

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of January 10, 1998
Oregon State Bar Center
Lake Oswego, Oregon

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

Absent: J. Michael Alexander
Daniel L. Harris
Rodger J. Isaacson
Rudy R. Lachenmeier
John H. McMillan

The following guests were in attendance: Susan Grabe, of the Oregon State Bar; Alan R. Tresidder, contract lobbyist for OTLA, Salem. Also present were Maury Holland, Executive Director, and Gilma J. Henthorne, Executive Assistant.

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

Agenda Item 2: Election of 1998 Council Officers (Mr. Gaylord). Mr. Gaylord placed the names of the following members in nomination to be the Council's officers during 1998: Mr. Bruce C. Hamlin to be Chair, Mr. J. Michael Alexander to be Vice Chair, and Mr. John H. McMillan to be Treasurer. He then asked whether there were any additional nominations from the floor. There being none, and after a vote, Mr. Gaylord declared the aforementioned members elected to the offices indicated, whereupon he turned over the chair and gavel to Mr. Hamlin. Mr. Hamlin presented Mr. Gaylord with two small gifts on behalf of the Council as tokens of its appreciation for his leadership as Chair during the years 1995-97.

Agenda Item 3: Approval of minutes of November 15, 1997 meeting (Mr. Hamlin). On motion of Judge Marcus, seconded by several members, the minutes of the November 15, 1997 Council meeting were approved as distributed with the agenda of this meeting.

Agenda Item 4: Schedule of future meetings (see Attachment A to Agenda of 10-15-97 meeting) (Mr. Hamlin). Mr. Hamlin

reminded members of the need for the Council to complete work on any tentatively adopted ORCP amendments no later than the September meeting so that the "exact language" in which they might be finally promulgated can be published to the bar at least 30 days prior to the votes on their promulgation, and asked whether any member could foresee any difficulties with the tentative meeting schedule preliminarily discussed at the November meeting. Mr. Gaylord expressed concern that the meeting tentatively scheduled for August 8, 1998 would directly conflict with the annual meeting of the Oregon Trial Lawyers Association, and that the meeting scheduled for July 11, 1998 might conflict with the annual meeting of the Oregon Association of Defense Counsel. Mr. Hamlin replied that it might be necessary to re-schedule one or both of these meetings, but no decision to that effect was made at this time.

Agenda Item 5: 1997 Legislative Session (Prof. Holland).

Prof. Holland referred members to the memo distributed at the November 15, 1997 meeting which briefly summarized actions of the 1997 Legislative Assembly relating either to the ORCP or to the Council, and reiterated his opinion that nothing done by the Legislature in either respect required responsive action on the part of the Council. Mr. Hamlin asked whether any member disagreed with this opinion and wished to propose one or more matters generated by the 1997 session for the Council's consideration, to which there was no response.

Prof. Holland stated that Oregon has a statutory requirement that all official language be gender-neutral, and asked whether the Council wished him to check into whether the current language of the ORCP is in full compliance with this requirement. Mr. Hamlin responded that, before any sort of review or revision of the ORCP is undertaken for this purpose, it would be best first to check with the Office of Legislative Counsel to see whether it is aware of any problem of this sort and whether that office has the responsibility of ensuring gender neutrality of official language, including the ORCP.

Prof. Holland then mentioned that he had just heard by phone from a former student who pointed out what the latter thought is a minor inconsistency created by one of the amendments to ORCP 7 D promulgated by the Council on December 16, 1996. The asserted inconsistency identified by the former student is that service of summonses and complaints by mail, as now authorized by amended ORCP 7 D(2)(d), would presumably most often be done by attorneys, whereas ORCP 7 E provides that attorneys for parties are ineligible to make service. Judge Brewer, who chaired the ORCP 7 subcommittee during the 1995-97 biennium, stated that he did not think this really presented any substantial problem, but added that he would give the matter some thought, consult with

the members of the subcommittee, and report back to the Council at a future meeting.

Agenda Item 6: Proposed amendments to Rule 55 H and I (see Attachment B to agenda of this meeting -- letters from Attorneys John R. Osburn, R. G. Stephenson, and David A Cameron; memo from Maury Holland) (Mr. Hamlin). For the benefit of new members, Mr. Hamlin recalled the background of ORCP 55 I, which was added by the 1995 Legislature. He noted that, as originally enacted, 55 I provided for only a 24-hour advance notice period to persons whose medical records were subpoenaed. The Council was prompted to increase the notice period to 15 days by comments from several sources which pointed out that the 24-hour period might lead to inadvertent waivers of the patient-physician privilege. He stated that, since the Council's 1996 amendment increasing the notice period from 24 hours to 15 days constituted a modification of an ORCP provision very recently added by the Legislature, special care was taken in promulgating that amendment, including consultation with the Oregon Medical Association, which had been the primary proponent of the original, legislatively enacted 55 I. Mr. Hamlin noted that comments have lately been received suggesting that the 15-day notice period might be unduly long and might unjustifiably delay discovery. He added that the letter from Mr. Cameron touches upon other issues having to do with the statutory incorporation of 55 I as a rule of criminal procedure, an area obviously outside the Council's purview.

