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COUNCIL ON COURT PROCEDURES
Minutes of Meeting of June 13, 1998
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present: J. Michael Alexander William A. Gaylord
David V. Brewer Bruce C. Hamlin
Bruce J. Brothers Daniel L. Harris
Anna J. Brown Rodger J. Isaacson
Lisa C. Brown Rudy R. Lachenmeier
Ted Carp Virginia L. Linder
Allan H. Coon Michael H. Marcus
Diana L. Craine John H. McMillan
Don A. Dickey

Absent: Kathryn S. Chase
Robert D. Durham
Stephen Kanter
David B. Paradis
Karsten Hans Rasmussen
Nancy S. Tauman

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

Agenda Item 2: Approval of minutes. On motion made and seconded, the minutes of the 3-14-98 meeting were approved as distributed with the agenda of this meeting.

Agenda Item 3: ORCP 70 A(2)(a) amendments proposed by OSB Debtor/Creditor Section (see Attachment A to agenda of this meeting) (Prof. Holland). Prof. Holland was recognized by the Chair to brief the Council on this item. Prof. Holland referred to Attachment A, which he stated was the draft of amendments to ORS 18.835, 18.350, and ORCP 70 A(2)(a) prepared by the OSB Debtor/Creditor Section. The purpose of these amendments, he explained, was to eliminate the need, created by some 1997 session legislation, to file a lien certificate, in addition to entry of a judgment, in order to secure a lien on a judgment debtor's real estate located in the county in which judgment is entered. He further explained that the Debtor/Creditor Section was not asking the Council to promulgate the ORCP 70 A(2)(a) amendments, but to approve or revise them and then report back its action to the Section through Susan Grabe of the OSB staff.

Several members commented that the ORCP 70 A(2)(a) amendments were nearly impossible to evaluate because the language they would change, add, or delete was not highlighted in the form in which they appeared in Attachment A. Prof. Holland apologized for this, and said that he would prepare a version of

these amendments highlighting the changes they would make and distribute it as an attachment to the agenda of the 7-11-98 Council meeting. Mr. McMillan remarked that the wording of A(2)(ii) and (iii) seemed to him to be very poor drafting.

Agenda Item 4: Report regarding proposed amendments to ORCP 68 C(4)(c) (Mr. Hamlin). Mr. Hamlin reported that he had not had an opportunity to prepare and send a letter to the Judicial Conference soliciting judicial reactions to the Council's tentative decision to promulgate an amendment to ORCP 68 C(4)(c) that would require trial courts, if timely requested, to make findings of fact and state conclusions of law relating to rulings on requests for attorney fees. He then distributed copies of a draft of a letter he had prepared to be sent to all presiding judges of the circuit courts for distribution to all circuit court judges, which would explain the reasons why the Council has concluded that an appropriate amendment is now needed, set forth the two alternative versions of such amendment that are now under active consideration, and ask the judges to submit any additional alternatives they might regard as preferable.

Mr. Hamlin requested that, during the break later in this meeting, each member take a bit of time to review his draft letter and give him such suggested changes or comments as might occur to him or her. At the end of the break, he received comments and suggestions from several members. He stated that, early in the following week, he would forward his revised letter to the staff by e-mail for copying and mailing to presiding judges. Judge Linder asked that one of these letters be forwarded to the Court of Appeals as well.

Judge Marcus reported that, during the recent Judicial Conference, he had briefed the judges on what the Council is considering respecting this matter. He added that his briefing did not elicit any critical comments or questions.

Agenda Item 5: Report from the ORCP 55 subcommittee (Judge Brown). Judge Brown reported that this subcommittee had met three times since the March Council meeting and had considered a variety of ways to deal with some defects found to exist in sections 55 H and I. Among other things the subcommittee has been trying to do, she explained, was to develop a single definition to cover every kind of medical or health record, whether those of hospitals, physicians, or other health care providers. Judge Brown noted that many custodians appear not to respond to records subpoenas as Rule 55 contemplates and as lawyers presumably assume they do, but tend instead to look primarily to a statute, ORS 192.500. She added that there seemed to exist on the part of many records custodians a kind of distrust of Rule 55 procedures as inadequately protecting them

against some sort of legal exposure they think might arise from production of subpoenaed records.

