COUNCIL ON COURT PROCEDURES
Minutes of Meeting of February 14, 1998
Oregon State Bar Center
Lake Oswego, Oregon

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

The following were also in attendance: Susan Grabe, of the Oregon State Bar; Beth Bernard, representing Oregon Trial Lawyers Association; David S. Barrows, Attorney, Portland; Amanda Williams, with Dave Barrows & Associates; Alan Crowe, Administrator, National Association of Professional Process Servers, Portland; Patricia Bennett, Malstrom's Process Service, Salem; J.R. (Scotty) Pettigrove, Rapid Service - Division of Royal Academy of Legal Investigators, Inc., Salem; Randy Ballard, Accu-Serve Legal Services, Portland; Steve Jensen, Steve Jensen & Associates, Portland; Terry Sheldon, Barristers Support Service, Portland.

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

Agenda Item 1: Call to order. Mr. Hamlin called the meeting to order at 9:33 a.m.

Agenda Item 2: Approval of minutes. On motion of Judge Marcus, duly seconded, the minutes of the Council's 1-10-98 meeting were approved as distributed with the agenda of this meeting.

Agenda Item 3: Amendment to ORCP 7 D(2) proposed by the Oregon Association of Process Servers ("OAPS") (see Attachment A to agenda of this meeting). The Chair recognized Mr. J. R. Pettigrove, of Rapid Service, Portland, who introduced Mr. Alan Crowe, of Portland, to make a statement in support of an amendment to ORCP 7 D that would, under certain circumstances, authorize a form of substituted service of summons by delivery to proprietors or managers of private mailbox services, or their agents, proposed by the OAPS (see Attachment A-3 to agenda of

this meeting). Mr. Crowe described the growing use of private mailboxes, the great difficulty they pose for process servers, and the added expense this difficulty often entails for litigants. He stated that, under the contracts between proprietors of private mailboxes and persons retaining their services, the former will not disclose the actual residences of the latter to private process servers. He added that in 1989 California became the first jurisdiction to respond to this growing problem with legislation, Cal. Civil Code § 415.20, authorizing substituted service along the lines proposed by the OAPS, followed by Washington last year. Justice Durham asked Mr. Crowe whether he was aware of any due process challenges to this legislation; the latter responded that he was not, but stated that he would check further into that question.

Ms. Pat Bennett, of Malstrom's Process Service, Salem, spoke next. She stated that the first preference of professional process servers is personal service, and their second choice is substituted service at the residence. She described a variety of problems faced by process servers when trying to serve a summons either at defendants' residences or places of work, all of which increase the cost of collecting debts, which ultimately increase the cost of goods and services to consumers. She stated that, normally, when attempting to serve summons, sheriffs will not take the trouble to go first to the location of the private mailbox service, and then make a second trip to a defendant's actual residence.

Mr. Dave Barrows, a Portland attorney and legislative counsel to the OAPS, was then recognized by the Chair. Mr. Barrows said he would undertake legal research to determine whether legislation or court rules authorizing the kind of service proposed had been successfully challenged on due process grounds. Judge Isaacson asked Mr. Barrows whether he knew if there had ever been a bill introduced in the Oregon Legislature on this topic, and the latter responded that he did not. He added that the OAPS did not want to "short-circuit" the Council by going directly to the Legislature with this proposal. Mr. Hamlin asked whether the proposed amendment would require any sort of showing to a court before service by the method it would authorize could be made. Mr. Barrow answered that no preliminary showing is required by the proposed amendment. Judge Marcus commented that proponents of this amendment should anticipate, and be prepared to respond to, the question that would almost certainly arise when this proposal is debated. That question, he stated, is, even if it is decided that some form of valid service on private mailboxes should be authorized, why it is essential to involve process servers rather than provide simply for service by mail. Mr. Barrows responded that, if a subcommittee is appointed to consider this proposal further, he would like to have the

opportunity to meet with it to discuss that and other questions the Council might have. Mr. Lachenmeier asked whether it would solve the problem if the Legislature were to enact a statute requiring that managers of private mailboxes must disclose defendants' actual residence to private process servers. Ms. Bennett responded that that would help, but would not entirely solve the problem. Mr. Terry Sheldon commented that service of summons is not supposed to be a game of hide and seek.