Ms. Brown stated that, in her experience, there is great confusion among health care providers concerning compliance with 55 I, and that this is something that definitely warrants the Council's attention. Mr. Gaylord said that he was strongly inclined to oppose the Council's revisiting the advance notice period of 55 I at this point. He also stated that there is nothing the Council could do about any problems that might be being experienced as a result of the Legislature's decision to utilize 55 I as a rule of criminal procedure. Mr. Brothers commented that he believed the privacy of medical records is not being adequately protected, in part because they are often obtained, not by subpoena from health care providers, but from such third-parties as Blue Cross and carriers providing PIP coverage. Mr. Rasmussen said that he agreed that the advance notice period should not be shortened to less than 15 days, and suggested that the Council might wish to take a look at both 55 H and 55 I, perhaps by means of a joint committee with the OSB Procedure and Practice Committee, which he noted was currently considering some issues pertinent to both provisions. Ms. Brown observed that there appears to be a serious question about whether compliance with a medical records subpoena waives the physician-patient privilege in favor of persons other than recipients of subpoenaed records, a question which she conceded might fall within the law of evidence rather than civil procedure. She added that, beyond issuance of protective orders on a case-by-case basis, there appear to be no clear rules as to what, if any, obligation recipients of subpoenaed medical records

have to protect privacy or to resist further disclosure. Judge Brewer questioned whether there is any good reason why 55 H and 55 I are not consistent with respect to the 15-day advance notice period. He also suggested that a possible solution to the problem of protecting the privacy of medical records once in the possession of persons obtaining them pursuant to subpoena might consist of amending 55 H or 55 I, or both provisions, to make them applicable to anyone having custody of copies of hospital or medical records, not, as presently drafted, solely applicable to custodians of originals of such records.

Mr. Hamlin concluded this discussion by suggesting that there were two possible ways in which the Council might proceed to develop a better understanding of the full range of problems which might exist in the area of hospital and medical records, and of what solutions might be both desirable and within its authority. The Council might, he said, invite all interested parties to attend a Council meeting to participate in a discussion focusing on the issues just suggested at this meeting, along with any others that might be raised. However, he stated that his own preference would be to appoint a subcommittee to study all issues pertinent to 55 H and 55 I that had surfaced in discussion at this meeting, together with any others that might occur to the subcommittee, and be prepared to report back to the Council with at least preliminary findings and recommendations at the March or April meeting. There was general agreement that appointment of a subcommittee was the preferable way to proceed.

The following members indicated their willingness to serve as members of an ORCP 55 subcommittee and were thereupon so appointed by Mr. Hamlin: Mr. Brothers, Judge Brown, Ms. Brown, Ms. Chase, Ms. Craine, Mr Gaylord, and Ms. Tauman. Judge Brown agreed to serve as chair of this subcommittee.

Agenda Item 7: Findings of fact/attorney fee petitions and allowable fees and costs under Rule 68 (see Attachment C to agenda of this meeting -- proposed amendments to Rule 68 considered at Council's 12-14-96 meeting) (Mr. Hamlin). Mr. Hamlin briefly reviewed the history of the Council's consideration of whether the provision in ORCP 68 C(4)(c)(ii), "No findings of fact or conclusions of law shall be necessary," in connection with rulings upon statements seeking recovery of attorney fees or costs and disbursements, or objections thereto, should be deleted or amended in light of two relatively recent substantial developments in the law. The first of these developments, he explained, is the apparent increase in the frequency with which recovery of attorney fees, in increasingly large amounts, is sought, and the requirement expressed by the Court of Appeals that, despite the provision of ORCP 68 C(4)(c)(ii) to the contrary, the trial court provide findings of fact and conclusions of law to facilitate its review of rulings on attorney fees requests. The second development, he added, has been the Legislature's addition to the ORCP of sanction provisions which, either expressly or impliedly, call for trial

