COUNCIL ON COURT PROCEDURES
Minutes of Meeting of August 15, 1998
5200 Southwest Meadows Road
Lake Oswego, Oregon

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

The following guests were in attendance: Bob Oleson, Public Affairs Director, Oregon State Bar; James R. Pettigrove, President, Oregon Association of Process Servers; Randene and Vicky Bacon (both with Rapid Serve in Portland).

Maury Holland, Executive Director, participated in this meeting by means of telephonic hookup from an undisclosed remote location. Gilma Henthorne, Executive Assistant, was also present at the meeting.

Agenda Item 1: Call to order. Mr. Hamlin called the meeting to order at 9:35 a.m. Mr. Hamlin announced that the Board of Bar Governors had appointed Connie Elkins McKelvey to fill the vacancy created by Rudy Lachenmeier's resignation.

Agenda Item 2: Approval of minutes. When Mr. Hamlin asked for approval of the minutes of the 7-11-98 meeting as distributed with the agenda of this meeting, Judge Marcus noted the following corrections: 1. The second full sentence on p. 2 of the minutes should be corrected to read as follows: "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 unable to find the defendant despite 'diligent inquiry.'" 2. The final sentence under Agenda Item 4, on p. 6, should be corrected to read as follows: "Judge Marcus also submitted for inclusion in the Council records an outline that he had used at the Oregon Judicial Conference earlier this year." Subject to those corrections, with which there was general agreement, the minutes of the 7-11-98 meeting were, on motion of Justice Durham duly seconded, approved as distributed with the agenda of this meeting.

Agenda Item 3: Report regarding amendments to ORCP 70 A(2) proposed by OSB Debtor/Creditor Section (see Attachment A to Item 3 of agenda of this meeting) (Mr. Hamlin). Mr. Hamlin introduced Mr. Tom Stilley, Chair of the OSB Debtor/Creditor Section, for the purpose of answering any questions members might have concerning these proposed amendments as set forth in the above-referenced attachment. Mr. Stilley began by briefly explaining the difficulties with which the proposed 70 A(2) amendments, along with related amendments to ORS 18.325 and 18.350, were intended to deal. He stated that these difficulties were the need for filing two documents, a money judgment and a lien certificate, in order to secure a lien against real property of judgment debtors, and the possibility of a gap period between entry of a judgment and filing of the lien certificate during which no lien would attach. Mr. Stilley further explained that the solution to both of these difficulties favored by the Debtor/Creditor Section was to eliminate the need for a lien certificate by including in the judgment itself the information statutorily now required to be included in the lien certificate.

In response to a question from Judge Marcus, Mr. Stilley said that he had not previously seen the form of the 70 A(2) amendments as they appear in the above-referenced attachment, which included some minor stylistic corrections suggested by Prof. Holland. In response to Justice Durham's question whether he was aware of any opposition in any quarter to these amendments, Mr. Stilley stated that he was not.

Mr. Hamlin suggested that the Council's vote on approval of these amendments be put over to the 9-12-98 Council meeting to give Mr. Stilley and others in the Section involved in this effort a chance to review the form of the amendments set forth in the attachment, and also to allow Council members to consider some pertinent comments prepared by Mr. Paradis and submitted by fax dated 8-14-98, a copy of which he directed be filed with the original of these minutes. There was general agreement with this suggestion. Justice Durham asked Mr. Stilley whether it would be helpful if the Council were to vote at this meeting to approve these amendments "in principle," to which the latter responded that the Section was anxious not to file a bill which included an ORCP amendment the precise language of which was not totally satisfactory to the Council.

Mr. McMillan asked what was meant by the second sentence of 70 A(2)(a) stating that its requirements are "not jurisdictional for purposes of appellate review." Judge Marcus explained that this language is intended to make clear that failure to comply with all requirements of paragraph 70 A(2)(a) would not make the judgment non-appealable for the purpose of appellate court jurisdiction.

