*** NOTICE ***

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES

Saturday, December 12, 1998
9:30 a.m.

Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Call to order (Mr. Hamlin)

2. Approval of September 12, 1998 minutes (copy attached)

3. Proposed amendments to Oregon Rules of Civil Procedure (attached) (Mr. Hamlin)

   Rule 7 (page 1 of packet)
   Rule 7 and Rule 69 (pages 2, 3 and 4 of packet)
   Rule 39 (pages 4, 5, 6 and 7 of packet)
   Rule 55 (pages 7 and 8 of packet)
   Rule 68 (pages 8, 9 and 10 of packet)
   Rule 70 (pages 10, 11, 12 and 13 of packet)

4. Election of 1999 Legislative Advisory Committee

5. Election of 1999 officers (Mr. Hamlin)

5. Old business

6. New business

7. Adjournment

# # #

PROPOSED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURES

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Bold-face (with underlining) denotes new language; italicized language within brackets indicates language to be deleted.

Comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent to:

Maurice J. Holland
Executive Director
Council on Court Procedures
1221 University of Oregon
School of Law
Eugene, OR 97403-1221

The Council meeting at which the Council will receive comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and place:

December 12, 1998 — Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

The Council will take final action on the proposed amendments at the December 12, 1998 meeting.

SUMMONS
RULE 7

* * * * *

D Manner of service.

* * *

D(2) **Service methods.**

* * *

D(2)(b) **Substituted service.** Substituted service may be made by delivering a true copy of the summons and the complaint at the dwelling house or usual place of abode of the person to be served, to any person [*over*] 14 years of age **or older** residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon such mailing.

* * * *

E By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. **However, service pursuant to subparagraph D(2)(d)(i) of this rule may be made by an attorney for any party.** Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

{NOTE: The Council on Court Procedures is considering whether to promulgate the amendment to ORCP 7 D(3) shown below authorizing mail agent service as therein provided, and whether, if the amendment is promulgated, there should also be promulgated a new subsection 69 A(3), shown below, which would require an affidavit, as therein described, in support of a motion for default judgment when service was made pursuant to subparagraph 7 D(3)(a)(iv).}

SUMMONS
RULE 7

* * * * *

D Manner of service.

* * *

D(3) **Particular defendants.** Service may be made upon specified defendants as follows:

D(3)(a) **Individuals.**

* * *

D(3)(a)(iv) Tenant of a mail agent. Upon an individual defendant who is a "tenant" of a "mail agent" within the meaning of ORS 646.221 by delivering a true copy of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

(A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

(B) the plaintiff, as soon as reasonably possible after delivery, causes a true copy of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copy of the summons and the complaint.

Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless

the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.

* * * * *

Council on Court Procedures, Staff Comment, 1998

New subparagraph D(3)(a)(iv) authorizes a method of serving individual defendants, apart from minors or incapacitated persons, who are "tenants" of "mail agents" as those terms are defined by ORS 646.221. This method may be used only when the party making service has been unable to find the party upon whom service is to be made despite having made diligent inquiry in an effort to do so. [1]If a party applies for entry of default on the basis of service by this method, the application therefor must be supported by one or more affidavits as prescribed in new paragraph 69 A(3).[1]

Service by this method is complete on the latest date resulting from application of subparagraph D(2)(d)(ii) of this rule or the date on which the party served receipts for the mailing required by (B) of subparagraph D(3)(a)(iv) of this rule, whichever is later.

[1]---[1]For inclusion if 69 A(3) is promulgated.

Note. There are no Staff Comments for the amendments to paragraph 7 D(2)(b) or section 7 E because none seemed to me to be necessary or even useful.

DEFAULT ORDERS AND JUDGMENTS
RULE 69

A Entry of order of default.

* * *

A(3) Mail agent service. Notwithstanding subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to subparagraph D(3)(a)(iv) of Rule 7 unless the plaintiff shows by affidavit that the plaintiff has conducted a diligent inquiry and cannot find the defendant and has accomplished the mailings required by that subparagraph. The affidavit shall not limit any showing by the plaintiff in any

proceeding to set aside an order or judgment of default.

Council on Court Procedures, Staff Comment, 1998

New subsection A(3) requires that, when mail agent service as provided in subparagraph 7 D(3)(a)(iv) is used, no default order may be entered unless the application therefor is supported by one or more affidavits setting forth the efforts made to find the defendant and inability to do so despite such efforts. All efforts made to find and serve the defendant before resorting to mail agent service should be set forth by affidavit with reasonable particularity. When some of those efforts are within the personal knowledge of one person and others are within the personal knowledge of one or more other persons, multiple affidavits will normally be needed in support of a default application. When sufficiency of mail agent service is contested, the party using that method is not limited, in showing sufficiency, to those facts averred by supporting affidavit.

DEPOSITIONS UPON ORAL EXAMINATION
RULE 39

* * * * *

[D Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until the final disposition of the action. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the record. Evidence objected to shall be

taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.]

D Examination; record; oath; objections.

D(1) Examination; cross-examination; oath. Examination and cross-examination of deponents may proceed as permitted at trial. The person described in Rule 38 shall put the deponent on oath.

D(2) Record of examination. The testimony of the deponent shall be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until final disposition of the action. Upon request of a party or deponent and payment of the reasonable charges therefor, the testimony shall be transcribed.

D(3) Objections. All objections made at the time of the examination shall be noted on the record. A party or deponent shall state objections concisely and in a non-argumentative and non-suggestive manner. Evidence shall be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:

(a) when necessary to present or preserve a motion under section E of this rule;

(b) to enforce a limitation on examination ordered by the court; or

(c) to preserve a privilege or constitutional or statutory right.

D(4) Written questions as alternative. In lieu of participating in an oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the deponent on the record.

[E Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in

the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. Those persons described in Rule 46 B(2) shall present the motion to the court in which the action is pending. Non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.]

E Motion for court assistance; expenses.

E(1) Motion for court assistance. At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. The motion shall be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only on order of the court in which the action is pending. Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection.

E(2) Allowance of expenses. Subsection A(4) of Rule 46 shall apply to the award of expenses incurred in relation to a motion under this section.

* * * *

Council on Court Procedures, Staff Comment, 1998

In addition to being reorganized in subsections for greater clarity, Section D is amended in response to suggestion by the OSB Procedure and Practice Committee that, in addition to their long established authority to deal with violations of this rule by

deposing parties or their attorneys, courts be given more explicit authority to provide relief against certain kinds of misconduct on the part of attorneys for deponents or other parties.

Specifically, the amendments to Section D provide that objections must be stated concisely, non-suggestively, and non-argumentatively, and prescribe the limited circumstances in which a deponent may properly be instructed not to answer a question.

Section E is reorganized in subsections for greater clarity and its title is changed from "Motion to terminate or limit examination" to "Motion for court assistance" to reflect its being expanded to authorize a motion by a deposing party for appropriate judicial relief when an oral deposition is being "hindered in bad faith, *or* in a manner not consistent with these rules [emphasis added]." The court has broad discretion in fashioning appropriate relief upon its finding that the taking of a deposition has been thus hindered, which might include an order that any attorney responsible for such hindrance reimburse the deposing party for some or all of the latter's costs attributable thereto, such as additional costs incurred by reason of the deposition being needlessly prolonged or having to be recessed and subsequently resumed.

