

CORRECTED (to add "not" at the bottom of p. 3)

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

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

Excused: J. Michael Alexander
Stephen J. R. Shepard

Mr. Charles S. Tauman, Executive Director, Oregon Trial Lawyers Association, was in attendance as a guest. Also present was Maury Holland, Executive Director.

Agenda Item 1: Call to order (Mr. Gaylord). Mr. Gaylord called the meeting to order at 9:38 a.m.

Agenda Item 2: Approval of minutes (Mr. Gaylord). Mr. Gaylord asked whether any member wished to propose objections or corrections to the minutes of the 9-14-96 meeting as previously distributed. Hearing none, he ordered that such minutes be approved.

Mr. Gaylord also announced that Judge Gallagher's resignation as a member of the Council had been received. Prof. Holland mentioned that Judge West, the current Chair of the Circuit Judges Association Executive Committee, had called him to discuss procedures for appointment of a successor to Judge Gallagher.

Agenda Item 3: Proposed amendments to Oregon Rules of Civil Procedure (ORCP) as shown in attachment to agenda of this meeting (Mr. Gaylord). Mr. Gaylord reminded the members that the only actions open to be voted upon at this meeting were to promulgate, or not to promulgate, tentatively adopted ORCP amendments as shown in the attachment to the agenda of this meeting and as published to the bar in 1996 Judicial Advance Sheet No. 21, and that a minimum of 15 affirmative votes is statutorily required to promulgate any amendment. He noted that letters commenting on various of the

tentatively adopted amendments had been received from Judge Henry Kantor, Ms. Susan G. Whitney, and Mr. David B. Williamson, copies of which were distributed to all members at the beginning of the meeting. Mr. Gaylord then asked members how they wished to proceed with voting upon the tentatively adopted amendments to Rules 7, 17, 39, 52, 55, 68, 69 and 72. There was general agreement that voting should proceed on tentatively adopted amendments in numerical order of the rule to which they pertained.

a) **Rule 7 amendments.** Judge Brockley moved, seconded by Judge Marcus, promulgation of all tentatively adopted amendments to Rule 7. Mr. McMillan pointed out that the terms "mail" and "mailing," as used in those amendments, might be understood to refer only to mailing by means of the U.S. Postal Service or to mailing by any means, including private mail services. Several members recalled earlier discussion of this issue in which most members who spoke to it expressed the view that the traditional understanding ought to continue that only mailing by means of the U.S. Postal Service is authorized. There was general agreement that this understanding should not be changed by any of the tentatively adopted Rule 7 amendments, and that this point should be clearly stated in a Staff Comment. After further brief discussion, upon the call of the question, the Brockley motion carried by the affirmative votes of 19 members.

b) **Rule 17 amendment.** Judge Pope, seconded by many members, moved promulgation of the tentatively adopted amendment to subsection D(4) of Rule 17. The Pope motion carried by the affirmative votes of 19 members.

c, d, e, g and h) **Rules 39, 52, 55, 69 and 72 amendments.** There was general agreement that time might be saved if a vote were taken on promulgation of all tentatively adopted amendments to all of the aforesaid rules, which could then be amended on motion of any member who desired further discussion of any such amendment in particular. Judge Brockley, seconded by many members, moved promulgation of all the aforesaid tentatively adopted amendments. The Brockley motion carried by the affirmative votes of 19 members.

f) **Rule 68 alternatively proposed amendments to subparagraph C(4)(c)(ii).** Judge Brockley explained his understanding of Alternative A, and Judge Marcus his understanding of Alternative B. Judge Johnson asked whether the word "material" in Alternatives A and B was needed, and what it was intended to mean. Justice Durham responded by referring to the large number of factors which ORS 20.075 requires trial judges to consider when ruling on attorney fee awards and explained that, by including the term "material," both Alternatives would require only findings and conclusions needed by the litigants, and by an

appellate court in the event of an appeal, to understand the reasoning determinative of any particular award. This, he further explained, would limit the burden on trial judges by making clear that, while they would have to consider all statutorily mandated factors, they would not have to provide findings and conclusions respecting any factors not pertinent on the facts of specific cases.

