COUNCIL ON COURT PROCEDURES
Minutes of Meeting of September 12, 1998
5200 Southwest Meadows Road
Lake Oswego, Oregon

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

The following guests were in attendance: Susan Grabe of the Oregon State Bar; Amanda Williams, with the Oregon Association of Process Servers; James R. Pettigrove, President, Oregon Association of Process Servers.

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

Agenda Item 1: Call to order. Vice Chair Mick Alexander called the meeting to order at 9:40 a.m.

Agenda Item 2: Approval of minutes. On motion duly made and seconded, the minutes of the 8-15-98 meeting were approved as distributed with the agenda of this meeting.

Agenda Item 3: Report regarding amendments to ORCP 70 A(2)(a) proposed by Debtor/Creditor Section of the Oregon State Bar (see copy of these amendments distributed at beginning of this meeting and filed with original of these minutes) (Mr. Hamlin assumed the Chair early in the discussion of this item). Mr. Alexander recognized Prof. Holland to recall for members the background of the amendments shown in the aforementioned copy, specifically that these amendments were part of a bill that would be submitted by the OSB to the 1999 Legislative Assembly. Prof. Holland reminded members that the Council had been asked to approve these amendments, but not to promulgate them. He invited members' attention to three minor changes from the draft shown in the Attachment to Item 3 of this meeting's agenda, which did not appear therein since they were agreed to, or initiated, by the Judgment Lien Workgroup at its 9-3-98 meeting.

Mr. Paradis moved, seconded by Judge Marcus, that the Council approve these amendments. Mr. McMillan asked why the Council had been asked to approve, but not to promulgate, them. Prof. Holland responded that these amendments would make no sense except as part of a statutory amendment that will be submitted to the 1999 legislative session, and also pointed out that the effective date of amendments promulgated by the Council is later than the effective date of enactments of the Legislature. Mr. Hamlin, after assuming responsibility as chair, commented that the Council's approval of these amendments could be included in the letter to the Legislature by which the Council transmits promulgated amendments. Mr. Gaylord remarked that it was unusual for the Council to be asked to provide advisory opinions on ORCP amendments, and asked whether it might be possible to promulgate these amendments conditionally. Mr. Gaylord then moved that these amendments be published for two purposes--that of simply soliciting comments, and that of preserving the option of voting to promulgate them at the 12-12-98 meeting. This motion failed for want of a second. Mr. Brothers stated that all groups should be encouraged to seek the Council's official approval of ORCP amendments.

Mr. Paradis' motion was then agreed to by a vote of 21 in favor, 0 opposed, and 0 abstentions.

Mr. Gaylord moved, in the form of a friendly amendment to the motion just agreed to, that these amendments be published as having been tentatively adopted. Mr. Hamlin stated that there is no requirement that amendments merely approved, as opposed to being tentatively adopted for possible promulgation, be published. Judge Coon queried what the point would be of promulgating these amendments if the OSB's statute were not enacted. Mr. Alexander said that, assuming these amendments would improve paragraph 70 A(2)(a), he saw no reason for the Council not to publish them as having been tentatively adopted.

Mr. Gaylord moved, seconded by Judge Linder, that these amendments be published as having been tentatively adopted, which he said would preserve the Council's option whether or not finally to promulgate them at the December meeting. After brief discussion, this amendment was agreed to by a vote of 17 in favor, 3 opposed, and 1 abstention. Justice Durham urged that the position taken by the Council on these amendments be clarified to the Legislature to obviate any possible confusion about effective dates or the like.

Agenda Item 4: Recommended amendments to ORCP 7 D and E (see Attachment to Item 4 of agenda of this meeting) (Judge Brewer). Judge Brewer explained that the purpose of the proposed amendment to paragraph 7 D(2)(b) was to make clear that the person to whom papers are delivered when abode service is used

may be as young as 14 years of age, and that the purpose of the proposed amendment to section 7 E was to authorize service by attorneys when mail service is used. On motion of Mr. Brothers, seconded by Mr. Rasmussen, both of these amendments were approved and tentatively adopted by a vote of 21 in favor, 0 opposed, and 0 abstentions.