The relief traditionally authorized against a party whose conduct of a deposition the court finds violative of pertinent rules, including subsection D(3) of this rule, is likewise subject to broad judicial discretion, but will normally consist of an order terminating or limiting examination until further order of the court. Subsection 46 A(4) applies to the award of expenses of a motion under subsection E(1) of this rule.

SUBPOENA
RULE 55

* * * * *

I Medical records.

* * *

I(2) **Manner of service.** If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient [*at least 15*] **not less than 14** days before the subpoena is served on a custodian or other keeper of medical

records. Upon a showing of good cause, the court may shorten or lengthen the [*15-day*] **14-day** period. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by Rule 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient [*at least 15*] **not less than 14** days before the subpoena is served on the custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the [*15-day*] **14-day** period. Service on a patient or health care recipient under this section must be made in the manner specified by Rule 7 D(3)(a) for service on individuals.

* * *

Council on Court Procedures, Staff Comment, 1998

Subsection 55 I(2) is amended to change from 15 to 14 the minimum number of days before being served on the records custodian a medical records subpoena must be served on the patient or health care recipient to whom the records pertain, or on his or her attorney. This amendment makes this subsection consistent with the 14 days required for hospital records subpoenas by paragraph H(2)(b) of this rule.

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS RULE 68

* * * * *

C(4)(c) **Hearing on objections.**

* * *

C(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. [*No findings of fact or conclusions of law shall be necessary.*]

{NOTE: The Council on Court Procedures is considering whether to promulgate either Alternative 1 or 2 as proposed new paragraph 68 C(4)(e), or neither of them.}

* * *

Alternative 1

C(4)(e) Findings and conclusions. On the written request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party shall make any requests for findings and conclusions pursuant to this paragraph within seven days of the last date for filing objections to a statement unless the court permits a later request. In the absence of a request under this paragraph, the court may make either general or special findings of fact and may state its conclusions of law regarding attorney fees.

Alternative 2

C(4)(e) Findings and conclusions. On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party shall make a request pursuant to this paragraph by including a request for findings and conclusions in the title of the statement of attorney fees or costs and disbursements or objections filed pursuant to paragraph (a) or (b) of this subsection. In the absence of a request under this paragraph, the court may make either general or special findings of fact and may state its conclusions of law regarding attorney fees.

{NOTE: Both alternatives above include the proposed amendment to C(4)(c)(ii) above.}

Council on Court Procedures, Staff Comment, 1998

The sentence formerly appearing in subparagraph C(4)(c)(ii)--"No findings of fact or conclusions of law shall be necessary"--is deleted as no longer stating prevailing law. In recent years appellate courts have increasingly experienced the need to remand rulings on attorney fee awards to the trial court for supplementation of the record by inclusion of findings and conclusions material to such rulings because of the difficulty or impossibility of conducting meaningful review in their absence. *See, e.g.*, Mattiza v. Foster, 311 Or 1, 10, 803 P2d 723 (1990).

A new paragraph C(4)(e) is added requiring the trial court to make special findings of fact and state its conclusions of law regarding issues material to any ruling on a statement of attorney

fees or objections thereto, which make clear the factual and legal basis for the denial of requested fees or the amount in which they are awarded. However, this requirement is conditional upon a request for special findings of fact and conclusions of law being timely made, in the absence of which the court may make only a general finding of fact and need not state its conclusions of law separately. [2]A request under this paragraph is timely only if filed with the court, and served on other parties, not more than seven days following the last date on which objections may be filed under paragraph C(4)(b) of this rule unless the court permits a later request.[2] [3]A request under this paragraph is timely only if included in the title of the statement filed pursuant to paragraph C(4)(a) of this rule or in the title of any objections filed pursuant to paragraph C(4)(b) of this rule.[3]

[2]---[2]For adoption if Alternative 1 is promulgated.
[3]---[3]For adoption if Alternative 2 is promulgated.

FORM AND ENTRY OF JUDGMENT
RULE 70

{Note: The proposed amendments to paragraph 70 A(2)(a) shown below will be proposed by the Bar to the 1999 Legislative Assembly. The Council might also promulgate these amendments, so they are published here for the purpose of obtaining comments prior to such action by the Council.}

* * * * *

[A(2)(a) Money judgment; contents. Money judgments are judgments that require the payment of money, including judgments for the payment of costs or attorney fees. The requirements of this subsection are not jurisdictional for purposes of appellate review. Money judgments shall include all of the following:

A(2)(a)(i) The names of the judgment creditor and the creditor's attorney.

A(2)(a)(ii) The name of the judgment debtor.

A(2)(a)(iii) The amount of the judgment.

A(2)(a)(iv) The interest owed to the date of the judgment, either as a specific amount or as accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals.

A(2)(a)(v) Post-judgment interest accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals.

A(2)(a)(vi) For judgments that accrue on a periodic basis, any accrued arrearages, required further payments per period and accrual dates.

A(2)(a)(vii) If the judgment awards costs and disbursements or attorney fees, that they are awarded and any specific amounts awarded. This paragraph does not require inclusion of specific amounts where such will be determined later under Rule 68 C.]

A(2)(a) Money judgment; contents. Money judgments are judgments that require the payment of money, including judgments for the payment of costs or attorney fees. The requirements of this paragraph are not jurisdictional for purposes of appellate review. Money judgments shall include all of the following:

A(2)(a)(i) The name and address of each judgment creditor and the creditor's attorney's name, address and phone number.

A(2)(a)(ii) The names of any persons or governmental bodies, other than the judgment creditor's attorney, who are entitled to any portion of a payment made on the judgment.

A(2)(a)(iii) The name of each judgment debtor and, if known, the judgment debtor's address, date of birth, social security number, driver's license number and issuing state, and the name of the judgment debtor's attorney.

A(2)(a)(iv) The amount of the judgment.

A(2)(a)(v) The interest owed to the date of the judgment, either as a specific amount or as accrual

information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals.

A(2)(a)(vi) Post-judgment interest accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals.

A(2)(a)(vii) For judgments that accrue on a periodic basis, any accrued arrearages, required further payments per period and accrual dates.

A(2)(a)(viii) If the judgment awards costs and disbursements or attorney fees, that they are awarded and any specific amounts awarded. This subparagraph does not require inclusion of specific amounts where such will be determined later under section C of Rule 68.

* * *

Council on Court Procedures, Staff Comment, 1998

Paragraph A(2)(a) is amended by addition of a new subparagraph (viii), and by requiring inclusion in money judgments certain information previously required, in order to obtain a lien on a judgment debtor's real property in the county in which judgment is entered, to be included in a judgment lien certificate by ORS 18.350(4) prior to the latter's amendment in the 1999 legislative session, in which judgment lien certificates were abolished. The information formerly required to be included in a judgment lien certificate, henceforth required to be included in all money judgments, consists of: the address and phone number of each judgment creditor's attorney, required by subparagraph A(2)(a)(i) as amended; the names, if known, of any person or governmental body, other than a judgment creditor's attorney, entitled to any portion of payment on the judgment, required by subparagraph A(2)(a)(ii) as amended; the name of each judgment debtor and, if known, his or her address, date of birth, social security number, driver's license number and issuing state, and the name of the judgment debtor's attorney, as required by subparagraph A(2)(a)(iii) as amended.

The purposes of these amendments are to facilitate obtaining a lien on a judgment debtor's real property in the county wherein judgment is entered without the need to file any separate

document, and also thereby to avoid the possibility of any gap period between entry of judgment and effectiveness of the judgment lien. However, in order to obtain a judgment lien on a judgment debtor's real property in any county other than where the judgment is entered, the requirement of filing a judgment lien abstract in such other county remains.