Justice Durham gave as one illustration of a material fact or conclusion whether a party seeking attorney fees was a "prevailing party" in a case where that might be the only disputed question. He added that the existing subparagraph 68 C(4)(c)(ii), which flatly states, in effect, that findings and conclusions are unnecessary even if requested and regardless of any other circumstances, is becoming increasingly out of line with the needs of appellate courts given the apparent increase in the frequency of attorney fee awards and the larger amounts of money they involve. Judge Marcus then reminded the members that further debating whether to include or delete "material," as it appears in both Alternative versions, seemed pointless in view of the fact that the only issue before the Council was whether or not to promulgate one or the other version as published to the bar. Mr. McMillan asked whether either or both Alternatives would add substantially to the workload of Oregon's best trial judges, as to which the response was mixed. Ms. Tauman expressed concern that the provision in both Alternatives--that parties requesting findings and conclusions would waive such requests unless incorporated in the caption of their initial statements or objections--would not in practice be effective to reduce the burden on trial judges, because she anticipated that many lawyers would thus incorporate their requests as a matter of boilerplate in virtually every case.

Judge Marcus commented that, as the drafter of Alternative B, his understanding of the term "material," as applied to findings and conclusions, is that it refers to any finding or conclusion that made a difference to how a trial court ruled on a request for attorney fees. He added that he continues to support Alternative A, and that he had drafted Alternative B, which he characterized as imposing a narrower burden on trial courts, only to provide the Council with an alternative to leaving subparagraph 68 C(4)(c)(ii) as it is in the event Alternative A should fail to attract the number of affirmative votes needed for promulgation. On the call of the question, Judge Pope, seconded by other members, moved promulgation of Alternative A. His motion failed to carry since it obtained the affirmative vote of 10 members.

Judge Marcus, seconded by Mr. Lachenmeier, then moved promulgation of Alternative B. Justice Durham stated that he did not

consider Alternative B to be even "half a loaf," because he did not believe it would really solve what he perceived to be an increasingly serious problem. Judge Marcus responded that his own preference had always been Alternative A, but added that Alternative B would at least facilitate greater development, at the appellate level, of the law concerning attorney fees. Justice Durham expressed appreciation of this point, but said that Alternative B would accomplish too little because entitlement to, as opposed to amount of, attorney fees seldom turns upon contested facts.

Mr. Gaylord asked whether promulgation of Alternative B would leave subparagraph 68 C(4)(c)(ii) still misleading as to the present state of the law. Mr. Hamlin responded that the cases mentioned in his earlier memo about this matter involved the issue of entitlement to attorney fees, not the amounts awarded.

On the call of the question, a motion was then properly made and seconded to promulgate the amendment set forth in Alternative B. This motion failed to carry since it obtained the affirmative votes of 7 members.

Prof. Kanter then moved reconsideration of Alternative A, which motion was duly seconded by many members. This motion obtained the affirmative votes of 14 members and therefore carried. Mr. Rasmussen pointed out that trial judges can always ask attorneys to prepare findings and conclusions. Judge Johnson commented that, in her experience, getting attorneys to prepare and submit findings and conclusions often entails more work for trial judges than preparing them themselves.

Mr. Rasmussen, seconded by Judge Marcus, moved promulgation of Alternative A. Further discussion followed, including a question by Judge Brewer to Judge Brockley as to the latter's understanding of the relationship between Alternative A and the factors mandated to be considered in ORS 20.075. Judge Brockley responded that he did not believe those factors required for their implementation promulgation of Alternative A. Mr. Rasmussen's motion initially obtained the affirmative votes of 12 members, and finally obtained 13 affirmative votes when Mr. Gaylord asked that his vote be changed from "abstain" to "yes," and therefore failed to carry.

f, cont'd.) *Rule 68.* Judge Brewer reminded the meeting that a pending technical amendment to subsection 68 A(2) had not yet been voted upon. He moved, seconded by others, promulgation of the tentatively adopted amendment to this subsection. This motion obtained the affirmative votes of 19 members, and therefore carried.