Discussion of this item concluded with agreement that Mr. Stilley would consult with the members of the Judgment Lien Certificate Work Group as to the acceptability of the form of the proposed 70 A(2) amendments as shown in the attachment and would notify the Council of the result of that consultation through Prof. Holland, who stated he would attend the next meeting of that group on 9-3-98. Mr. Hamlin said the Council would plan to vote on approval of the form of these amendments at its 9-12-98 meeting.

Agenda Item 5: Report from ORCP 7 D (Mail Agent Service) Subcommittee (see Attachment to Item 5 of agenda of this meeting) (Judge Brewer). Mr. Hamlin asked whether there was any objection to taking up this item out of order in consideration for guests representing the Oregon Association of Process Servers, to which none was expressed. Mr. Hamlin then recognized Judge Brewer to lead discussion of this item.

Judge Brewer began by acknowledging Judge Marcus's excellent work in drafting the form of this proposed amendment, two alternative versions of which were set forth in the above-referenced attachment. He explained that the version appearing on p. 1 of the attachment is favored by Judge Marcus and Prof. Holland, while the version appearing on p. 2 of the attachment is favored by him and, he believed, by Justice Durham. Judge Brewer further explained that the provisions that would authorize mail agent service, proposed subparagraph 7 D(3)(a)(iv), were identical in both versions, and that the two versions differed only in that the one shown on p. 1 of the attachment would add a new subsection (3) to section 69 A, whereas the one shown on p. 2 would not. He added that Judge Marcus and he had each summarized, on pp. 3 and 4 of the attachment, their respective reasons for favoring the version he preferred, but had also agreed to support whichever version the Council might finally vote to adopt.

Judge Brewer then briefly recapitulated his reasons for favoring adoption of proposed subparagraph 7 D(3)(a)(iv) without proposed subsection 69 A(3) or any other addition to section 69 A. He explained that he regarded mail agent service as a form of substituted service, and not comparable to motor vehicle service pursuant to 7 D(4)(a)(i), which does require an affidavit in connection with application for a default judgment. As a form of substituted service, Judge Brewer stated that he did not believe that any special showing of "diligent inquiry" by affidavit in connection with defaults in mail agent service cases is either required by due process or useful in terms of sensible procedure. He added that injecting a special affidavit requirement for defaults in mail agent service cases would suggest that there is something inherently doubtful or unreliable about that service method. He further added that, while Prof. Holland had argued

that the affidavit requirement would afford greater protection to defendants in cases where default judgments are never contested, he thought that adequate protection would be typically afforded by relief under section 71 B.

Judge Brewer then introduced Mr. James Pettigrove, President of the Oregon Association of Process Servers, and invited him to say anything he wished to. Mr. Pettigrove thanked the Council for its efforts in this area and stated that process servers generally favor the exercise of "due diligence" and also its documentation by means of certificates or affidavits. Mr. Pettigrove did not express any preference as between the two versions of mail agent service amendments currently being considered by the Council. Ms. Randene Bacon and Ms. Vicky Bacon, both of Rapid Service, Portland, were introduced, but made no remarks.

Judge Marcus then explained his reasons for favoring inclusion of 69 A(3). He stated that he did not believe that mail agent service would be equivalent to abode or office service in terms of assurance it would provide of actual notice, but would be closer on the scale of reliability to service by publication under 7 D(6), although not so close to the latter as to require advance judicial authorization. He added that quite a few people are likely to be traveling or otherwise absent from their mail agent's location for considerable periods of time, and he was concerned about fairness to them. He further added that imposition of a default judgment lien can create serious hardship. He also said that requiring articulation in a pre-default judgment affidavit of the efforts made to comply with the "diligent inquiry" standard would have a prophylactic effect of encouraging greater efforts on the part of servers to locate defendants and make personal, abode, or office service if those were possible. Finally, he stated that the effort of articulating steps taken by way of "diligent inquiry" would be minuscule compared to the effort involved in actually taking those steps.