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of September 12, 1998
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	J. Michael Alexander	Bruce C. Hamlin
	David V. Brewer	Daniel L. Harris
	Bruce J. Brothers	Rodger J. Isaacson
	Anna J. Brown	Virginia L. Linder
	Ted Carp	Michael H. Marcus
	Kathryn S. Chase	Connie Elkins McKelvey
	Allan H. Coon	John H. McMillan
	Diana L. Craine	David B. Paradis
	Don A. Dickey	Karsten Hans Rasmussen
	Robert D. Durham	Nancy S. Tauman
	William A. Durham	
Excused:	Lisa C. Brown	

The following guests were in attendance: Susan Grabe of the Oregon State Bar; Amanda Williams, with the Oregon Association of Process Servers; James R. Pettigrove, President, Oregon Association of Process Servers.

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. Vice Chair Mick Alexander called the meeting to order at 9:40 a.m.

Agenda Item 2: Approval of minutes. On motion duly made and seconded, the minutes of the 8-15-98 meeting were approved as distributed with the agenda of this meeting.

Agenda Item 3: Report regarding amendments to ORCP 70 A(2)(a) proposed by Debtor/Creditor Section of the Oregon State Bar (see copy of these amendments distributed at beginning of this meeting and filed with original of these minutes) (Mr. Hamlin assumed the Chair early in the discussion of this item). Mr. Alexander recognized Prof. Holland to recall for members the background of the amendments shown in the aforementioned copy, specifically that these amendments were part of a bill that would be submitted by the OSB to the 1999 Legislative Assembly. Prof. Holland reminded members that the Council had been asked to approve these amendments, but not to promulgate them. He invited members' attention to three minor changes from the draft shown in the Attachment to Item 3 of this meeting's agenda, which did not appear therein since they were agreed to, or initiated, by the Judgment Lien Workgroup at its 9-3-98 meeting.

Mr. Paradis moved, seconded by Judge Marcus, that the Council approve these amendments. Mr. McMillan asked why the Council had been asked to approve, but not to promulgate, them. Prof. Holland responded that these amendments would make no sense except as part of a statutory amendment that will be submitted to the 1999 legislative session, and also pointed out that the effective date of amendments promulgated by the Council is later than the effective date of enactments of the Legislature. Mr. Hamlin, after assuming responsibility as chair, commented that the Council's approval of these amendments could be included in the letter to the Legislature by which the Council transmits promulgated amendments. Mr. Gaylord remarked that it was unusual for the Council to be asked to provide advisory opinions on ORCP amendments, and asked whether it might be possible to promulgate these amendments conditionally. Mr. Gaylord then moved that these amendments be published for two purposes--that of simply soliciting comments, and that of preserving the option of voting to promulgate them at the 12-12-98 meeting. This motion failed for want of a second. Mr. Brothers stated that all groups should be encouraged to seek the Council's official approval of ORCP amendments.

Mr. Paradis' motion was then agreed to by a vote of 21 in favor, 0 opposed, and 0 abstentions.

Mr. Gaylord moved, in the form of a friendly amendment to the motion just agreed to, that these amendments be published as having been tentatively adopted. Mr. Hamlin stated that there is no requirement that amendments merely approved, as opposed to being tentatively adopted for possible promulgation, be published. Judge Coon queried what the point would be of promulgating these amendments if the OSB's statute were not enacted. Mr. Alexander said that, assuming these amendments would improve paragraph 70 A(2)(a), he saw no reason for the Council not to publish them as having been tentatively adopted.

Mr. Gaylord moved, seconded by Judge Linder, that these amendments be published as having been tentatively adopted, which he said would preserve the Council's option whether or not finally to promulgate them at the December meeting. After brief discussion, this amendment was agreed to by a vote of 17 in favor, 3 opposed, and 1 abstention. Justice Durham urged that the position taken by the Council on these amendments be clarified to the Legislature to obviate any possible confusion about effective dates or the like.

Agenda Item 4: Recommended amendments to ORCP 7 D and E (see Attachment to Item 4 of agenda of this meeting) (Judge Brewer). Judge Brewer explained that the purpose of the proposed amendment to paragraph 7 D(2)(b) was to make clear that the person to whom papers are delivered when abode service is used

may be as young as 14 years of age, and that the purpose of the proposed amendment to section 7 E was to authorize service by attorneys when mail service is used. On motion of Mr. Brothers, seconded by Mr. Rasmussen, both of these amendments were approved and tentatively adopted by a vote of 21 in favor, 0 opposed, and 0 abstentions.

Agenda Item 5: Report of ORCP 55 Subcommittee (see Attachment to Item 5 of this agenda) (Judge Brown). Judge Brown explained that the purpose of the amendments shown in the aforementioned attachment was to remove the inconsistency between sections 55 H and I regarding the number of days prior to service of hospital or medical records subpoenas on records custodians such subpoenas must be served on persons to whom the records pertain. This, she further explained, was done by a proposed amendment that would change the number of days required in subsection 55 I(2) from 15 to 14, as is required for hospital records subpoenas in paragraph 55 H(2)(b). Judge Brown added that the subcommittee would continue with its work respecting sections 55 H and I in the expectation that it would have a more thoroughgoing set of amendments for proposal to the Council during the coming biennium.

On motion of Judge Brown, seconded by Mr. Rasmussen, these amendments, as shown in the aforementioned attachment, were approved and tentatively adopted by a vote of 21 in favor, 0 opposed, and 0 abstentions.

Agenda Item 6: Proposed amendments to ORCP 39 (see Attachment to Item 6 of agenda of this meeting) (Mr. Brothers). Mr. Brothers referred members to marked up copies of the aforementioned attachment which were distributed to members at the beginning of this meeting, one of which is filed with the original of these minutes. These copies, he explained, showed the proposed amendments as set forth in the attachment, but marked up with several handwritten changes agreed to by the subcommittee shortly before this meeting. Mr. Brothers asked that discussion focus on the final subcommittee version. He further explained that the amendments now proposed for tentative adoption seek to respond to the problem described to the Council by the OSB Procedure and Practice Committee, while at the same time avoiding any effort unduly to micromanage conduct of depositions. He noted that there seemed to be some difference of opinion within the Council as to the seriousness and extent of the problem raised by the Procedure and Practice Committee. Mr. Brothers concluded his introductory comments by stating that the subcommittee had considerably scaled back on the scope and specificity of these proposed amendments in light of the sense it obtained at the 8-15-98 meeting that the Council appeared disinclined to adopt more elaborate and detailed ones.

Judge Brewer commented that, whereas Rule 46 contemplates formal, written motions to compel discovery, for example against a good faith, but erroneous, claim of privilege, proposed subsection 39 E(1) appears to contemplate telephonic requests for emergency rulings to deal with "bad conduct" in the course of a deposition, such as deliberate embarrassment of a deponent or improper instructions to a deponent not to answer questions. He asked whether the subcommittee intended that good faith evidentiary or other similar disputes occurring in the course of a deposition could be dealt with under proposed 39 E(1).

Mr. Brothers responded that he thought Judge Brewer had raised a good point, and stated that he believed it could best be addressed by restoring on line 49, p. 3 of the marked-up copy the clause "or in a manner not consistent with these rules," following "in bad faith," language he believed the subcommittee had earlier agreed to include.

