

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of July 11, 1998
Oregon State Bar Center
Lake Oswego, Oregon

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

The following guests were in attendance: Mr. David S. Barrows, Portland, legislative representative for Oregon Association of Process Servers; Mr. Paul Helikson, Redmond, immediate past president of Oregon Association of Process Servers. Also present were Maury Holland, Executive Director, and Gilma J. Henthorne, Executive Assistant.

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 6-13-98 meeting were approved as previously distributed, with a single correction noted by Mr. Gaylord, namely, that the reference to "Rule 43" on page 3 of the minutes should be corrected to read "Rule 42."

Agenda Item 3: Report from Mail Agent Subcommittee (Judge Brewer). The Chair recognized Judge Brewer to report on this item. Judge Brewer referred members to two alternative versions of proposed amendments to ORCP 7 D(3)(a) and F(2) that would authorize a form of substituted service on individual defendants by personal delivery of summonses and complaints to their "mail agents" as that term is defined in ORS 646.221. Copies of these alternative versions, respectively labeled "Marcus Proposals," dated July 9, 1998, and "Durham Proposal," dated July 10, 1998, were distributed to members at the beginning of this meeting, and a copy of each filed with the original of these minutes.

Judge Brewer commented that there was broad agreement within the subcommittee that mail agent service would constitute a form of substituted service which ought not require advance judicial

approval in the manner of service by publication pursuant to ORCP 7 D(6). He further pointed out that, as with substituted or office service generally, both alternative versions would require follow-up mailing. He added that both versions agree that mail agent service should not be authorized as a primary service method, but should be available only when a plaintiff has been unsuccessful in effecting service by personal delivery or delivery to a resident of defendant's abode because of inability to find the defendant despite having made "diligent inquiry."

Judge Brewer concluded his introductory remarks by saying that the only significant difference between the views of Justice Durham and Judge Marcus, as reflected in their respective alternative versions, related to whether, on the basis of either due process concerns or simply as a matter of sound procedure, these amendments should include a new, specific certification requirement, by way of proof of service, that would recite in either a conclusory fashion that the defendant could not be found or, in a more demonstrative fashion, would also recite what specific efforts had been made to find the defendant. Judge Brewer remarked that he was inclined to favor Justice Durham's approach, but was prepared to support either of the present alternative versions.

Judge Marcus stated that this subcommittee was anxious to get the Council's preliminary reactions to the two alternative proposals, especially on the question of whether a new certification requirement, tailored specifically to mail agent service, would be needed or useful, and if so, whether the conclusory or the demonstrative form of certification was preferred. He added that he believed that a form of certification that would inform trial judges of the specific circumstances offered to justify the use of mail agent service would be at the least useful, and might also be a significant factor in satisfying due process requirements. He further added that he had some concern about people, such as retirees, who rent private mailboxes, travel a lot, and sometimes might not get their mail for several days, even weeks, after its delivery. For this reason, he stated, he had some concern as to whether service by this method should be deemed completed in as short of a period as three, or even seven days, after the follow-up mailing. Judge Marcus concluded these remarks by observing that, while the efforts to locate a given defendant might be onerous, certifying what those efforts were did not seem to him unduly burdensome, and that he could imagine situations where a trial judge, called upon to set aside a default and stay a judicial sale of defendant's property, might well find it extremely useful to be able to read a proof of service factually certifying what efforts had been made to locate the defendant before resorting to the mail agent service.

Justice Durham then explained his reasoning in omitting a counterpart to the proof of service requirement as set forth in (C) of Judge Marcus's proposal. He stated that his primary reason was what he characterized as a "structural" consideration, namely, that proof of service is the place where the server certifies what steps he or she took to place the papers in the defendant's hands, but is not the place for the server to explain why he or she did not, or could not, use other service methods. He added that he did not find Judge Marcus's "conclusory form" of certification any less inconsistent than the "demonstrative form" with the structural consideration which led him to oppose any new certification requirement specifically tailored to mail agent service. Justice Durham concluded by saying that he thought this difference of opinion regarding certification had more to do with what constitutes sound procedural rules than with what is required by due process.

Judge Brown asked whether there was substantial agreement within the subcommittee that mail agent service would not violate due process, to which the response was affirmative. She then commented that her sense of the issue on which there was some difference of opinion was that it had primarily to do with practical efficiency rather than constitutionality. She stated that one practical concern which occurred to her was whether, when sufficiency of mail agent service is challenged, the plaintiff would, in trying to establish its sufficiency, be limited to the facts averred in the proof of service, which she added that she hoped would not be the case.

Judge Marcus commented that he understood the role of structural concerns to be enhanced clarity of the rules, but that it should not override substantive concerns about either constitutionality or practicality. He said he did not agree with the notion that mail agent service would be nearly indistinguishable, in terms of assuring actual notice, from abode or office service. He added that, in his opinion, a fairly specific and detailed certification requirement might possibly save a mail agent service provision from a plausible due process challenge.

