judge Brewer responded that they were so regarded, and Mr. Lachenmeier concurred with this view.

Judge Marcus questioned why the amendment proposed to 7 D(2)(d) required mailing by first class, as well as certified, registered or express mail. Judge Brewer replied that the subcommittee believed that a form of mailing that would yield a receipt should be required so that service could be proved, but also understood that first class mail is often more likely actually to reach the defendant. Judge Marcus then suggested that the following sentence be added to D(2)(d) as a new second sentence: "For purposes of this section, 'first class mail' does not include certified or registered mail, or any other form of mail that might delay or hinder actual delivery of mail to the defendant." There was general agreement with this suggestion, and it was agreed to as a friendly amendment. There was also general agreement with Mr. Rasmussen's suggestion that the first sentence of D(2)(d) be rewritten to read as follows:

> When required or allowed by this rule or by statute, service by mail, except as otherwise permitted, shall be made by mailing a true copy of the summons and the complaint to the defendant by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail.

This suggestion was agreed to as a friendly amendment.

Mr. Gaylord then asked about the apparent difference between D(2)(d) and D(3)(a)(i) concerning when service by mail is complete. Justice Durham explained that there is an important difference between a provision about when service is complete as opposed to one about whether it is accomplished. He added that it was his understanding that D(2)(d) provides two alternative dates when service by mail is regarded as complete, while D(3)(a)(i) provides that, when mailing is used as a primary method of serving individuals, it is not accomplished unless the defendant signs a receipt. Judge Brewer agreed with this explanation, and added that the reason for this difference between D(2)(d) and D(3)(a)(i) was that the former applies to other service-by-mail provisions, apart from D(3)(a)(i), such as D(6)(a) and D(3)(b)(ii), wherein service can be accomplished even if no signed receipt is returned. In response to a further query by Ms. Tauman, Judge Brewer said that D(2)(d), as proposed to be amended, was intended to function as a residual provision prescribing completion dates for all service-by-mail provisions except for those otherwise expressly providing, such as D(3)(a)(i) and D(4)(a)(i). There was general agreement with Ms. Tauman's suggestion that a staff comment be used to elucidate this point.

Mr. Lachenmeier noted that the amending language to D(3)(a)(i) states that "service shall be complete on the date on which the defendant signs a receipt for the mailing," but does not state whether completion is only for purposes internal to the ORCP or also for purposes of statutes of limitations. He added that, particularly in light of the cases in which the Court of Appeals has stated that Rule 7 may provide for completion-of-service dates only as applied to the ORCP, he had some concern that the addition of the phrase "or by statute" in such places as D(2)(d) and D(4)(a)(i), but not in D(3)(a)(i), might confuse the courts as to what the Council had tried to accomplish.

Following a short recess, Mr. McMillan commented that there appeared to him to be some degree of confusion, or at least lack of full agreement, regarding some aspects of the Rule 7 amendments, and asked what the consequences would be if the Council took no action now, but deferred this effort until the next biennium. Mr. Paradis responded that he thought the proposed amendments were needed at the earliest possible date, in part because several quite recent judicial decisions had highlighted some lack of clarity and predictability in the language of the existing rule.

Prof. Holland asked the members what they thought about the subcommittee's suggestion (*see* note 7, p. A-7 of Attachment A) that cross-references within Rule 7 from one to another provision of the rule, or to other rules, be simplified by referring to them in the manner indicated by ORCP 1 E. Messrs. Gaylord and Hamlin both stated that any such possible change might better be put off until the next biennium.