Mr. Rasmussen then referred members to a marked-up version of the Attachment to Item 6, with the initials "KHR" in the bottom right-hand corner of each page, which included some changes of language he had discussed with Judge Dickey. (A copy of this version is filed with the original of these minutes.) These changes, he explained, were all grammatical or stylistic, with no change of meaning intended.

Judge Carp remarked that Multnomah and Marion Counties presently have more stringent deposition guidelines than what was proposed here, as do the federal courts, and he did not understand why the Council should have any problem agreeing to the modest amendments proposed by the subcommittee. Mr. Gaylord stated that he had some concerns with these proposed amendments, partly because he thought it difficult to legislate good conduct on the part of attorneys, and partly because he thought that the circumstances specified in proposed D(3)(a)-(d) wherein a deponent might properly be instructed not to answer a question were unduly limited, such as by not including that one or more questions are beyond the scope of discovery. Ms. Tauman said that she was concerned about the vagueness of the term "unreasonably annoyed" as it appears in proposed D(3)(b). Judge Isaacson asked how proposed D(3)(b) would relate to the issue of discoverability. Ms. Tauman commented that she did not see how any provision of proposed D(3) covered either work product or scope of discovery.

Judge Dickey reminded members that the OSB Procedure and Practice Committee has gone on record with its belief that some problems do exist regarding attorney conduct at depositions, and that the existence of deposition guidelines in Multnomah and Marion Counties, tougher than the standards these amendments would impose, are further indication of their existence. He

added that he hoped the Council could support what the subcommittee has come up with. Judge Carp asked whether any language proposed would respond to concerns voiced by some members that it would not provide adequate protection against questions clearly beyond the scope of discovery. Judge Dickey responded that the language in the last two lines on p. 2 of the Attachment to Item 6 would provide adequate protection. Judge Brown stated that she had very serious reservations about several features of these proposed amendments, such as the limited circumstances under which they would authorize instructions to deponents not to answer a question, but would nonetheless join in a vote to publish these amendments to get comments from the Bar.

Mr. Alexander said that he was inclined to oppose any amendments that would flatly prohibit instructions not to answer regardless of how far outside the scope of discovery a question might be. Mr. McMillan questioned whether the phrase "unreasonably annoy, embarrass, or oppress" has a sufficiently well understood meaning. Justice Durham responded that this standard will have to be applied by courts on a case-by-case basis, since it implicates what is unreasonable under varying facts and circumstances. He also urged that improvement in the wording of some of these amendments be attempted, such as shifting from the passive to the active voice. Ms. Craine observed that, as perhaps improved by editing, these amendments might have some value for inexperienced lawyers now coming into the courts in large numbers. Several members expressed opposition to publishing these amendments with proposed D(3)(b) included in its present form.

Mr. Hamlin then suggested that, in consideration for guests present from the Oregon Association of Process Servers, discussion might turn to Item 8 of the agenda, with the understanding that, during the luncheon break, the Rule 39 subcommittee would attempt to revise its proposed amendments to take account of the reservations and concerns that had been expressed regarding them in their present form. This suggestion was generally agreed to.

Agenda Item 8: Report from ORCP 7 D (Mail Agent Service) Subcommittee (see Attachment to Item 8 of this agenda) (Judge Brewer). Judge Brewer noted that the issues presented by the two versions of these proposed amendments had been extensively discussed at the August meeting, and said that he saw no need to recapitulate that discussion. He therefore moved, seconded by Judge Carp, tentative adoption of the version as shown on p. 2 of the aforementioned attachment, that is, addition of a new subparagraph D(3)(a)(iv) to authorize mail agent service under the circumstances therein stated, but without addition of a new subsection 69 A(3) as shown on p. 1 of the attachment. Mr. Hamlin asked whether the two versions of the amendments set forth

in the attachment were unchanged from those discussed at the August meeting. Judge Brewer responded that they were.

Judge Marcus stated that, after much thought about the matter following the August meeting, he had decided that subparagraph 7 D(3)(a)(iv) should not be adopted unless accompanied by subsection 69 A(3). He explained that, without the safeguard afforded by the affidavit requirement, the mail agent service provision could cause real harm to people, and do so for no good reason. He pointed out that the affidavit requirement was not opposed by the process servers, would impose only a negligible burden on lawyers, and, most importantly, would be conducive to greater care being taken by lawyers and servers when using this method of service. He also emphasized that, under 69 A(3) as proposed, there would be no doubt but that facts averred in supporting affidavits could be supplemented whenever motions were made to set aside mail agent service.

Judge Brewer stated that, while he had a strong preference for the version not including the affidavit requirement, he was nonetheless prepared to support whichever version was favored by the Council majority. Judge Brewer then invited Justice Durham to summarize the reasons which led him to oppose adoption of D(3)(a)(iv) if accompanied by the 69 A(3) affidavit requirement. Justice Durham responded by noting that, while he had great respect for Judge Marcus' due process concerns, he did not share them with respect to this particular proposal, largely because he did not think it risked unfairness towards people who have deliberately designated their mail agent's address as the place to which communications with them should be directed. He added that he regarded the affidavit requirement as accomplishing nothing beyond adding to the paperwork burden on parties making service, and that when mail agent service is actually challenged, the facts stated in an affidavit would be binding on nobody.

Mr. Hamlin then asked for a vote on whether to publish proposed D(3)(a)(iv) while reserving the question whether also to publish 69 A(3). The vote was 15 in favor, 6 opposed, and 0 abstentions.

Ms. Amanda Williams was then recognized by Mr. Hamlin. On behalf of the Oregon Association of Process Servers and Mr. Dave Barrows, she thanked the Council and the subcommittee for their hard work on this problem. She added that either version of this amendment would be acceptable to process servers, but that she was inclined to agree with the view of Justice Durham and Judge Brewer that the version not including the affidavit requirement was preferable.

Judge Carp, seconded by Mr. Paradis, moved that the version including the affidavit requirement be published in addition to

the version that did not. Mr. Hamlin queried whether proposed 69 A(3) was intended to refer to a single affidavit furnished by the party making service, and whether there might be instances where more than one affidavit, possibly from different affiants, might be needed or helpful. In response to this question, and to Judge Marcus' noting that the reference in 69 A(3) should be to D(3)(a)(iv) rather than D(3)(a)(ii), there was general agreement that line 31 on p. 1 of the Attachment to Item 8 should be revised to read: "D(3)(a)(iv) of Rule 7 unless the plaintiff shows by affidavit that the plaintiff has ...." Judge Carp's motion then carried by a vote of 12 in favor, 9 opposed, and 0 abstentions.

Agenda Item 7: Report regarding proposed ORCP 68 C(4) amendments (see Attachment to Item 7 of this agenda) (Justice Durham). Justice Durham recalled that, at the August meeting, straw votes were taken showing substantial support for what appears on p. 3 of the aforementioned attachment as "Proposal C" (hereinafter "C") and, with some possible suggested changes, for what appeared as "Judge Barron's Proposal" on p. 4 of the Attachment to Item 4 of the 8-15-98 agenda. He explained that, following the August meeting, he discussed those few suggested changes with Judge Barron, who expressed no objection to them, which were reflected in "Judge Barron's Proposal No. 2" (hereinafter "2") on p. 4 of the Attachment to Item 7 of this meeting's agenda.