Judge Brown asked about the respective roles of the Council, the Legislative Assembly, and the courts in determining whether a mail agent service provision would pass constitutional muster. Justice Durham responded that, as with any legislative or quasi-legislative body, the Council does its work under an implicit obligation to be convinced that whatever it promulgates is consistent with pertinent constitutional standards, but that the courts have the obligation independently and ultimately to determine the constitutionality of any ORCP provision when that issue is properly raised before them. In that connection, Justice Durham reminded the Council that, when its judicial

members vote to promulgate an ORCP provision, they do not, and may not, foreclose themselves from reconsidering its constitutionality should that issue come before them, with the benefit of briefs and argument, in their judicial capacity. He also noted that, as with statutes, a given provision of a rule might appear perfectly constitutional on its face as drafted, but that its application to the facts of a particular case might nonetheless be adjudged to violate due process or some other constitutional provision.

Mr. Gaylord said that he wished to raise a question and make one comment. The question was how much detailed information Judge Marcus's demonstrative form of certification would require on the part of servers. Judge Marcus responded that his proposed language required certification on the part of "the person with knowledge" of the facts certified, which as to some facts might be the server, but as to others might be the plaintiff's attorney or investigator. This, he further explained, is the reason why his proposed language used the words: "the certificate of service ... shall contain or be accompanied by a certificate of the person with knowledge thereof. ..."

Mr. Gaylord then commented that no amendment promulgated by the Council can change a plaintiff's burden of demonstrating compliance with due process standards.

The Chair then recognized Mr. Dave Barrows, Portland, legislative representative for the Oregon Association of Process Servers ("OAPS"), and asked him if he wished to make a statement. Mr. Barrows stated that he and the OAPS very much appreciated the hard work of the subcommittee, and of the Council, in trying to come to grips with the difficulties created for process servers by private mailbox services. He then introduced Mr. Paul Helikson, Redmond, immediate past president of the Oregon Association of Process Servers. Mr. Helikson repeated Mr. Barrows' words of appreciation, and asked whether a mail agent service provision would also apply to summonses and other kinds of papers that must be served, but not governed by ORCP 7. Judge Brewer responded that the Council has operated within the context of ORCP 7, since that is what is within its purview, but that most other provisions of state law requiring service of various sorts of papers typically incorporate ORCP 7 by reference. Justice Durham asked Mr. Helikson whether the OAPS had given any consideration to asking the 1999 Legislative Assembly to enact legislation that would impose a legal obligation on private mailbox services to forward summonses and complaints to their tenants when the latter are named as defendants. Mr. Helikson replied that he was not aware of any such consideration at the present time, but thought this was a good idea which the OAPS should consider.

Mr. Hamlin stated that discussion of this item would conclude by asking each member, apart from members of the subcommittee, to say whether he or she was inclined to favor the approach of Justice Durham or that of Judge Marcus to the issue of certification and, if the latter, whether the preference was for the conclusory or the demonstrative form. Mr. Paradis responded that he was inclined to favor Judge Marcus's demonstrative form, in part because he thought it would provide more guidance to lawyers. Judge Coon said he had been inclined to favor the conclusory form of certification until reminded by Professor Holland of some Court of Appeals decisions which had held that, when plaintiffs employ service by publication, they are restricted in showing sufficiency of service to the facts averred in their affidavits. Judge Carp stated he favored Justice Durham's approach. Mr. Rasmussen said he agreed with Judge Marcus's approach. Judge Isaacson expressed agreement with Justice Durham's proposal. Mr. Gaylord said he had not yet made up his mind except that he was not supportive of the demonstrative form of certification. Ms. Craine said she was wary of such terms as "due diligence," and preferred the conclusory form. Ms. Chase stated that, when defending cases, she found it useful for the proof of service to contain as much specific information as possible, and therefore favored the demonstrative form. Judge Brown commented that the issue of sufficiency of service is raised on two contexts, those being Rule 21 motions to dismiss and motions to set aside defaults. She added that she preferred the demonstrative form, but thought it should be placed in Rule 69 A, because that provision deals with the procedural context where the issue of sufficiency of service is posed most urgently.

In concluding discussion of this item Mr. Hamlin offered two comments. The first was that initially he had not been persuaded of the need for a specific provision dealing with mail agent service, but had changed his mind when he recalled a U.S. Supreme Court decision, *Shaffer v. Heitner*,¹ holding that a state's failure to have enacted a specific long-arm provision evidenced a lack of state interest, which failure was a negative factor in the due process balancing process. His second comment was that he had earlier favored advance judicial approval before mail agent service could be attempted, but had been persuaded otherwise by Judge Brown's remarks.