Justice Durham then spoke and stated that he wished to associate himself with the views of Judge Brewer, except that he was inclined to oppose adoption of 7 D(3)(a)(iv) if that would mean adding subsection (3) to section 69 A. He added that he did not share Judge Marcus's concern about possible unfairness to defendants who, as tenants of mail agent services, have chosen to identify their mail agent's address as the place where communications to them should be sent or delivered. He also added that service was either sufficiently accomplished when it occurred, or it was not, and no subsequent affidavit could add anything useful. He concluded these remarks by saying that proposed subsection 69 A(3) would "stick out like a sore thumb."

At this point Judge Brewer asked Prof. Holland whether he wished to add anything to the discussion. Prof. Holland then summarized the memo he had sent to members of the subcommittee arguing that there must be some instances where defendants served by mail agent service would simply default and never contest sufficiency of the service. They would, in other words, upon discovering that their real property had been subjected to a lien, simply discharge it by paying off the judgment, perhaps because they failed to consult an attorney. He added that he thought including 69 A(3) would be useful in providing somewhat greater assurance to such defendants that the service upon which entry of a default judgment had been based was both sufficient under 7 D(3)(a)(iv) and permissible under due process standards. He concluded these comments by noting that rulemakers should be careful not to assume that courts never do anything possibly injurious to people except in the context of contested litigation, but can sometimes inflict legal injury when acting *ex parte*.

Judge Brewer then suggested to Mr. Hamlin that an advisory, straw vote on these issues might be useful to the subcommittee in preparation for the 9-12-98 Council meeting. Ms. Tauman noted that it was not clear to her what would happen, should 69 A(3) be included in these amendments, if the required affidavit were, subsequent to its filing and entry of default judgment, determined to be deficient in some way. Judge Brewer responded that this raised a good question which the subcommittee should further reflect upon prior to the September meeting. Mr. McMillan asked whether the term "person apparently in charge" has a generally accepted meaning, to which Judge Brewer and others replied that it does.

Mr. Hamlin at this point asked each member, apart from members of the subcommittee, to indicate whether he or she was inclined to favor the version of the amendments that would include proposed subsection 69 A(3) or the version that would omit it. Eleven members expressed their preference for the version that would omit subsection 69 A(3), while three members indicated their preference for the version that would include it.

At the conclusion of discussion of this item, Mr. Hamlin thanked the guests from the Oregon Association of Process Servers for their attendance at this meeting.

Agenda Item 4: Report regarding proposed ORCP 68 C(4) amendments (see Attachment to Item 4 of the agenda of this meeting) (Justice Durham). Justice Durham referred members to the three versions of these proposed amendments included in the above-referenced attachment, designated "Proposal B," "Proposal C," and "Judge Barron's Proposal." He noted that the last of

these had been submitted to the Council by Judge Barron in his letter dated 7-1-98 in response to Mr. Hamlin's request for judicial comments on the different proposed amendments being considered by the Council. He also noted that, as requested, he had prepared summaries of comment letters received from Circuit Judges Barron, Gardner, Lipscomb, Nachtigal, and Titkin, which appear on pp. 5-9 of the above-referenced attachment.

Justice Durham pointed out that Proposals B and C differ from one another only with respect to their second sentences, dealing with timing of requests for findings and conclusions. Mr. McMillan asked whether the Supreme Court had, in effect, entirely preempted the Council on the matter of findings and conclusions, thus depriving it of any discretion as to what should be done. Justice Durham responded that, while there had been appellate court decisions mandating findings and conclusions in the context of attorney fee awards in certain circumstances, he thought those decisions left a good deal to the Council's discretion in deciding on a response that might range from merely deleting the second sentence of the present ORCP 69 C(4)(c)(ii) that "No findings of fact or conclusions of law shall be necessary" to devising a reasonably detailed amendment to deal with such issues as timing of requests, waiver, and the like.