court findings and conclusions in connection with awards of, or refusals to award, sanctions. He recalled that, during the 1995-97 biennium, he had drafted a proposal that would have simply deleted the "[n]o findings of fact or conclusions of law" language or to include an "except as otherwise required by law" proviso, so that this subparagraph would at least no longer misstate current law, but that this proposal was not adopted. Mr. Hamlin further recalled that two alternative proposed amendments to 68 C(4)(c)(ii) were formulated whereby that provision would be amended to require trial courts to make findings and conclusions when timely requested by any party having an interest in an attorney fee ruling, but these proposals were defeated at the Council's 12-14-96 meeting when they fell two short of the 15 affirmative votes needed for promulgation. He stated that this question has returned to the Council's current agenda, at least for the purpose of sounding out the members as to whether there is sufficient interest in revisiting it, at the suggestion of Mr. McMillan at the 11-10-97 meeting.

In response to Mr. Hamlin's query as to whether members favored reconsideration of this issue, Mr. Gaylord stated that he was decidedly in favor of doing so. Justice Durham said that he first became keenly aware of the difficulties the absence of findings and conclusions were causing the Court of Appeals when he served as a member of its motions department. He added that he thought it was unfortunate that the amendment to 68 C(4)(c)(ii) known as "Alternative A" failed of promulgation at the 12-14-96 meeting simply because of the absence of two members, both of whom he was reasonably certain favored it. Justice Durham added, however, that, by favoring the Council's reconsideration of this issue, he did not wish to be understood as being wedded to either of the alternative, proposed amendments that failed of promulgation in the previous biennium, but that, to the contrary, he remained open to any new ideas or proposals that might be suggested.

Mr. Hamlin stated that he was inclined to think this was not an issue for which appointment of a subcommittee was appropriate or necessary, since so much debate and drafting had occurred in the course of the 1995-97 biennium. He added that, by virtue of all the time and effort which the Council had devoted to this question during the last biennium, the groundwork had been prepared for the Council to now decide, first whether to revisit it, and if so, go on to decide the policy question of whether findings and conclusions should be required in connection with attorney fee awards, and under what circumstances. Judge Marcus and Mr. Gaylord expressed agreement with the thought that appointment of a subcommittee would be neither necessary nor useful. Judge Carp cautioned that any requirement of findings

and conclusions could only have the effect of making trials nastier.

Mr. Hamlin concluded this discussion by directing that this matter be included as an item on the agenda of the 2-14-98 meeting, and that an attachment to that agenda show on a single page the text of each proposal that has been made to amend ORCP 68 C(4)(c)(ii). He also directed the staff to furnish each new Council member with excerpts of portions of the minutes summarizing the debate respecting each such proposed amendment as much in advance of the 2-14-98 meeting as possible. He further indicated that, at the conclusion of discussion and debate at the 2-14-98 meeting, the Council might be ready for a vote on tentative adoption of a proposed amendment to 68 C(4)(c)(ii), but if that discussion revealed the need for more time, the vote could be deferred to the 3-14-98 meeting.

Justice Durham mentioned that he was aware that some trial judges, and perhaps others, have expressed some thoughtfully considered reservations about any ORCP requirement of findings and conclusions relating to attorney fee awards, adding that he would be happy to meet with such individuals between Council meetings in order to encourage a full airing of anyone's concerns about this matter. He added that he appreciated the need for the Council to tread as lightly as possible in any matter increasing the burdens on trial judges.

With regard to the proposal of the Oregon Paralegal Association to amend Rule 68 to provide expressly for recoverability of paralegal fees (see Attachment B-1 to agenda of 10-15-97 meeting), Mr. Hamlin referred to a memo prepared by Judge Brewer summarizing the case law relevant to this issue addressed to Prof. Holland dated 1-8-98 and filed with the original of these minutes, copies of which were distributed to members prior to this meeting. Judge Brewer's memo indicated that, under that case law and pursuant to existing ORCP 68 A(1), there is ample authority for awards of paralegal fees within the category of "the reasonable value of legal services relating to the prosecution or defense of an action." There was general agreement with Mr. Hamlin's suggestion that this item be removed from the Council's current biennial agenda pending receipt of any response by the Association to Prof. Holland's letter to it indicating the tentative sense of the Council that it saw no need for an amendment to Rule 68 dealing more specifically with recoverability of paralegal fees.

Agenda Item 8: ORS 19.034 (see Attachment D -- letter from Attorney Stephen E. Lawrence) (Mr. Hamlin). Mr. Hamlin asked Prof. Holland whether he understood the problem raised by Mr. Lawrence to have any particular bearing on any provision of the

ORCP; the latter responded that he did not. After brief discussion there was general agreement with Mr. Hamlin's suggestion that Prof. Holland be directed to respond to Mr. Lawrence by letter stating the Council's belief that the problem he raised, if one exists, lies outside the Council's authority since it relates to the statutory jurisdiction of the Court of Appeals.

