

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of November 15, 1997
Oregon State Bar Center
Lake Oswego, Oregon

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

Ms. Amanda Williams, of the office of Mr. David Barrows, Portland, was in attendance as a guest. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Mr. Gaylord). Mr. Gaylord called the meeting to order at 9:35 a.m.

Agenda Item 2: Introduction and welcome to new members (Mr. Gaylord). Mr. Gaylord began this first meeting of the 1997-99 biennium by asking all members to introduce themselves and by expressing special welcome to new members. He then proceeded with a brief overview of the Council's role and functioning, including such matters as its meeting schedule, the normal sequence of its work over the course of a biennium, and how proposals for ORCP amendments come before the Council for its consideration. He emphasized the need for getting all ORCP amendments proposed for final promulgation at the December meeting prior to the legislative session in final form no later than the previous September meeting because of the statutory requirement that the "exact language" of any amendment be published to the bar at least 30 days before the Council votes on its promulgation.

Mr. Gaylord concluded his introductory remarks by noting that any member wishing to propose an ORCP amendment for the Council's consideration should feel free to do so at any time, but should have in mind the following: any proposed amendment will likely be referred for study and recommendation by a subcommittee appointed for that purpose, following which there usually occurs further discussion, and some likely revisions, by the full Council of whatever emerges from the subcommittee. The entire process from initial suggestion to final drafting most often requires several meetings for its completion.

Agenda Item 3: Approval of November 15, 1997 minutes (Mr. Gaylord).

On motion of Justice Durham, duly seconded by several members, the minutes of the Council's November 15, 1997 meeting were adopted as distributed with the agenda of this meeting.

Agenda Item 4: Schedule of future meetings (Mr. Gaylord). Mr. Gaylord noted that the Council's customary meeting date is the second Saturday of each month, but that, for a variety of reasons, a decision is sometimes made to omit the meeting that would normally occur in a particular month. He proposed that the December 1997 meeting be omitted, and that the Council's next meeting be on January 10, 1998, with which there was general agreement.

There then followed a lengthy discussion of the restriction on the Council's flexibility, in particular its inability to revise proposed ORCP amendments after their preliminary publication to the bar in light of any comments that might be received in response to such publication, stemming from the "exact language" requirement of ORS 1.735(2). Justice Durham stated that he regarded this requirement as having the very unfortunate effect of making the effort to obtain comments on proposed amendments nearly useless because the only impact such comments might have is to persuade the Council not to promulgate an amendment as published, rather than make one or more suggested changes to it either prior to, or during the course of, the December meeting when the final vote on promulgation takes place.

Mr. Gaylord responded that, during the 1995-97 biennium, Prof. Holland wrote a memo to the Council recommending that it request the Bar to prepare a bill for consideration by the 1997 Legislative Assembly to delete the "exact language" requirement of ORS 1.735(2), but that he ruled the suggestion out of order at the time because he thought it raised several issues which the Council should very carefully consider. One example of an issue needing some thought, he explained, is the advisability of inviting the Legislature to focus in this manner on the functioning of the Council. Mr. Gaylord added that, rather than seeking any statutory change, it might be better if the Council could find some way of soliciting comment on proposed

amendments in the course of their consideration and refinement, prior to the September meeting, following which, as he earlier noted, insufficient time remains for further revisions in response to such comments as are received.

Mr. Hamlin stated he thought it would be important that, before any legislative approach is decided upon, there be reasonable assurance that it would be well received. Mr. McMillan mentioned that, from his observations, very few legislators have any understanding of what the Council does or about the background which led to its creation. Prof. Holland commented that, in the 1995 and 1997 sessions, the Bar sponsored some rather technical statutory changes relating to the Council with no untoward results. Mr. Gaylord concluded this discussion by directing that this issue be placed on the agenda of the January 1998 meeting as an item for further consideration.

Agenda Item 5: 1997 Legislative Session (Prof. Holland). Mr. Gaylord called the members' attention to a memo of Prof. Holland, dated 11-13-97 and distributed at the outset of this meeting, which briefly summarized legislative actions in the 1997 session having some pertinence to the Council. Prof. Holland stated that, compared to the 1995 session, the 1997 Legislative Assembly took only relatively modest actions with respect to the ORCP, civil procedure generally, or the Council. He noted that the 1997 legislature had not, with one exception, acted to disallow or revise any of the ORCP amendments promulgated by the Council at its December 14, 1996 meeting. The one exception was a purely stylistic amendment to the Council's amendment of ORCP 72 A. He also noted that H.B. No. 2096, providing for limited confidentiality of driver records maintained by the Oregon Department of Transportation, included a specific exemption that avoids any problems with ORCP 7 D(4)(a)(i) as amended by one of the Council's 12-14-96 promulgations.

Mr. Gaylord suggested that the members take some time before the Council's 1-10-98 meeting to review Prof. Holland's memo, so that at that meeting there could be further discussion of any issues arising out of the 1997 Session which any member believes might warrant the Council's attention.