Judge Brown continued by noting that the subcommittee wishes to achieve a number of mutually consistent objectives. These include assuring any person who is the subject of records that are subpoenaed or otherwise required to be produced has an adequate opportunity to assert any pertinent privilege or object on any other available ground. Another objective, she added, is to reduce the number of times the same records are subject to subpoenas, thus reducing costs for everyone involved. She explained that the subcommittee has been working with a rather new concept, not yet reduced to rules language, whereby reliance on Rule 55 subpoenas would be reduced in favor of greater use of Rule 42 motions to produce documents, combined in some manner with authorizations as provided in ORS 192.500. More specifically, Judge Brown stated that the subcommittee was carefully considering a new procedure, possibly involving an amendment to Rule 42, whereby a defendant would request the plaintiff to obtain two identical sets of designated records, which would be furnished to the plaintiff in two sealed packets. After inspecting the records contained in one packet, the plaintiff would then forward the other packet to the defendant. If this concept can be reduced to workable rules language, Judge Brown said it would go far towards assuring that all parties obtained the identical records, as well as reducing costs and hassles. She concluded her report by stating that the subcommittee expected to have some amending language ready for submission to the Council at the July 11 meeting, adding that some form of section 55 H would probably be retained as a backup or secondary method of obtaining records for verification and for trial.

Judge Marcus raised a question as to how the subcommittee's proposal would deal with situations involving records relating to a non-party. Mr. Gaylord commented that the subcommittee is attempting to deal with the hearsay problem regarding records obtained in the course of discovery by providing procedures, such as use of affidavits, that would be deemed sufficient to make such records admissible at trial as records kept in the ordinary course of business. Judge Brown stated that the subcommittee would appreciate any comments or suggestions that might be forthcoming from any member, adding that these should be forwarded to her as promptly as possible.

Agenda Item 6: Report of Rule 39 subcommittee (Mr. Brothers). Mr. Brothers was recognized by the Chair to report on this item. He referred members to Attachment B to the agenda of this meeting, which he said reflected some preliminary thinking and drafting on the subcommittee's part as to how the problems raised in Ms. Solomon's 2-10-98 letter to Mr. Hamlin might

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usefully be addressed. He stated that there is some disagreement within the subcommittee as to whether there should be pre-ordained time limits on depositions. He noted that proposed 39 E(3) is intended to deal with "suggestive objections." Mr. Gaylord commented that he agreed with Mr. Brothers in being personally opposed to any pre-set time limits on depositions, adding that the proper way to deal with any problem of unreasonably lengthy depositions is by resort to a protective order to terminate or limit examination as presently authorized by section 39 E.

Mr. Hamlin asked whether this subcommittee intends to go beyond what is proposed in Ms. Solomon's letter, to which Mr. Brothers responded that what the subcommittee presently had in mind would not go much, if at all, beyond those proposals. He also noted that the subcommittee did not think the drafting proposed in the attachment to that letter was entirely satisfactory. Mr. Gaylord opined that obstructive tactics do not constitute a particularly significant problem in Oregon at the present time. Mr. Hamlin suggested that the subcommittee might do well to obtain the sense of the Procedure and Practice Committee as to whether a significant problem actually does exist throughout the state. Judge Brown said that, in her opinion, a significant problem does exist, perhaps created primarily by younger, less experienced members of a rapidly growing bar. She added that the President of the Multnomah County Bar had recently circulated proposals that would further codify the Multnomah County Deposition Guidelines. Judge Carp commented that he had not encountered any significant problem of this kind, but thought that the Council should give some weight to the fact that the proposal attached to Ms. Solomon's letter had been unanimously adopted by the members of the Procedure and Practice Committee, whose position appears to be that the Multnomah County Deposition Guidelines should be given state-wide applicability. Judge Harris observed that this issue had been debated in various quarters for quite a long time, and that the conclusion usually reached has been that, if a problem of this kind does exist, it is more or less concentrated in Multnomah County, which he said suggested to him that it should be dealt with by means of Supplemental Local Rules, not by amendments to ORCP 39.

Mr. Brothers concluded his report by saying that the subcommittee would promptly consult with the Procedure and Practice Committee, and expected to have a specific proposal for the Council to consider at its 7-11-98 meeting.