Justice Durham noted that the first sentences of both proposed amendments were identical except that "C" included in line 26 the phrase "on the record" following "conclusions of law," whereas "2" did not. He added that the most important difference between the proposals was that "C" would permit requests for findings and conclusions as late as the seventh day following the latest date for filing objections unless the court allows a later request, whereas "2" would require that requests be included in the title of statements or objections. Justice Durham stated that, with respect to that difference, while prepared to support "2", he was inclined to favor "C" because it would give a party seeking attorney fees an opportunity to see any objections filed before deciding whether to request findings and conclusions, with the result that fewer requests would likely be made.

Judge Brown noted that "C" included "on the record" in line 26, while that phrase did not appear in "2". Justice Durham responded that "on the record" was implied in "2". Judge Brown asked whether oral findings and conclusions would suffice provided they were "on the record." Justice Durham replied that his intention was that they would. Judge Brown asked why the word "special" was needed to modify "findings," to which Justice Durham replied that "special findings" was a well understood term

used throughout the ORCP. Judge Marcus noted that in line 12 of "2" the singular "objection" appears, whereas the plural "objections" should be used since that is the form used elsewhere. There was general agreement that "objection" should be changed to "objections." Mr. Gaylord commented that the most important difference between "C" and "2" was the time when waiver would occur, and that he favored "C" as best reconciling all opposing interests.

Several members raised the question whether a waiver under either "C" or "2" would effect a waiver on appeal as well as in the trial court. Justice Durham commented that no provision of the ORCP can directly determine what is waived or preserved for purposes of appeal, but that, for obvious reasons, appellate courts normally determine that any contention waived in the trial court is thereby not preserved for purposes of appeal. Several members also raised the question whether the party which appeals from an attorney fee ruling must request findings and conclusions or otherwise waive them, or whether no waiver would be found provided at least one party had timely requested them. Justice Durham stated that neither "C" nor "2" explicitly resolved that question, which he thought was best left to the appellate courts. Several members wanted these minutes to reflect the members' clear understanding that a failure by a party to request findings or conclusions would not preclude that party or any other party from assigning error on appeal with respect to the trial court's ruling on attorney fees, but would prevent the trial court's failure to make findings and state conclusions, or any error ruling upon which would, in the judgment of the appellate court, require such findings and conclusions, from effectively being assigned as error.

Mr. Gaylord commented that he hoped this prolonged discussion had not caused members to lose sight of the need for an amendment dealing with findings and conclusions in the context of rulings on attorney fees. He also reiterated his strong belief that "C" was preferable to "2" because the former would be less conducive to requests being made routinely even when no party ultimately wanted them. Judge Brown suggested that in line 24 of p. 3 of the attachment, the word "written" be inserted between "On" and "the," with which there was general agreement.

Judge Brewer suggested that, in view of the similarity between Rule 62 and what proposed 68 C(4)(e) was intended to accomplish, it might be sensible to adopt the following parallel language from section 62 A: "In the absence of such a demand for special findings, the court may make either special or general findings." Mr. Hamlin pointed out that this quoted language makes nothing turn upon which party or parties make or fail to make the demand. Justice Durham stated that he found considerable merit in the idea of adopting the language of the

second sentence of section 62 A and proposed that it be made the last sentence of "C".

Justice Durham then moved, and was duly seconded, that both "C" and "2" be published as alternatives, with the following revisions as agreed upon in the course of this discussion:

1. With respect to "C", in line 24, p. 3 of the attachment, the word "written" would be inserted between "On" and "request; and the final sentence would be deleted and replaced by the following: "In the absence of a request under this paragraph, the court may make either general or special findings of fact and conclusions of law regarding attorney fees."

2. With respect to "2", in line 12 of p. 4 of the attachment, change "objection" to "objections"; in line 7 of the same page, insert "on the record" between "conclusions of law" and "regarding," and delete the final sentence and substitute: "In the absence of a request under this paragraph, the court may make either general or special findings of fact and conclusions of law regarding attorney fees."

Justice Durham's motion carried by a vote of 14 in favor, 5 opposed, and 0 abstentions.

Mr. Rasmussen, seconded by Judge Dickey, moved that only "2", revised as shown above, be published. Mr. Brothers stated that he agreed that only the version deemed better by the Council should be published. Mr. Hamlin said he thought the Council's posture would be improved if the Bar was afforded an opportunity to express preferences between alternative versions of amendments. Mr. Rasmussen's motion failed to carry by a vote of 6 in favor, 12 opposed, and 0 abstentions.

Agenda Item 6 (Resumption of discussion). A draft of proposed amendments to sections 39 D and E was distributed to members which contained further revisions, made by Mr. Rasmussen and other members during the luncheon break, responsive to the earlier discussion of this item. After brief discussion, a motion was made and duly seconded to publish these tentatively adopted amendments as thus revised. This motion carried by a vote of 18 in favor, 0 opposed, and 0 abstentions. These amendments as tentatively adopted are shown in "Proposed Amendments to Oregon Rules of Civil Procedure," a copy of which is filed with the original of these minutes.

Agenda Item 9: New business (Mr. Hamlin). Mr. Hamlin reminded members of the importance of full attendance at the 12/12/98 meeting because of the statutory requirement of at least 15 affirmative votes in order to promulgate an ORCP amendment.

Agenda Item 10: Old business (Mr. Hamlin). No item of old business was raised.

Agenda Item 11: Adjournment (Mr. Hamlin). Without objection Mr. Hamlin declared the meeting adjourned at 1:10 p.m.

Respectfully submitted,

Maury Holland
Executive Director

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of December 12, 1998
Oregon State Bar Center
Lake Oswego, Oregon

Present: Lisa A. Amato, J. Michael Alexander, Bruce J. Brothers, Anna J. Brown, Lisa C. Brown, Ted Carp, Kathryn S. Chase, Allan H. Coon, Diana L. Craine, Don A. Dickey, Robert D. Durham, William A. Gaylord, Bruce C. Hamlin, Daniel L. Harris, Rodger J. Isaacson, Virginia L. Linder, Connie Elkins McKelvey, John H. McMillan, Michael H. Marcus, David B. Paradis, Nancy S. Tauman

(Note: Karsten Hans Rasmussen attended a portion of the meeting via speaker telephone.)

The following guests were in attendance: Bob Oleson of the Oregon State Bar; Amanda Williams, of the office of David Barrows, Portland; J.R. (Scotty) Pettigrew of the Oregon Process Servers Association. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

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

Agenda Item 2: Approval of September 12, 1998 minutes (Mr. Hamlin). The minutes of the Council's September 12, 1998 meeting were adopted as distributed with the agenda of this meeting, with the exception that in the list of those members present, Bill Gaylord should be included as being present.

Agenda Item 3: Proposed amendments to Oregon Rules of Civil Procedure (attached) (Mr. Hamlin).

a. ORCP 68 C(4). After brief discussion it was decided that it would not be feasible to vote on the attached tentatively adopted amendments as a package. Mr. Hamlin stated that, since the time during which Mr. Rasmussen could participate in the meeting by telephone was limited, he proposed to begin by consideration of the two alternative versions of the amendments to ORCP 68 C(4).

Mr. Gaylord said that he favored that either alternative be adopted in preference to adoption of neither, but thought that Alternative 1 would be the better choice because he believed it

would result in fewer requests for findings and conclusions being made. Judge Marcus, seconded by Mr. Paradis, moved adoption of Alternative 1. Mr. McMillan asked for clarification of how the two alternative versions differed from one another. Mr. Hamlin responded that Alternative 1 would permit requests to be made at a later time than would Alternative 2. Mr. Alexander commented that, if Alternative 2 were adopted, it would result in findings being requested almost automatically, even in many cases where neither party really wanted or needed them. Judge Dickey said that he preferred Alternative 2 because that was the version preferred by all the judges who had submitted comments.