Judge Brewer then asked for comments and suggestions regarding the amendments proposed to D(4)(a)(i). Mr. Hamlin stated that he had some concern that, while the language of the existing provision makes clear that the method of service it authorizes applies only to defendants who are using the "roads, highways and streets" of the state as motorists, the amending language proposed lends itself to a broader interpretation whereby it might be thought applicable to passengers, mechanics or product manufacturers, and others about whom it could not necessarily be said that they consented to this method of service as a quid pro quo for using Oregon's roads, etc. To clarify the amending language, he suggested that D(4)(a)(i) (ln. 19-26, p. A-11 of Attachment A) be revised to read as follows [language added in highlighted bold underlined; language deleted in strikeover]:

> ... if the plaintiff makes at least one attempt to serve the defendant who operated such motor vehicle, **or caused it to be operated on that defendant's behalf**, by a

> method authorized by subsection (3) of this section except service by mail pursuant to subparagraph (3)(a)(i) of this section and, as shown by its return, did not effect service, the plaintiff may then serve ~~the~~ that defendant by mailings made in accordance with paragraph (2)(d) of this section addressed to ~~the~~ that defendant at: ...

There was general agreement with this suggested revision, which was agreed to as a friendly amendment. Judge Brewer then noted that D(4)(a)(i) had been reformatted, as had been suggested by Mr. Hamlin during the July meeting, for better readability. Justice Durham stated that the word "which," as it appears in what would become D(4)(a)(i)(A) (ln. 8, p. A-12 of Attachment A) should be changed to "that." This was generally agreed to as a friendly amendment. Judge Brewer noted that Mr. Gaylord had pointed out an erroneous reference in what would become new D(4)(a)(iii) (ln. 12, p. A-13 of Attachment A) to Rule "69 A(2)," which should be corrected to read "Rule 68," which was generally agreed to.

Mr. Gaylord said that he had some concern that the possible vagueness of the word "might" as it appears in D(6)(c) as proposed to be amended (ln. 21, p. A-16) could lead to second-guessing about what a plaintiff knew or should have known. He therefore suggested that the word "reasonably" be added immediately before "might." This suggestion was agreed to as a friendly amendment.

Mr. McMillan asked for a motion that the Council approve the suggestion in note 13 of Attachment A (p. A-14) that the Chair be directed to communicate to the legislature the Council's belief that D(4)(b) does not appropriately belong in the ORCP, since it is not a rule of procedure, accompanied by a suggestion that this provision be inserted in the Vehicle Code or other appropriate place in the Oregon Revised Statutes. Judge Marcus, seconded by Justice Durham, so moved, and the motion carried by unanimous voice vote. There followed some discussion as to whether this motion should be implemented by a letter to Sen. Neil Bryant asking him to pre-session file an appropriate bill to accomplish its purpose, or whether such request should be included in the letter from the Chair to the Speaker of the House and the President of the Senate reporting, at the beginning of the session, on the Council's action during the current biennium. The sense of the meeting was that this should be left to the discretion of the Chair.

At the suggestion of the Chair that a motion or motions would be in order, Judge Marcus, seconded by Mr. Hamlin, moved

that all the Rule 7 amendments as set forth in Attachment A, and as revised by the succession of friendly amendments agreed to, be tentatively adopted. This motion carried by vote of 17 in favor, none opposed and 2 abstentions.

Mr. Hamlin then said that he would like to retain the option of further considering the validity of amendments adding the phrase "or by statute" at several places throughout section 7 D, especially in light of any adverse comments that might be received in response to publication and before the vote on final promulgation. He therefore moved, seconded by Mr. McMillan, that two alternative versions of the Rule 7 amendments be published, one with, and the other without, the added phrase "or by statute." Mr. Lachenmeier stated that, in his view, the amendments must all stand or fall together. This motion failed to carry by a vote of 2 in favor, 15 opposed, and 2 abstentions.

Judge Brewer noted that the subcommittee to review ORCP 7 also recommended tentative adoption of various amendments to Rules 68 and 69 relating to the Rule 7 amendments, as set forth on Attachment pp. A-24 to A-35. A motion, duly seconded, by Mr. Rasmussen tentatively to adopt all the amendments to ORCP 68 and 69 as set forth on the aforesaid pages carried by unanimous voice vote, but with paragraph 69 A(2)(c) omitted and paragraph 69 A(2)(a) revised to read as follows: "A(2)(a) that the plaintiff complied with the requirements of ORCP 7 D(4)(a)(ii), and ..."