At the conclusion of this discussion, Mr. Hamlin asked if any members were willing to serve as a subcommittee to consider this matter further and report back to the Council at a later meeting. Justice Durham, Judge Brewer, and Judge Marcus indicated their willingness to serve, and were so appointed by Mr. Hamlin.

Agenda Item 4: Review of ORCP 68 C(4)(c)(ii) with a view to deciding whether, and if so how, to amend this subparagraph to require findings of fact and conclusions of law in connection with rulings on attorney fee awards (see "ORCP 68 (Review)" attached to agenda of this meeting). Mr. Hamlin began discussion of this item by referring members to a memo from Justice Durham to Prof. Holland dated 2-12-98, a letter from Mr. McMillan to Prof. Holland dated 2-4-98, and a summary of "Amendments to ORCP 68 C(4)(c)(ii) Proposed But Not Adopted 1994-96," copies of which were distributed at the beginning of this meeting and filed with the original of these minutes. Discussion focused initially on a draft amendment proposed by Justice Durham as set forth on page 2 of his 2-12-98 memo as follows:

> **If requested by a party to the action before the court determines the issues, the court shall make special findings of fact and state its conclusions of law, in writing, regarding the issues that are material to the award or denial of attorney fees. The procedure for preparing the court's finding and conclusions under this rule is committed to the court's discretion.**

Judge Coon stated that, when ruling on attorney fee awards, he often relies upon conclusions he reaches by the end of trial, such as that the attorney for the prevailing party turned what should have been a two-day trial into a three-day one, but that such conclusions usually cannot be tied to any evidentiary facts contained in the record. Judge Marcus said he thought this point opened some new ground. Ms. Tauman asked Justice Durham what kind of findings are needed by appellate courts, specifically whether all such findings would need to be supported by something contained in a fee statement or objection. Justice Durham

responded that the kind of thing he had in mind could be illustrated by supposing that the trial judge applied his or her judgment and experience to determine that a maximum of three hours should have sufficed to prepare jury instructions, but the fee statement claims 20 hours of attorney time for performing that task. Under those circumstances, he explained, the judge would not be required under this proposal to point to anything asserted in a statement or objection, in an affidavit, or elsewhere in the record, to justify a conclusion that no more than three hours of attorney time should be allowed for preparation of jury instructions.

Judge Marcus said that he would be extremely concerned if any requirement of findings and conclusions might lend itself to an interpretation whereby trial judges would have to deal with often voluminous and detailed statements and objections in the manner of an accountant, that is, by having to account for each and every hour, or item of expense, claimed and objected to. Judge Brewer stated that he shared Judge Marcus's concern, and gave as an example a recent two-week trial before him where opposing experts submitted conflicting, conclusory affidavits as to what each thought was a reasonable fee. He added that neither of the experts had reviewed the entire record because that would have been cost prohibitive. He further added that he had another concern, which was whether a provision in ORCP 68 C(4)(c)(ii) that the right to obtain findings and conclusions in connection with attorney fees is subject to waiver might be inconsistent with such statutes as ORS 20.075. Justice Durham responded that the case law dealing with findings and conclusions in this context does not deal with the question of waiver, but that he thought a properly crafted ORCP provision could and should do so.

Judge Brown asked what exactly was meant by the phrase "on the record" in Justice Durham's draft amendment. Justice Durham responded that he meant nothing more elaborate that an oral finding, stated from the bench and incorporated into the record, such as: "I find that the reasonable number of hours is 30, not 40." Judge Brewer said that he was not sure whether appellate courts would recognize waiver of findings relating to any of the factors which ORS 20.075 mandates trial courts to consider. Justice Durham replied that, wholly apart from what trial judges might be statutorily mandated to consider, he thought it highly unlikely that appellate courts would rule that appealable error is preserved by a party who fails to make a timely request for finding and conclusions if and as required by an amended ORCP 68 C(4)(c)(ii).

Judge Marcus asked whether the last sentence of Justice Durham's draft amendment was needed. Justice Durham stated that he included it to negate any inference that the amendment would

require trial judges themselves to prepare findings and conclusions, but said that the sentence is probably not essential. Judge Marcus remarked that this point might best be made in a staff comment.