In response to a suggestion by several members, Mr. Hamlin asked for a straw poll as to preferences between Alternatives 1 and 2. Eleven members then indicated a preference for Alternative 1, and 11 members a preference for Alternative 2. No member indicated a preference that neither version be adopted. Judge Harris then stated that he wished to change his straw vote to support Alternative 1, and Ms. McKelvey stated she wished to change her straw vote to support Alternative 2. Judge Marcus, in response to Mr. McMillan's question as to why he favored Alternative 1, said that in relatively few cases involving attorney fee awards does any party really want findings, and that Alternative 1 would tend to limit requests for findings to those cases where a party really does want them.

Justice Durham noted that, while he was not opposed to Alternative 1, his preference was for Alternative 2, largely out of respect for the view expressed by trial judges, and added that should Alternative 2 prove undesirable in actual practice, he would be willing to see the Council reconsider this issue in the next biennium. Judge Carp expressed agreement with this view. Judge Marcus stated that, as between the two versions under consideration, the clear preference of the Judicial Conference would be for Alternative 1.

Mr. Rasmussen, seconded by Judge Harris, moved that the pending motion be amended to substitute Alternative 2 for Alternative 1. This motion was agreed to by vote of 13 in favor, 7 opposed, with the chair abstaining. Mr. Hamlin then called for a binding vote on the main motion, as amended, to adopt Alternative 2. Mr. Gaylord said that he had been persuaded by the views expressed by Justice Durham, and would therefore vote in favor of the main motion. **The main motion, as amended, was then agreed to by a vote of 23 in favor, none opposed, and no abstentions.**

At this point Mr. Rasmussen said he had to discontinue his telephonic participation in the meeting. Mr. Hamlin, in response to a query from Mr. Gaylord about when consideration would be given to the draft Staff Comments to the amendments just adopted, said he would defer such consideration until later in the meeting so that any member who might have to leave before the conclusion of the meeting would be able to vote on all tentatively adopted

amendments.

b. ORCP 7 D(2)(b) and 7 E. Judge Marcus, seconded by Justice Durham, moved adoption of the proposed amendments to these provisions. **Without discussion this motion was agreed to by vote of 22 in favor, none opposed, and no abstentions.**

c. ORCP 7 D(3)(a) and 69 A. Mr. Hamlin reminded members that the Council's options were to not adopt either proposed new subparagraph 7 D(3)(a)(iv) or proposed new subsection 69 A(3), to adopt the former without the latter, or to adopt both proposed provisions. At the suggestion of Judge Brewer Mr. Hamlin asked for a straw vote on how much support existed for each of the aforementioned options. This straw vote showed that 13 members favored adoption of proposed subparagraph 7 D(3)(a)(iv) without adoption of proposed subsection 69 A(3), and that seven members favored adoption of both proposed provisions. No member expressed support for the option of adopting neither proposed provision.

Mr. Gaylord stated that he did not regard proposed subparagraph 7 D(3)(a)(iv) and subsection 69 A(3) as alternatives as to which a choice should be registered by a single vote, but as separate proposals as to each of which a vote should be taken. He then moved, seconded by Justice Durham, that proposed subparagraph 7 D(3)(a)(iv), the basic provision for mail agent service, be adopted, but that proposed 69 A(3) not be adopted.

Judge Marcus expressed strong opposition to this motion, stating that inclusion of proposed 69 A(3), with its requirement that due diligence be shown by affidavit, would entail very little extra effort on the part of attorneys, but would cause them to be more meticulous in their efforts to effect service in the appropriate, more traditional manner, and therefore might occasionally protect perfectly law-abiding persons against the possibility of being seriously damaged if mail agent service did not result in actual, timely notice. He added that mail agents are presently under no legal obligation to forward summonses and complaints to their customers when served in this manner, and that the mere fact that a given defendant uses mail agent services should not be understood as evidencing an intent to evade service. He concluded by saying that he would vote against adoption of proposed 7 D(3)(a)(iv) without proposed 69 A(3) because he believed that would pose some risk of harm without any justification for it.

Mr. Hamlin then asked Ms. Amanda Williams, representing the Oregon Association of Process Servers, whether she wished to offer any comments on this matter. Ms. Williams responded that the Association would like to see adoption of proposed 7 D(3)(a)(iv), with or without proposed 69 A(3), but that its preference was for adoption of 7 D(3)(a)(iv) without 69 A(3).

Mr. Gaylord stated that he favored adoption of 7 D(3)(a)(iv) without 69 A(3). He pointed out that customers of mail agent

services have made a voluntary designation of their mail agent's establishment as the place at which they wished to be contacted. He added that he did not believe that adding a requirement of a due diligence affidavit would afford defendants served in this manner any greater level of due process, because if a default were entered and subsequently challenged, the party which had used mail agent service would have to show what efforts had been made to locate the defendant, at which point the affidavit would not be controlling. Judge Brewer expressed agreement with this view, and added that he thought it very important that the chair make clear to members that they could vote in favor of proposed 7 D(3)(a)(iv) without thereby binding themselves either way with respect to proposed 69 A(3). In response Mr. Hamlin stated that the ensuing vote on Mr. Gaylord's motion would be understood to relate only to 7 D(3)(a)(iv), and that if the vote were to adopt that proposal, a separate vote would subsequently be taken on whether to adopt 69 A(3). **On the call of the question, Mr. Gaylord's motion, as thus understood, was agreed to by vote of 21 in favor, none opposed, and no abstentions.**

Judge Marcus, seconded by Ms. Chase, moved adoption of proposed subsection 69 A(3). He reiterated his strongly held opinion that failure to accompany adoption of the mail agent service provision by adoption of the due diligence affidavit requirement would gratuitously create some risk of injustice to mail agent customers, and do so for no good reason. He analogized inclusion of 69 A(3) to the greater protection afforded by installing better brakes on new cars. **On the call of the question, Judge Marcus's motion was not agreed to by vote of seven in favor, 13 opposed, and no abstentions.**

d. ORCP 39 D and E. Judge Marcus commented that there appeared to be relatively little support for these proposed amendments, and a belief that, if adopted, they would constitute over-regulation. Ms. Tauman expressed agreement with this opinion. Mr. Hamlin asked Mr. Brothers, chair of the subcommittee which drafted the pending amendments, to recapitulate how they originated and evolved. Mr. Brothers responded that these amendments originated from a request by the OSB Procedure and Practice Committee that the Council consider amending Rule 39 to deal more effectively with what that Committee perceived to be a growing and increasingly state-wide problem of excessive and unfounded obstruction to the taking of oral depositions. Examples of such obstruction provided by the Committee, Mr. Brothers continued, were unjustified instruction by counsel to deponents not to answer questions, argumentative objections to questions, and interruptions of depositions while a question is pending. He noted that, in response to criticisms at a previous meeting, the proposed amendments had been revised to make them less detailed in their proscriptions.