Agenda Item No. 5: Report of subcommittee to review ORCP 55 I (*see* Attachments B to 12-9-95 and 5-11-96 agendas and Attachments C to 7-13-96 agenda and to agenda of the present meeting) (Mr. Hart). Without objection, Mr. Gaylord directed that this item be taken up out of order to avoid further delaying Mr. Jim Walsh, who was in attendance in order to make a statement on this matter. Mr. Hart invited the Council's attention to two alternative versions of subsection 55 I(2), hereinafter referred to as Proposals A and B, which he had drafted as set forth in Attachment C-3 of the present agenda. Mr. Gaylord noted that two other versions of proposed amendments to 55 I(2) had been distributed at, or prior to, the meeting, one prepared by Mr. Lachenmeier and the other by the OSB Procedure & Practice Committee, hereinafter referred to as Proposals C and D, respectively, copies of which are filed with the original of these minutes.

Judge Marcus remarked that, while it was clear to him that no waiver of the physician-patient privilege should be inferred under the existing 24-hours-to-object provision, he wondered whether extending the objection period to 10 or 14 days might

support an inference of waiver, if no timely objection were made, even if that was not the Council's intent.

Mr. Jim Walsh was then recognized to make a statement concerning subsection 55 I(2). He stated that the adoption of section 55 I by the 1993 legislature was ill-advised, and recommended that the Council vote to delete the entire section. Mr. Walsh also submitted a written statement for the record, a copy of which the Chair directed be filed with the original of these minutes.

Mr. Hart commented that there was presently pending before the Court of Appeals a case that might well clarify this area of the law regarding such questions as the discoverability of records pertaining to unrelated injuries. He therefore favored Proposal B because it responded directly, and in a limited fashion, to the immediate problem that has concerned Mr. Walsh and, apparently, others. Judge Marcus stated that section 55 I had been in effect for a biennium, that he doubted whether a supermajority of the Council was prepared to repeal it, and that he therefore favored Mr. Hart's Proposal B. Ms. Craine said that she had no strong preference as between Proposals A and B, but added that, regardless of which version is adopted, a staff comment should be provided making clear that 55 I was not intended to compromise or narrow the physician-patient privilege. A number of members then asked for further clarification of the differences among Proposals A, B and C. Mr. Gaylord responded that several different solutions had been proposed, one that would return Rule 55 to its status prior to the 1995 legislative session, another that would merely extend the objection period from 24 hours to 14 days, and Mr. Lachenmeier's proposal, which would make an explicit exception for medical records to be produced before a court or arbitrator. Mr. Hart noted that a great deal of the law about discoverability of patient records has been preempted by federal statutes.

Mr. Hamlin then moved, seconded by Judge Marcus, tentative adoption of the amendments to ORCP 55 I(2) prepared by Mr. Hart shown as "Proposed Language B" (see Attachment p. C-3), but not including the comment and also substituting for: "This 15-day period may be shortened or lengthened as the court may direct" as it twice appears in Proposed Language B the following: "Upon the showing of good cause, the court may shorten or lengthen the 15-day period." Several members questioned whether there was a need to repeat this sentence twice, but Mr. Hamlin stated that, to dispel any possible doubt, he thought it should be repeated. On the call of the question, the Hamlin motion carried by a vote of 16 in favor, 1 opposed and 2 abstentions.

Ms. Tauman then moved, seconded by Judge Marcus, that a new subsection 55 I(3) be added to address the mode of compliance with subpoenas of patient records, along the lines of 55 H(2) relating to privileges or restrictions on production of hospital records. After further discussion, Mr. Hamlin, seconded by Mr. Paradis, moved to table Ms. Tauman's motion. The motion to table carried by vote of 14 in favor, 1 opposed and 4 abstentions, following which Mr. Gaylord directed that this matter be carried over to the next biennium.