Justice Durham continued by noting that the difference between Proposals B and C reflected tension between requiring findings requests so early as to encourage their being made in every case where attorney fees are contested, as opposed to so late as not to give trial judges timely notice, prior to their having to decide the issues, that findings and conclusions will be required. Judge Dickey said that he preferred something along the lines of Judge Barron's proposal, and had proposed Proposal C as a compromise with those members he sensed were insisting upon some provision for requests being permitted later than the filing of statements and objections. Judges Brewer and Dickey both expressed doubt, based upon their experience, that requiring requests be made as early as in the captions of statements or objections would result in their being made routinely, or even frequently, in cases where findings are not really needed by a party for purposes of an appeal.

There then followed an extended discussion of the relationship, if any, between waiver of hearing on attorney fee statements and objections and requests for findings relating thereto. Judge Marcus stated that he believed there is an important difference between a party waiving hearing as opposed to not wanting findings.

Judge Isaacson asked Justice Durham whether, as Judge Gardner's letter suggested, it might be wise to exclude domestic relations cases from any amendment that might be adopted.

Justice Durham responded that he fully understood the policy reasons which might make such exclusion desirable, but did not think that option was open to the Council given the fact that ORS 20.075, the controlling statute, makes no distinction between domestic relations and other kinds of civil actions. Mr. Hamlin recalled that, when Rule 68 was originally adopted, it excluded from its operation awards of attorney fees in domestic relations cases on the basis that such fees are sometimes balanced against other aspects of the award of support and division of assets and liabilities.

Judge Dickey mentioned that he was very concerned about the added time and expense which adoption of either Proposal B or C would lead to in domestic relations cases, and added that many trial judges feel strongly that adoption of any amendment to require findings in connection with fee awards would reflect lack of confidence in the trial courts. He added, however, that he agreed with the broadly shared sense of the Council that doing nothing was not now a viable option. Justice Durham suggested that special concerns relating to domestic relations cases might be obviated to the extent that orders concerning payment of attorney fees in such cases are not properly characterized as an award of attorney fees for purposes of ORCP 68.

Discussion then turned to how to proceed in preparation for the 9-12-98 meeting, when the Council would have to vote on final language. Justice Durham asked the members whether they wished him to work on developing additional alternative proposals for distribution before that meeting, but it was generally agreed that adding new proposals at this stage would not be helpful.

Following some additional comments, Mr. Hamlin called for a straw poll to reveal members' current thinking, in particular their preferences among the proposals presently under consideration. The result of the straw poll was that no member preferred Proposal B, eight members preferred Proposal C, five members favored Judge Barron's proposal, and no member preferred that no action be taken to amend ORCP 68 C(4).

Mr. Rasmussen stated that his inclination to support Judge Barron's proposal was conditioned on removal of its final sentence, which read: "If no objection if filed, the court need not make findings of fact and conclusions of law." Justice Durham said that, with regard to Judge Barron's proposal, he would prefer that explicit waiver language be included. However, Justice Durham also remarked that, in light of comments by several trial judges that they are not especially concerned that requiring requests as early as the filing of statements or objections would lead to requests being routinely made in nearly every case, he was beginning to alter his thinking somewhat about the issues of timing and waiver.

Agenda Item 6: Recommended amendments to ORCP 7 D and E (see Attachment to Item 6 of agenda of this meeting) (Judge Brewer). Judge Brewer briefly explained that these two amendments would merely rectify a minor defect in ORCP 7 D(2)(b) and another minor defect in ORCP 7 E, both of which were explained in the above-referenced attachment. Mr. McMillan remarked that the present language of section 7 E, "to any person over 14 years of age," was certainly, not just possibly, wrong if the intended meaning is a person who has attained the age of 14. No further discussion of, or voting on, this item occurred, and Mr. Hamlin directed that it be put over to the agenda of the 9-12-98 meeting.