Judge Carp said that he wished to express two concerns on

behalf of Mr. Rasmussen, based on the latter's extensive experience in taking and defending depositions and as a current member of the Procedure and Practice Committee. The first concern was that proposed paragraph 39 D(3) could have the effect of unduly restricting the circumstances in which defending counsel might properly instruct a deponent not to answer a question. Mr. Rasmussen's second concern, as related by Judge Carp, was that the Procedure and Practice Committee clearly believed that there is a problem of obstruction of depositions which requires a state-wide response, presumably in the form of one or more amendments to ORCP 39, and that the Committee continues to favor the amendments presently under consideration. Judge Carp added that proposed paragraph 39 D(3) would regulate what goes on at depositions considerably less stringently than do the Multnomah County Circuit Deposition Guidelines and less stringently than is true in federal court. Mr. Brothers commented that, on the assumption that the Council would do something to deal with this problem on a state-wide basis, he had discouraged adoption of a local rule in Deschutes County. Judge Brown expressed surprise that a proposed amendment as controversial as this appeared to be had elicited only one comment in response to publication of the amendment in the advance sheets.

Justice Durham, seconded by Judge Brewer, made a motion to lay this proposal on the table, which he explained would mean that, for the present, the Council would not go on record as either finally adopting or voting down this proposed amendment. He further explained his reason for so moving, which was his sense that not enough information had been gathered concerning the extent and seriousness of the problem to which the proposed amendment would respond to warrant either its adoption or definitive rejection at this point. Judge Isaacson questioned what impact, if any, the Council's deferring decision on this matter would have on adoptions of Supplemental Local Rules intended to address the problem of obstruction of depositions. Mr. Hamlin expressed some concern that if the Council decided to do nothing, even if only temporarily, that might create an impression that the Council is unresponsive to civil practice problems identified by the Bar, specifically the Procedure and Practice Committee, and also might encourage proliferation of Supplemental Local Rules more restrictive of what counsel defending depositions can properly do than anything the Council would seriously consider.

Mr. Gaylord said he was opposed to the motion to table this item. He further stated that the concerns he had expressed at an earlier meeting, that the originally proposed version of 39 D(3) would unduly restrict defending counsel from instructing deponents not to answer questions intruding upon privileged matters and the like, had been satisfactorily met by the subcommittee's revisions as reflected in the currently pending proposal. He added that he believed the Procedure and Practice Committee had acted correctly

in bringing this problem to the Council's attention, and that he had some worry that, if the Council were now to do nothing, the OSB might cause legislation to be introduced which could result in a less desirable solution than what is contained in the current proposal. **On the call of the question, the motion to table this item was not agreed to by vote of four in favor, 16 opposed, and no abstentions.**

Judge Brewer explained that his reason for seconding Justice Durham's motion to table this proposal was not because he disagreed with it, but because he was concerned about the apparent lack of consensus on the subcommittee which prepared it. He further explained that this proposal deals with an area of practice as to which some differences in local rules might be appropriate to reflect differences in experience encountered in various parts of the state. Mr. Brothers reiterated the point that many local bar associations were working on the perceived problem addressed by this proposal, and stated his agreement with Mr. Gaylord's point that if the Council fails to act, other groups might.

Mr. Brothers, seconded by Judge Carp, then moved adoption of the proposed amendments to ORCP 39 D and E. Judge Brown stated that she strongly supported the motion because she believed that the problem of obstruction of depositions is a serious and recurring one which badly needs addressing. Ms. McKelvey stated that she would vote against this motion because she believed the proposal was premature and failed to address some significant issues which she thought required further careful consideration. **On the call of the question, Mr. Brothers' motion was agreed to by vote of 16 in favor, three opposed, and one abstention.**

e. ORCP 55 I(2). Judge Marcus, seconded by Judge Carp, moved adoption of the proposed amendments to subsection 55 I(2). **On the call of the question, this motion was agreed to by vote of 19 in favor, none opposed, and no abstentions.** Judge Brown, chair of the subcommittee tasked with studying problems assertedly being experienced in connection with hospital and medical records subpoenas, reported that this subcommittee had met several times during this biennium, had put in a good deal of hard work, but did not have sufficient time to complete its difficult task. She added that this work would presumably be carried over to the 1999-2001 biennium, when the Council and any subcommittee assigned to this project would have the benefit of the considerable work her subcommittee had accomplished, but was unable to complete.

f. ORCP 70 A(2). Mr. Hamlin reminded members that these proposed amendments were referred to the Council by the OSB Debtor/Creditor Section, not for promulgation, but for any comments and suggestions the Council might have. He also recalled

that, at the Council's September 12 '98 meeting, Mr. Gaylord's motion was agreed to that these proposed amendments be published in the October advance sheets together with the other ORCP amendments tentatively adopted by the Council, so that comments might be obtained from the bench and bar, and so that the Council would retain the option of promulgating these amendments. Mr Hamlin noted that the reason the Debtor/Creditor Section had asked the Council for any comments members might have, rather than that the Council promulgate these amendments, was that the amendments were integral parts of legislation which the OSB would cause to be introduced in the 1999 legislative session.

Mr. Hamlin asked whether there had been any reaction on the part of the Debtor/Creditor Section to the fact that the Council had published these amendments for the purpose of possibly promulgating them independently of anything the OSB might do by way of proposed legislation. Prof. Holland replied that the Debtor/Creditor Section was pleased to have the Council's support for these amendments, but added his own caution that for the Council to independently promulgate these amendments might not be wise, first because the statutory amendments of which these subsection 70 A(2) amendments are a part might not be enacted and, secondly, because if the statutory changes are enacted and these amendments are also promulgated by the Council, the former would have an earlier effective date than the latter, thereby possibly creating confusion.

Judge Marcus moved that these amendments be endorsed, but not promulgated, by the Council, but this motion was not seconded. Mr. Gaylord then moved, seconded by Judge Isaacson, that a formal vote of members be taken on whether to endorse these amendments and, if the amendments were thus endorsed, that the Legislature be informed, both of the fact of the Council's endorsement and of the reason the amendments were not promulgated. **This motion was then agreed to by vote of 19 in favor, none opposed, and no abstentions.**

g. Staff Comments. Several members suggested revisions to Staff Comments to one or more of the amendments adopted for promulgation as prepared by Prof. Holland. He, with accustomed docility, agreed that all suggested revisions would be reflected in the Staff Comments as published.

Agenda Item 4: Election of 1999 Legislative Advisory Committee ("LAC"). Mr. Hamlin declared the floor open for nomination of members to compose the 1999 LAC. The following were unanimously so elected: Mr. Alexander, Judge Dickey, Mr. Gaylord, Judge Linder, and Mr. McMillan.

Agenda Item 5: Election of 1999 Officers. Justice Durham nominated the following members for the offices indicated, to serve during the year 1999: Mr. Hamlin to be Chair, Mr.

Alexander to be Vice Chair, and Mr. McMillan to be Treasurer. Mr. Hamlin asked for any additional nominations. There were no such nominations. Judge Brewer moved, and was duly seconded, that nominations be closed, and this was unanimously agreed to.

Agenda Item 6: Old business. Judge Brown said that it would be useful for the Council to confirm the authority of the Rule 55 subcommittee to continue its work during the interim period before the Council's first meeting in the coming biennium. Mr. Hamlin replied that he was sure that he was expressing the sense of the Council in stating that any work which the Rule 55 subcommittee, its chair, and members could manage to accomplish during the interim period would be most welcome and appreciated. He added that he anticipated that a Rule 55 subcommittee would be reappointed at the Council's first meeting in the 1999-2001 biennium, comprised of continuing members willing to serve, to which other members might be added.

Judge Brown circulated a copy of a recent order and opinion of Multnomah County Circuit Court Judge David Gernant ordering a party to permit the adverse party to depose certain of the former's intended expert witnesses. Several members stated that they would like to have a copy of this order and opinion, and Prof. Holland said he would make and send copies to all members.