There followed further discussion on whether to adopt the comment to ORCP 55 H(2) as prepared by Mr. Hart (see Attachment p. C-3) or a differently worded comment. A motion of Mr. Hart, duly seconded, to adopt the comment he prepared carried by vote of 15 in favor, 2 opposed and 2 abstentions. Mr. Lachenmeier, seconded by Judge Isaacson, then moved to add the following language: "other than a subpoena requiring production of records of a party" following "subpoena" at each point where the latter appears. Mr. Lachenmeier stated that his intention was to go back to the old rule. This motion failed to carry by vote of 2 in favor, 12 opposed and 5 abstentions.

Agenda Item No. 4: Discussion of "broader issues" pertaining to ORCP 68 C(4)(c)(ii) (*see* Attachment B to agenda of this meeting) (Mr. Gaylord). Justice Durham began discussion of this item by explaining the reason why Oregon appellate courts frequently feel the need for trial court findings of fact and conclusions of law when called upon to review attorney fee awards. He added that appellate courts can experience real difficulty in determining whether to affirm a trial court's allowance of less than a requested fee in the absence of findings and conclusions. He further added that his proposed amendment to ORCP 68 C(4)(c)(ii), as set forth on Attachment pp. B-2-b to B-2-f, was intended to respond to the appellate courts' need for findings and conclusion in a manner that would minimize any additional burden on trial judges. The latter consideration, he added, was the reason his amendments provided for waiver of findings and conclusions unless requested in the statement or objection filed pursuant to ORCP 68 C(4)(a) or (b), the limitation to those findings and conclusions that are necessary to support the fee award, and the provision that findings and conclusions must be made only if requested by a party.

Mr. McMillan asked why, if there is a public interest in fee awards being understandable, findings and conclusions may be waived by the parties. Judge Marcus responded that, while in theory all rulings by judges should be understandable by the public as well as parties, under our adversary system judges do not normally inject themselves into matters not disputed among litigants. Judge Marcus added that he supported Justice Durham's

proposed amendment as written, and therefore, seconded by Mr. McMillan, moved its tentative adoption, while reminding members that he had prepared a fall-back alternative amendment (*see* Judge Marcus's memo of 9-14-96, a copy of which is filed with the original of these minutes).

Mr. Hamlin raised the question whether there might be some situations where findings and conclusion are required by law even though not requested by any of the parties. Justice Durham responded that parties should be deemed to have waived any need for findings and conclusions unless they request them as provided in his proposed amendment, and that if there is waiver, the issue should be foreclosed on appeal. On the call of the question, Judge Marcus's motion carried by vote of 15 in favor, 4 opposed and no abstentions, but with a friendly amendment agreed to by Justice Durham whereby the word "material" was substituted for the word "necessary" as the latter appeared in line 3 of Attachment p. B-2-b.

Judge Marcus again noted that he had drafted what he characterized as a more modest amendment to ORCP 68 C(4)(c)(ii) which he suggested might usefully be tentatively adopted so that, if Justice Durham's amendment should not command the 15 affirmative votes needed for promulgation at the 12-14-96 meeting, the former amendment would be available for consideration at that meeting. Judge Marcus therefore moved, seconded by Judge Dickey, tentative adoption of his proposed amendment with the understanding that it would be published as an alternative to Justice Durham's proposed amendment, but would be considered for promulgation only in the event Justice Durham's proposed amendment did not obtain 15 or more affirmative votes. This motion carried by vote of 14 in favor, 3 opposed and 2 abstentions. Justice Durham and Judge Marcus then agreed to accept, as a friendly amendment, the suggestion that the phrase "in the caption of" be added to their respective amendments immediately following the phrase "fails to incorporate the request." Judge Marcus also agreed to a friendly amendment to substitute the word "material" for the word "necessary" as the latter appeared on the fourth line of the second page of his aforementioned memo.

Agenda Item No. 6: Review tentatively adopted amendments to ORCP 39 and 72 (*see* Attachment D and E, respectively, to agenda of this meeting) (Mr. Gaylord). A motion duly made and seconded carried by unanimous voice vote to confirm both of these amendments as previously tentatively adopted.