Agenda Item 6: Inquiry from Michael L. Williams regarding telephonic testimony at trial (see Mr. Williams' letter dated 2-18-97, Attachment A to Agenda of 11-15-97 meeting) (Mr. Gaylord). Justice Durham stated that the ORCP presently includes neither authorization for, nor prohibition of, trial testimony coming in by closed-circuit television either as a matter of trial judges' discretion or otherwise. Judge Brewer asked whether, given that there is a statute, ORS 45.400, which expressly authorizes televised testimony in non-jury cases, authorization of such testimony in jury-trial

cases is within the proper scope of the ORCP or the Council's authority. Judge Marcus commented that substantially the same thing as what Mr. Williams suggests could be accomplished by revising the rules regarding perpetuation depositions. Mr. Rasmussen stated that the OSB Procedure and Practice Committee was currently considering the matter of admissibility of televised testimony. Mr. Gaylord suggested that Prof. Holland respond to Mr. Williams' letter by telling him that the Council's present view is that it probably lacks authority to address the issue of televised testimony, also adding that the result suggested as desirable in his 2-18-97 letter seems to have been at least partially accomplished by the amendment to ORCP 39 I(4), which clarified the discretionary authority of trial judges to allow perpetuation depositions to be taken as late as during trial and upon shorter notice than otherwise required. There was general agreement with this suggestion.

Agenda Item 7: Proposed amendment to ORCP 68 C(2) (see letter dated 11-15-97 from the Oregon Paralegal Association, Attachment B to the Agenda of 11-15-97 meeting) (Mr. Gaylord). Mr. McMillan recalled that at least one aspect of rulings on fee petitions had been extensively debated by the Council during the 1995-97 biennium, and suggested that it might be advisable for the Council to revisit that issue, whether in connection with this suggestion of the Oregon Paralegal Association or otherwise. He also asked whether the statement in the second paragraph of the 11-15-97 letter: "All too often, however, these [paralegal] fees are disallowed outright ..." is factually accurate. Judge Brewer stated that he had allowed recovery of paralegal fees and that there exists at least two appellate opinions dealing with recoverability of fees. Mr. Hamlin said that he was unaware of any case where recovery of fees had been disallowed on the ground that they reflected work by paralegals as opposed to attorneys.

Following some further discussion, a consensus developed to the following effect. Prof. Holland was directed to write a letter to the Oregon Paralegal Association inquiring whether it could provide any specific instances where recovery of fees has been disallowed on the ground that they reflected the work of paralegals, and also asking whether it has a specific amendment to Rule 68 to propose. Judge Brewer said he would recheck the state of the case law regarding recoverability of paralegal fees. Mr. Gaylord directed that this issue be continued on the agenda pending a response from the Oregon Paralegal Association and Judge Brewer's summary of pertinent case law. There was also general agreement that the agenda of the 1-10-98 Council meeting include an item for further discussion concerning the advisability of revisiting the question of findings of fact and conclusions of law in connection with rulings on fee petitions, along with any other issues relating to Rule 68 which any member might wish to have discussed at that meeting.

Agenda Item 8: Proposed amendment to ORCP 55 I (see letter of Mr. John R. Osburn dated 2-5-97 and letter of Mr. Ronald G. Stephenson dated 2-25-97, Attachment C to Agenda of 11-15-97 meeting) (Mr. Gaylord). Mr. Gaylord recalled the circumstances which prompted the Council, by promulgation on 12-14-96, to amend Rule 55 (I)(2) to change the advance notice period from 24 hours to 15 days. Mr. Hamlin stated that he thought there was no doubt but that Rule 55 I needed to be looked at, with which there was general agreement. Mr. Gaylord therefore directed that this be included on the agenda of the 1-10-98 meeting as an item for further discussion.

Agenda Item 9: New business (see Attachment D to Agenda of 11-15-97 meeting) (Mr. Gaylord). Mr. Gaylord referred members to a letter received from Mr. David A. Cameron dated 9-30-97 concerning ORCP 55 H and I, a letter from Mr. Stephen E. Lawrence dated 1-8-97 concerning ORS 19.034 and possible need of an ORCP amendment to clarify that provision, and a memo by Prof. Holland dated 10-17-97 summarizing a suggestion by Ms. Karen Allan regarding the possible need for a clarifying amendment to ORCP 55 H(2)(b) and (c). After brief discussion, Mr. Gaylord directed that each of these matters be placed on the agenda of the 1-10-98 Council meeting as items for further discussion.

Ms. Amanda Williams, of the office of Mr. David Barrows, Portland, was then recognized to say that a letter would shortly be addressed by that office to the Council pointing out one or more perceived specific problems with of the amendments to ORCP 7 D promulgated by the Council on 12-14-96. Mr. Hamlin responded that, because of the time cycle under which the Council operates, anything proposed to be acted upon during the current biennium should be forwarded in time to be placed on the agenda of the January or February meeting.

Judge Harris asked Mr. Gaylord whether he intended to appoint a subcommittee to study the various issues that appear to have surfaced regarding Rule 55. Mr. Gaylord responded that he thought that would be premature at this point, but that, depending upon whatever conclusions were reached at the 1-10-98 Council meeting, appointment of a Rule 55 subcommittee might then be in order.

Agenda Item 10: Old business (Mr. Gaylord). There was no old business. Mr. Gaylord reminded the members that, in accordance with the Council's revised Rules of Procedure, the Council's officers for 1998 would be elected at the 1-10-98 meeting. He added that, as had been the customary practice, the Council's Executive Committee will nominate a slate of new officers, following which the floor would be open for any additional nominations.

Agenda Item 11: Adjournment (Mr. Gaylord). Without objection Mr. Gaylord declared the meeting adjourned at 11:52 a.m.

Respectfully submitted,

Maurice J. Holland
Executive Director