Agenda Item 7: New business. Justice Durham mentioned that Chief Justice Carson had recently commented to him about how the "exact language" requirement of ORS 1.735(2) is so rigid that it would prohibit the Council from acting upon suggestions received during the comment period following publication of tentatively adopted amendments in the October advance sheets, regardless of how much they might improve draftsmanship, but without changing the meaning of published amendments. The example used by Chief Justice Carson was that ORS 1.735(2) would prohibit the Council from changing "phone" to "telephone." Justice Durham stated that he was inclined to agree with the Chief Justice's comment, and would like to see the Council give some consideration to how this procedural problem might be addressed, possibly, though not necessarily, by asking the Legislature to amend or repeal ORS 1.735(2). Mr. Hamlin expressed agreement with this thought.

Agenda Item 8: Adjournment. Without objection Mr. Hamlin declared the meeting adjourned at 12:31 p.m.

Respectfully submitted,

Maury Holland
Executive Director

SUMMONS
RULE 7

* * * *

D Manner of service.

* * *

D(2) **Service Methods.**

* * *

D(2)(b) **Substituted service.** Substituted service may be made by delivering a true copy of the summons and the complaint at the dwelling house or usual place of abode of the person to be served, to any person [*over*] 14 years of age **or older** residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon such mailing.

* * * *

D(3) **Particular defendants.** Service may be made upon specified defendants as follows:

D(3)(a) **Individuals.**

* * *

D(3)(a)(iv) Tenant of a mail agent. Upon an individual defendant who is a "tenant" of a "mail agent" within the meaning of

ORS 646.221 by delivering a true copy of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

(A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

(B) the plaintiff, as soon as reasonably possible after delivery, causes a true copy of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copy of the summons and the complaint.

Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.

* * * *

E By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. However, service pursuant to subparagraph D(2)(d)(i) of

this rule may be made by an attorney for any party. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

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Council on Court Procedures, Staff Comment, 1998

New subparagraph D(3)(a)(iv) authorizes a method of serving individual defendants, apart from minors or incapacitated persons, who are "tenants" of "mail agents" as those terms are defined by ORS 646.221. This method may be used only when the party making service has been unable to find the party upon whom service is to be made despite having made diligent inquiry in an effort to do so.

Service by this method is complete on the latest date resulting from application of subparagraph D(2)(d)(ii) of this rule or the date on which the party served receipts for the mailing required by (B) of subparagraph D(3)(a)(iv) of this rule, whichever is later.

DEPOSITIONS UPON ORAL EXAMINATION
RULE 39

* * * *

[D Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until the final disposition of the action. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the record. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.]

D Examination; record; oath; objections.

D(1) Examination; cross-examination; oath. Examination and cross-examination of deponents may proceed as permitted at trial.

The person described in Rule 38 shall put the deponent on oath.

D(2) Record of examination. The testimony of the deponent shall be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until final disposition of the action. Upon request of a party or deponent and payment of the reasonable charges therefor, the testimony shall be transcribed.

D(3) Objections. All objections made at the time of the examination shall be noted on the record. A party or deponent shall state objections concisely and in a non-argumentative and non-suggestive manner. Evidence shall be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:

(a) when necessary to present or preserve a motion under section E of this rule;

(b) to enforce a limitation on examination ordered by the court; or

(c) to preserve a privilege or constitutional or statutory right.

D(4) Written questions as alternative. In lieu of participating in an oral examination, parties may serve written questions on the party taking the deposition who shall propound

them to the deponent on the record.

[E Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. Those persons described in Rule 46 B(2) shall present the motion to the court in which the action is pending. Non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent,the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.]

E Motion for court assistance; expenses.

E(1) Motion for court assistance. At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being conducted or hindered in

bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. The motion shall be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only on order of the court in which the action is pending. Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection.

E(2) Allowance of expenses. Subsection A(4) of Rule 46 shall apply to the award of expenses incurred in relation to a motion under this section.

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Council on Court Procedures, Staff Comment, 1998

In addition to being reorganized in subsections for greater clarity, Section D is amended in response to a suggestion by the OSB Procedure and Practice Committee that, in addition to their long established authority to deal with violations of this rule by deposing parties or their attorneys, courts be given more explicit authority to provide relief against certain kinds of misconduct on the part of attorneys for deponents or other parties.

Specifically, the amendments to Section D provide that objections must be stated concisely, non-suggestively, and non-argumentatively, and prescribe the limited circumstances in which a deponent may properly be instructed not to answer a question.

Section E is reorganized in subsections for greater clarity and its title is changed from "Motion to terminate or limit examination" to "Motion for court assistance" to reflect its being expanded to authorize a motion for appropriate judicial relief when an oral deposition is being "hindered in bad faith, *or* in a manner not consistent with these rules [emphasis added]." The court has broad discretion in fashioning appropriate relief.

Subsection 46 A(4) applies to the award of expenses of a motion under subsection E(1) of this rule.

SUBPOENA
RULE 55

* * * *

I Medical records.

* * *

I(2) **Manner of service.** If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient [*at least 15*] **not less than 14** days before the subpoena is served on a custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the [*15-day*] **14-day** period. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by Rule 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient [*at least 15*] **not less than 14** days before the subpoena is served on the custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the [*15-day*] **14-day** period. Service on a patient or health care recipient under this section must be made in the manner specified by Rule 7 D(3)(a) for service on individuals.

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Council on Court Procedures, Staff Comment, 1998

Subsection 55 I(2) is amended to change from 15 to 14 the minimum number of days before being served on the records custodian a medical records subpoena must be served on the

patient or health care recipient to whom the records pertain, or on his or her attorney. This amendment makes this subsection consistent with the 14 days required for hospital records subpoenas by paragraph H(2)(b) of this rule.

ALLOWANCE AND TAXATION
OF ATTORNEY FEES AND COSTS
AND DISBURSEMENTS
RULE 68

* * * *

C(4)(c) **Hearing on objections.**

* * *

C(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. [*No findings of fact or conclusions of law shall be necessary.*]

* * *

C(4)(e) Findings and conclusions. On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party shall make a request pursuant to this paragraph by including a request for findings and conclusions in the title of the statement of attorney fees or costs and disbursements or objections filed pursuant to paragraph (a) or (b) of this subsection. In the absence of a request under this paragraph, the court may make either general or special findings of fact and may state its conclusions of law regarding attorney fees.

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Council on Court Procedures, Staff Comment, 1998

The rule previously provided that: "No findings of fact or conclusions of law shall be necessary." In recent years appellate courts have increasingly experienced the need to remand rulings on attorney fee awards to the trial court for supplementation of the record by inclusion of findings and conclusions material to

such rulings because of the difficulty or impossibility of conducting meaningful review in their absence. *See, e.g.*, Mattiza v. Foster, 311 Or 1, 10, 803 P2d 723 (1990).

A new paragraph C(4)(e) is added requiring the trial court to make special findings of fact and state its conclusions of law regarding issues material to any ruling on a statement of attorney fees or objections thereto, which make clear the factual and legal basis for the denial of requested fees or the amount in which they are awarded. However, this requirement is conditional upon a request for special findings of fact and conclusions of law being timely made. In the absence of a timely request the court may make only a general finding of fact and need not state its conclusions of law separately. A request under this paragraph is timely only if included in the title of the statement filed pursuant to paragraph C(4)(a) of this rule or in the title of any objections filed pursuant to paragraph C(4)(b) of this rule.