Agenda Item No. 4: Old business (Mr. Gaylord). In response to Mr. Gaylord's query whether any member wished to raise any item of old business, none was raised.

Agenda Item No. 5: New business (Mr. Gaylord). As required by statute and the Council's Rules of Procedure, Mr. Gaylord announced that the floor was open for election of officers to serve for the year 1997. On motion duly made and seconded, it was moved to re-elect Mr. Gaylord as Chair, Mr. Hamlin as Vice Chair, and Mr. McMillan as Treasurer. This motion carried by unanimous voice vote.

Prof. Holland reported that 1996 was the year when it became the Council's turn to be officially and formally audited in accordance with the State of Oregon's procedures applicable to all state agencies. He further reported that the auditors assigned to the Council had found that all funds allocated to the Council have been properly accounted for and that all requirements of record-keeping and documentation have been fully complied with, the entire credit for which he stated was owed to the diligent and meticulous work of Ms. Henthorne. The Chair directed that a copy of the final audit report be filed with the original copy of these minutes, and expressed the Council's appreciation for Ms. Henthorne's excellent work.

There followed brief discussion of the draft of 1996 Staff Comments that had been distributed to all members prior to the meeting. Mr. McMillan suggested the usefulness of a Staff Comment clarifying that the various mailings required by the section 7 D amendments must be made by the U.S. Postal Service if that is what the Council intended, with which there was general agreement. Mr. Tauman was recognized to suggest that a Staff Comment to Rule 68 should call attention to the requirement of case law that findings of fact and conclusions of law be provided, in some instances, in support of rulings on attorney fees petitions, with which there was general agreement. There was also general agreement with Mr. Hart's suggestion that, if any members wished to provide comments or suggestions relating to Staff Comments, they should forward the same to Prof. Holland within 30 days of this meeting. Prof. Holland mentioned that he had already received a helpful written suggestion from Judge Marcus as to how the mailing requirements of the ORCP 7 D amendments might be more clearly explained.

There was then brief discussion of how the Legislative Advisory Committee ("LAC") would function during the coming legislative session if called upon to do so. Prof. Holland stated that Ms. Henthorne and he were prepared to provide any needed logistical or administrative support to the LAC.

Mr. Gaylord stated that he had sent a letter to Sen. Neil Bryant, as the latter earlier requested, reporting on the results of the Council's review of 1995 procedural legislation, specifically that the Council had not found any significant technical problems created by that legislation regarding congruency with the ORCP. He added that his letter had explained in some detail the reason that led the Council to amend ORCP 55 I as enacted by the 1995 legislature. Finally, he stated that he decided not to ask Sen. Bryant's help, at this time, in repealing or amending the "exact language" requirement of ORS 1.735(2) because he concluded that that step posed some issues which he believed the full Council ought to consider further. Mr. Lachenmeier asked whether there existed any consensus among members that something should possibly be done to modify or eliminate the exact language requirement. Mr. Gaylord accepted Mr. Lachenmeier's offer to work on a proposal in this regard for the Council's consideration at a subsequent time. Judge Marcus commented that this statutory requirement frustrates the Council's ability to act upon comments from the bar concerning published tentatively adopted amendments, however helpful such comments might be.

Mr. Gaylord said that, unless a special meeting had to be called during the forthcoming legislative session, the next meeting of the Council would occur in early October of 1997. He concluded by expressing thanks to all members, especially to the chair and members of the ORCP 7 subcommittee, and to the staff, for their hard work and many contributions during the current biennium. The members returned thanks to Mr. Gaylord for his leadership and skill in chairing Council meetings.

Agenda Item No. 6: Adjournment (Mr. Gaylord). Without objection, Mr. Gaylord declared the meeting adjourned at 11:15 a.m.

Respectfully submitted,

Maury Holland
Executive Director