Agenda Item 8: Report regarding ORCP 7 (Judge Brewer).
The Chair recognized Judge Brewer to report on this item. He reported that the subcommittee consisting of Justice Durham, Judge Marcus, and himself had been hard at work in trying to resolve the questions it had been delegated to study, which were

whether a provision should be added to ORCP 7 D that would authorize some manner of substituted service on mail agents, and if so, how an amendment should be crafted that would be both workable and would satisfy the requirements of due process. Judge Brewer added that the subcommittee thought it was important that the Council provide some response to the concern raised by the Oregon Association of Process Servers, and had therefore decided that it should prepare the best possible amendment for careful consideration by the full Council.

Judge Marcus stated that, as a member of this subcommittee, he was curious as to what the Council's preliminary thoughts are about this matter, in particular whether the Council would regard a conclusory averment of due diligence in the proof of service on a mail agent as being sufficient, or whether it thought that the proof of service should particularize the specific efforts to make conventional service before resorting to service by delivery of papers to a mail agent. Judge Brewer responded that he is inclined to think that, the proposal being for a species of substituted service, all that should be required is an averment of due diligence in efforts to make conventional service, plus the back-up first class mailing that is normally required for substituted service.

Judge Brewer then asked whether any member wished to offer any comments or suggestions at this point. Judge Coon asked whether the subcommittee had considered requiring the affidavit language which appears in ORCP 7 D(6) relating to court-ordered service. Judge Brewer responded that the subcommittee had considered adoption of that language, had not reached any final conclusions, but seemed inclined to think that whatever it required should not be any more onerous than what is required for substituted service generally.

Mr. Hamlin asked what the subcommittee had in mind doing about the due process requirement, established in *Hess v. Pawloski*,¹ that when service is made by delivery of the summons and complaint to an agent of the defendant, the agent must be under a statutory or other legal duty to ensure that the papers actually reach the defendant. Judge Brewer responded that *Hess* involved appointment of a government official as defendants' statutory agent, whereas what the subcommittee was considering was more akin to service by delivery of papers to a resident of defendant's usual place of abode, which does not require any formal legal duty on the part of the individual to whom delivery is made. Judge Brewer concluded this portion of his report by stating that this subcommittee would have some specific language

1. 274 U.S. 352, 47 S. Ct. 632 (1927).

for the Council to begin considering at the 7-11-98 meeting. He added that the subcommittee appointed in the 1995-97 biennium to propose amendments regarding service by mail and related matters would have a short proposed amendment adding one sentence to ORCP 7 E the purpose of which would be to authorize attorneys to make service when service is by mailing.

Mr. McMillan raised a question whether the language of these amendments make sufficiently clear whether mailing may be accomplished by use of private, as opposed to U.S.P.S., mail services, and also whether anything should be done about the possibility of authorizing service by electronic mail. Prof. Holland noted that a Staff Comment to the 1996 amendment authorizing service by mailing included a clarifying statement of the Council's intent that only use of the U.S.P.S is permitted. Mr. Hamlin commented that he did not think that electronic mail had advanced in reliability to the point where service by that method should be authorized, with which there appeared to be general agreement. Mr. Brothers stated that he wanted the Council to reconsider whether to restore the inclusion of service on the DMV in motor vehicle cases. Judge Brewer mentioned that he would like to discuss this with Mr. Brothers prior to the next Council meeting.

Agenda Item 8: New business. In response to Mr. Hamlin's query as to whether anyone wished to raise an item of new business, Prof. Holland responded by making the following three announcements: The first was that word had been received from Prof. Kanter that he is resigning from the Council because of other pressing commitments. The second was Prof. Holland's assurance that, when responding to telephone inquiries about the ORCP, he invariably makes abundantly clear that anything he says is not said on behalf of the Council, and that he never gives legal advice to non-lawyers. His third announcement was that subcommittees should feel entirely free to call upon him for legal research or the like in support of their work, and should also call upon Ms. Henthorne when advance arrangements need to be made for a conference call among subcommittee members.

Agenda Item 9: Old business. No item was raised.

Agenda Item 10: Adjournment. Without objection Mr. Hamlin declared the meeting adjourned at 11:56 a.m.

Respectfully submitted,

Maury Holland
Executive Director