Agenda Item No. 7: Report of subcommittee to review ORCP 17 (*see* Attachment B to 12-9-95 agenda and Attachment B to 7-13-96 agenda; together with letter of Mr. Alexander dated 7-16-96 and

memo of Mr. Alexander dated 7-12-96, copies of which are filed with original of these minutes) (Mr. Alexander). Mr. Alexander noted that, in his 7-16-96 letter, he proposed that the following language be added to subsection 17 D(4): "In order to impose such monetary penalty as a sanction, the court must find, by clear and convincing evidence, that the conduct of the sanctioned party is of such a nature as would support an award of punitive damages" immediately following: "The sanction may include monetary penalties payable to the court."

Judge Johnson asked whether the "clear and convincing evidence/punitive damages" standard was intended to apply to any sanction awarded pursuant to Rule 17. Mr. Alexander responded that this standard was intended to apply only to monetary penalties payable to the court. Mr. Hamlin stated that he agreed with the requirement of clear and convincing evidence, but questioned the wisdom of incorporating the law relating to punitive damages in this context. After further discussion, Judge Marcus moved, and was duly seconded, tentative adoption of the following amendment of subsection 17 D(4) [language added shown in highlighted bold underlined]:

> D(4) Sanctions under this section must be limited to amounts sufficient to reimburse the moving party for attorney fees and other expenses incurred by reason of the false certification, including reasonable attorney fees and expenses incurred by reason of the motion for sanctions, and **upon clear and convincing evidence of wanton misconduct** amounts sufficient to deter future false certification by the party or attorney and by other parties and attorneys. The sanction may include monetary penalties payable to the court. The sanction must include an order requiring payment of reasonable attorney fees and expenses incurred by the moving party by reason of the false certification.

The Marcus motion tentatively to adopt the amendment as above carried by vote of 15 in favor, 1 opposed and 3 abstentions.

Agenda Item No. 8: Review of LAC Internal Rules and revised Council Rules of Procedure (*see* Attachment F to agenda of this meeting) (Messrs. Alexander and Hamlin). The revised Council Rules of Procedure, including Rule II D regarding the Legislative Advisory Committee (LAC), as set forth in Attachment pp. F-5 to F-9, were briefly reviewed and their previous adoption confirmed.

Agenda Item No. 9: Old business (Mr. Gaylord). Mr. Gaylord asked whether any member wished to raise an item of old business, and none was raised.

Agenda Item No. 10: New business (Mr. Gaylord). In response to Mr. Gaylord's query whether any member wished to raise an item of new business, Mr. Lachenmeier invited the Council's attention to his faxed letter dated 9-10-96, copies of which were distributed to all members present. He stated that a recent opinion of the Court of Appeals, *Gottenberg v. Westinghouse Electric Corp.*, 142 Or App 70 (1996), a copy of which was attached to the aforesaid letter, commented that the second sentence of ORCP 52 A does not make clear whether "the party securing the postponement" refers to a party who requests a postponement after a case has been called for trial or to a party whose conduct necessitates such postponement. He added that the court in *Gottenberg* had not found it necessary to resolve this doubt, and urged the Council to do so by the clarifying amendment suggested in his letter. After brief discussion, Mr. Lachenmeier, seconded by Judge Pope, moved that section 52 A be amended to read as follows [language added shown in highlighted bold underlined; language deleted in strikeover]:

> **A Postponement.** When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a postponement. At its discretion, the court may grant a postponement, with or without terms, including requiring ~~the party securing the postponement~~ **any party whose conduct made the postponement necessary** to pay expenses incurred by an opposing party.

The Lachenmeier motion carried by vote of 10 in favor, 6 opposed, and 3 abstentions.

Agenda Item No. 11: Adjournment (Mr. Gaylord). Without objection, Mr. Gaylord declared the meeting adjourned at 3:50 p.m.

Respectfully submitted,

Maury Holland
Executive Director