Agenda Item 4: Report regarding ORCP 68 (Mr. Hamlin).
Mr. Hamlin noted that, in response to his letter of inquiry, letters had been received from Circuit Court Judges Barron, Gardner, Lipscomb, and Tiktin commenting on alternative

1. 433 U.S. 186, 97 S. Ct. 2569 (1977).

amendments to ORCP 68 C(4) now under consideration that would require findings and conclusions in connection with rulings on attorney fees. Copies of these letters were distributed to members at the beginning of this meeting, and a copy of each filed with the original of these minutes. Mr. Hamlin said that, in light of the fact that members had not had an opportunity to consider the judges' letters carefully, further discussion of the 68 C(4) amendments should be deferred until the August 15 Council meeting, with which there was general agreement. Mr. Hamlin asked Justice Durham, with the assistance of Council staff, to prepare a version of these amendments incorporating the changes suggested in Judge Barron's letter, in draft form highlighting language that would be added or deleted, for distribution with the agenda of the August meeting. Judge Marcus also submitted for inclusion in the Council records a handout that he had distributed to the Oregon Judicial Conference earlier this year.

Agenda Item 5: Report from ORCP 55 Subcommittee (Judge Brown). Judge Brown reported that this subcommittee, which she said should be referred to as the ORCP 55/44 Subcommittee, was continuing to work very hard, but was finding that sections 55 H and I presented a large number of very difficult issues, in part because of the interrelationships between those provisions and other ORCP provisions. She added that she was by no means certain that the subcommittee would have the time needed to formulate and recommend one or more amendments that would deal comprehensively with all of the many difficulties that have been identified, but asked that this item be placed on the agenda of the 8-15-98 Council meeting. She also added that an effort was being made to come up with a single definition of "health care records."

Mr. Hamlin commented that, even if a comprehensive solution to all identified problems should prove impossible given the very little time remaining in this biennium, he hoped the subcommittee would at least be able to deal with the inconsistency between the 14-day advance notice period required under 55 H(2)(b) and the 15-day advance notice period required under 55 I(2), and also that these sections would be amended to make clear that their authorization of health care records subpoenas should not be construed as a waiver of the patient-physician privilege. Judge Brown responded that the subcommittee intended to propose amendments that would at least address both of those purposes. She then asked whether any member was opposed to changing the 15 days required by 55 I(2) to 14 days, to which the general response was that there was no such opposition. Mr. Rasmussen stated that he fully appreciated the difficulty of the issues confronting this subcommittee, but added that these issues are also extremely important because, from his observations, the problems relating to these sections are getting worse. Mr. Hamlin concluded discussion of this item by commenting on the

great importance of gaining the trust and confidence of all the various interest groups, so that they would be willing to work with the Council rather than going to the Legislature for what might well turn out to be faulty fixes.

Agenda Item 6: Report of the ORCP 39 Subcommittee (Judge Carp in the absence of Mr. Brothers). Judge Carp stated that this subcommittee was continuing its work and had received some good suggestions from Professor Holland, but did not think that the amendments proposed in the attachment to this item were quite ready for discussion at this meeting. He added that the subcommittee hoped and expected to have some specific proposed amending language ready for the Council to discuss at the 8-15-98 meeting. Judge Carp stated that, in the meantime, the subcommittee would appreciate any written comments any member might offer on the proposals contained in the attachment to this item as much prior to the August meeting as possible.

Agenda Item 7: Report regarding ORCP 70 A(2) amendments drafted by the OSB Debtor/Creditor Section (Professor Holland). Professor Holland referred members to the attachment to this item of the agenda which set forth the 70 A(2) amendments in draft form highlighting language that would be added or deleted, with a few corrections of style he had noted. He said that the Council should either approve these amendments as drafted and corrected or approve them with whatever additional revisions members thought advisable. He also noted that a report of the Council's action needed to be forwarded to Ms. Susan Grabe and to Mr. Tom Stilley, Chair of the Debtor/Creditor Section, as promptly as possible.

Several members indicated that they were reluctant to have the Council approve or revise these amendments without more information and further discussion. Mr. Hamlin then asked Mr. Paradis whether he would study these amendments carefully and lead a discussion of them at the August meeting, to which request Mr. Paradis agreed. Mr. Hamlin also directed Professor Holland to arrange for someone from the Judgment Lien Workgroup to attend the August meeting to answer any questions members might have.

Agenda Item 8: New business (Mr. Hamlin). No item of new business was raised.

Agenda Item 9: Old business (Mr. Hamlin). Mr. Hamlin noted that a proposed amendment to ORCP 7 E had been distributed as an attachment to the agenda of this meeting, but said there was insufficient time for consideration of this proposal and therefore directed that it be placed on the agenda of the 8-15-98 meeting.

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Agenda Item 10: Adjournment (Mr. Hamlin). Without objection Mr. Hamlin declared the meeting adjourned at 11:20 a.m.

Respectfully submitted,

Maury Holland
Executive Director