Agenda Item 9: Discussion regarding statutory requirement of publication of "exact language" of tentatively adopted ORCP amendments (Mr. Hamlin). Mr. Hamlin framed this discussion by noting that, since the 1993 Legislature added the "exact language" requirement of ORS 1.735(2), the Council has occasionally discussed, most recently at its 11-15-97 meeting, the advisability of asking the Legislature to repeal or modify that requirement. The reasons expressed by those favoring repeal of this requirement have been two. The first is that, as a practical matter, it shortens the Council's biennial cycle by making the September meeting preceding legislative sessions the last meeting at which additional work can be accomplished by way of revising and perfecting the language of tentatively adopted ORCP amendments. This has meant that the October meeting preceding legislative sessions is normally not held, since nothing could be done on that occasion, while the only matter before the Council at the December meeting is whether or not to promulgate tentatively adopted amendments as finalized at the preceding September meeting and published to the bar in the October issue of the judicial advance sheets. The second, related reason stated by those favoring repeal of ORS 1.735(2) is that it drastically reduces the usefulness of the period during which comments are solicited and received from the bar and the public, because such comments cannot be given the effect of improving the draftsmanship of tentatively adopted amendments in response to them, but can only have the effect of persuading the Council that one or more amendments as published should not be promulgated, something that has never occurred since enactment of the exact language requirement. After thus stating the issue, Mr. Hamlin called for discussion.

Justice Durham stated that he regards this requirement as excessively restricting the Council's deliberative process, and suggested that perhaps the Legislature should be informed about this restrictive effect through the Legislative Advisory Committee, which was created to conduct liaison with the Legislature. Prof. Holland queried why a proposal to delete ORS 1.735(2) should not be channeled to the Legislature through the Public Policy Committee of the Oregon State Bar (OSB), as has been done with several other changes to legislation affecting the Council. Mr. Hamlin recalled that, on several past occasions, the Council has worked through the OSB successfully to propose

legislative changes needed to harmonize statutory law with one or more ORCP amendments. Mr. Rasmussen said that the reason which prompted the Legislature to enact ORS 1.735(2) was to prevent the Council from promulgating ORCP amendments significantly different from their content as published to the bar. Mr. Gaylord stated that the existence of the exact language requirement might be important for the Council's retaining its credibility with the Legislature because it affords enhanced assurance of the openness of its process.

At the conclusion of this discussion, a consensus developed to the effect that this matter should be dropped from the Council's agenda for the present, and that greater effort be made to "pre-publish" tentatively adopted amendments on an interim basis, that is, as they are adopted, rather than waiting until after the September meeting and the October advance sheets.

Agenda Item 10: New business (Mr. Hamlin). In response to Mr. Hamlin's query whether any member had an item of new business to raise, Mr. Brothers said he thought there should be a rule prescribing where parties can be deposed, just as there is a rule prescribing where non-party witnesses can be deposed. Mr. Hamlin commented that he wondered whether Mr. Brothers' concern could usefully be addressed by an ORCP provision, or whether this is a matter best left to customary practice and the occasional protective order when appropriate. Judge Brown stated that she thinks there is less and less of a problem in this area, that adoption of a rule would not be useful, and that judges expect counsel to resolve this question among themselves. Judge Brewer expressed agreement with Judge Brown. This discussion then concluded without reaching any decision.

Justice Durham remarked that, rather than relying primarily upon correspondence initiated by members of the bar or the bench to develop ideas about improving the ORCP, the Council might do well to become somewhat more methodical. To that end he suggested as one possibility having either a subcommittee or the Executive Director prepare summary digests of appellate opinions which interpret or apply provisions of the ORCP, or which deal with other matters that might have some bearing on the ORCP. Prof. Holland said that he had discussed this idea with Justice Durham following the 11-15-97 meeting, and agreed that it was such an obviously good one that he had decided to get started on this project at his earliest opportunity. The members then expressed informal, but unanimous, agreement with Justice Durham's suggestion and Prof. Holland's assignment to carry it into effect.

Mr. Rasmussen reported on various proposals now under consideration by the OSB Practice and Procedure Committee, which

included matters relating to ORCP 39, 55 H and I, and expert discovery.

Agenda Item 11: Old business (Mr. Hamlin). There was no old business.

Agenda Item 12: Adjournment (Mr. Hamlin). Without objection, Mr. Hamlin declared the meeting adjourned at 11:55 a.m.

Respectfully submitted,

Maury Holland
Executive Director