Judge Dickey queried whether the language, "before the court determines the issues," might be improved. He explained that this phraseology might be interpreted to mean that an attorney dissatisfied with the judge's ruling on fees might request findings for the first time after the judge regarded the matter as having been submitted. Mr. Hamlin stated that the phrase "before trial" had been proposed, but that costs and fees are often awarded in cases which do not go to trial. Ms. Tauman commented that if findings and conclusions must be requested "before trial," such requests were likely to be made routinely in virtually every case and would seldom be withdrawn even when, as matters turned out, nobody actually wanted them. Judge Brewer asked Justice Durham whether, in terms of the timing of requests, the substantially identical language in both Alternatives A and B, shown on p. 52 of the "ORCP 68 (Review)," might not be an acceptable compromise. That language is as follows:

> **A party waives the right to request {that the court make/such} findings of fact and conclusions of law if the party fails to incorporate the request in the caption of the statement or objection filed under paragraph (a) or (b) of this subsection.**

Mr. Lachenmeier asked whether it might not be best if the amendment merely required that requests for findings and conclusions must be "timely," and leave it to the judges to determine whether a given request is, or is not, timely. Justice Durham indicated that he did not think that much latitude would be advisable. Judge Coon asked whether the pertinent language should not be something to the effect of "before I hear it." Judges Brewer and Marcus indicated that they favored the timing language in Alternative A.

Following further debate, Justice Durham observed that the discussion had been extremely illuminating and had led him to conclude that the language of none of the proposals now before the Council was, in every respect, entirely satisfactory. He therefore suggested that some additional drafting seemed to be in order. Mr. Hamlin then asked Justice Durham to undertake some additional drafting prior to the March meeting, which he agreed to do. Discussion of this item concluded with each member briefly summarizing, for Justice Durham's guidance, his or her position regarding the principal questions that had emerged in

the course of that discussion, following which Mr. Hamlin encouraged all members to show reasonable flexibility on matters of detail, adding that he thought a sound and workable amendment to ORCP 68 C(4)(c)(ii) is badly needed in view of the fact that the present provision misstates the pertinent law.

Agenda Item 5: Schedule of future meetings (see "REVISED MEETING SCHEDULE" attached to agenda of this meeting). Mr. Hamlin noted that the revised meeting schedule attached to the agenda of this meeting differed from the schedule distributed at the January meeting in that the August meeting has been rescheduled from August 8 to August 15 to avoid conflict with the annual meeting of the Oregon Trial Lawyers Association.

Agenda Item 6: New business. Mr. Hamlin referred members to a 2-10-98 letter to him from Ms. Vivian Raits Solomon, Chair of the OSB Procedure and Practice Committee, informing the Council of some proposed amendments to ORCP 39 E modeled on FRCP 30(d) and the Multnomah County Deposition Guidelines, copies of which were distributed at the beginning of the meeting. He asked Ms. Susan Grabe, of the OSB, if she wished to say anything about these proposals. Ms. Grabe responded that the Practice and Procedure Committee was acting in response to a sense that increasing difficulties are being experienced concerning unduly obstructive tactics sometimes engaged in by counsel defending oral depositions. She added that the Committee has been considering whether these difficulties might effectively be addressed by amendments to ORCP 39 E along the lines shown in the memo attached to Ms. Solomon's letter. Ms. Grabe stated that the Committee was submitting these proposals on the understanding that, if the Council approves them, with whatever modifications the Council might choose to make, and decides to promulgate them at its December meeting, the Committee would omit them from the package of proposals it would be forwarding to the Board of Governors. Judge Carp suggested appointment of a Council subcommittee to review the Committee's proposals and coordinate the process. Mr. Hamlin then appointed a subcommittee for this purpose consisting of Judge Carp, Judge Dickey, Mr. Brothers and Mr. Rasmussen. Mr. Hamlin stated that, in due course, he would appoint Chairs both for this subcommittee and for the subcommittee charged with studying the amendment proposed to ORCP 7 D by the OAPS.

Agenda Item 7: Old business. There was no item of old business.

Agenda Item 8: Adjournment. Without objection Mr. Hamlin declared the meeting adjourned at 12:35 p.m.

Respectfully submitted,

Maury Holland
Executive Director