Agenda Item 7: Report from ORCP 39 Subcommittee (see Attachment to Item 7 of agenda of this meeting). In the absence of Mr. Brothers, Judge Dickey reminded members that this amendment project was prompted by suggestions from the OSB Practice and Procedure Committee that Rule 39 should be amended to deal with what that Committee perceived to be increasing problems relating to asserted hindrance of oral depositions, primarily in the form of argumentative or suggestive objections, or improper instructions to deponents not to answer questions. He explained that a proposed new subsection 39 D(3), in combination with a proposed new 39 E(2), would seek to deal with the problem of unreasonable hindrance of deposition examinations by attorneys representing deponents or defending parties. He further explained that proposed E(3) would be broken out as a separate subsection, but would continue the reference in the existing section 39 E to subsection 46 A(4), which authorizes award of expenses of a motion, including attorney fees.

Judge Brewer asked whether proposed D(3), in tandem with proposed E(2), would impose a kind of strict liability for making a suggestive or otherwise improper objection, or whether liability for sanctions would flow only from a finding that such objection was subjectively intended to hinder examination of a deponent. He further commented that the proposed language of D(3) left some doubt as to when a question would cease to be pending. Mr. Rasmussen stated that he had a problem with the absolute prohibition on "suggestive" objections.

Ms. Tauman questioned whether incorporating a prohibition on suggestive objections would be wisely located in a rule, when an adequate remedy might lie in a call to a judge. Mr. Hamlin reminded members that the Practice and Procedure Committee had informed the Council that its members thought there was enough of a problem as to warrant being addressed in a rule amendment. Judge Brown stated that she was inclined to think that these proposed amendments go too far in the direction of prescribing in undue detail attorney conduct at depositions, and that she was wary about going down that road. Judge Marcus noted that he had

discovered grammatical errors in some of the proposed language. Justice Durham said he wished to associate himself with the comments of Judge Brown, and agreed that some further drafting was needed to improve grammar and readability, such as by converting verb forms from the passive to the active voice.

Mr. Hamlin concluded discussion of this item by asking for a straw poll to indicate the present leanings of members regarding the various issues presented by the proposed amendments to ORCP 39 D and E. In response, one member reported a leaning toward these amendments substantially as set forth in the attachment, seven reported leaning toward framing any amendments along the lines of the corresponding provisions of the Federal Rules of Civil Procedure, and five members reported leaning toward adopting no amendments relating to conduct of depositions. Mr. McMillan observed that he did not think the proponents of these amendments had made an adequate case that they are needed. Mr. Rasmussen said he thought the Council should be reluctant to take absolutely no action in response to the Procedure and Practice Committee's request, and added that he was inclined towards adopting the language of the counterpart provisions in the Federal Rules of Civil Procedure. Judge Brown conceded that problems might well exist in this area, but contended that the present language of Rule 39 and related provisions of the ORCP give the courts adequate authority to deal with them when they arise.

Agenda Item 8: Report from ORCP 55 Subcommittee (Judge Brown). Judge Brown reported that this subcommittee would be unable, during this biennium, to recommend one or more amendments dealing with the multitude of problems detected in connection with ORCP 55 H and I. However, she stated that the subcommittee would have specific amending language to remove the inconsistency between the 14-day notice period required under 55 H(2)(b)(iv), and the 15-day notice period required under 55 I(2), to recommend for adoption at the 9-12-98 meeting, and asked that an item be placed on the agenda of that meeting for that purpose. Judge Brown added that the subcommittee planned to continue work towards a broader solution of problems identified during the interim between the present and the next biennium. Justice Durham asked Judge Brown whether she was aware of any other groups which might be working on these problems, possibly with a view to introducing legislation in the upcoming session of the Legislature. She responded that she was not.

Agenda Item 9: New business (Mr. Hamlin). No item of new business was raised.

Agenda Item 10: Old business (Mr. Hamlin). No item of old business was raised.

Agenda Item 11: Adjournment (Mr. Hamlin). Before adjourning this meeting, Mr. Hamlin reminded members of the great importance of full attendance at the 9-12-98 meeting because of the statutory requirement of a minimum of 15 affirmative votes in order to promulgate an ORCP amendment. Mr. Hamlin, without objection, then declared the meeting adjourned at 11:58 a.m.

Respectfully submitted,

Maury Holland
Executive Director