Agenda Item 5: Report of ORCP 55 Subcommittee (see Attachment to Item 5 of this agenda) (Judge Brown). Judge Brown explained that the purpose of the amendments shown in the aforementioned attachment was to remove the inconsistency between sections 55 H and I regarding the number of days prior to service of hospital or medical records subpoenas on records custodians such subpoenas must be served on persons to whom the records pertain. This, she further explained, was done by a proposed amendment that would change the number of days required in subsection 55 I(2) from 15 to 14, as is required for hospital records subpoenas in paragraph 55 H(2)(b). Judge Brown added that the subcommittee would continue with its work respecting sections 55 H and I in the expectation that it would have a more thoroughgoing set of amendments for proposal to the Council during the coming biennium.

On motion of Judge Brown, seconded by Mr. Rasmussen, these amendments, as shown in the aforementioned attachment, were approved and tentatively adopted by a vote of 21 in favor, 0 opposed, and 0 abstentions.

Agenda Item 6: Proposed amendments to ORCP 39 (see Attachment to Item 6 of agenda of this meeting) (Mr. Brothers). Mr. Brothers referred members to marked up copies of the aforementioned attachment which were distributed to members at the beginning of this meeting, one of which is filed with the original of these minutes. These copies, he explained, showed the proposed amendments as set forth in the attachment, but marked up with several handwritten changes agreed to by the subcommittee shortly before this meeting. Mr. Brothers asked that discussion focus on the final subcommittee version. He further explained that the amendments now proposed for tentative adoption seek to respond to the problem described to the Council by the OSB Procedure and Practice Committee, while at the same time avoiding any effort unduly to micromanage conduct of depositions. He noted that there seemed to be some difference of opinion within the Council as to the seriousness and extent of the problem raised by the Procedure and Practice Committee. Mr. Brothers concluded his introductory comments by stating that the subcommittee had considerably scaled back on the scope and specificity of these proposed amendments in light of the sense it obtained at the 8-15-98 meeting that the Council appeared disinclined to adopt more elaborate and detailed ones.

Judge Brewer commented that, whereas Rule 46 contemplates formal, written motions to compel discovery, for example against a good faith, but erroneous, claim of privilege, proposed subsection 39 E(1) appears to contemplate telephonic requests for emergency rulings to deal with "bad conduct" in the course of a deposition, such as deliberate embarrassment of a deponent or improper instructions to a deponent not to answer questions. He asked whether the subcommittee intended that good faith evidentiary or other similar disputes occurring in the course of a deposition could be dealt with under proposed 39 E(1).

Mr. Brothers responded that he thought Judge Brewer had raised a good point, and stated that he believed it could best be addressed by restoring on line 49, p. 3 of the marked-up copy the clause "or in a manner not consistent with these rules," following "in bad faith," language he believed the subcommittee had earlier agreed to include.

Mr. Rasmussen then referred members to a marked-up version of the Attachment to Item 6, with the initials "KHR" in the bottom right-hand corner of each page, which included some changes of language he had discussed with Judge Dickey. (A copy of this version is filed with the original of these minutes.) These changes, he explained, were all grammatical or stylistic, with no change of meaning intended.

Judge Carp remarked that Multnomah and Marion Counties presently have more stringent deposition guidelines than what was proposed here, as do the federal courts, and he did not understand why the Council should have any problem agreeing to the modest amendments proposed by the subcommittee. Mr. Gaylord stated that he had some concerns with these proposed amendments, partly because he thought it difficult to legislate good conduct on the part of attorneys, and partly because he thought that the circumstances specified in proposed D(3)(a)-(d) wherein a deponent might properly be instructed not to answer a question were unduly limited, such as by not including that one or more questions are beyond the scope of discovery. Ms. Tauman said that she was concerned about the vagueness of the term "unreasonably annoyed" as it appears in proposed D(3)(b). Judge Isaacson asked how proposed D(3)(b) would relate to the issue of discoverability. Ms. Tauman commented that she did not see how any provision of proposed D(3) covered either work product or scope of discovery.

Judge Dickey reminded members that the OSB Procedure and Practice Committee has gone on record with its belief that some problems do exist regarding attorney conduct at depositions, and that the existence of deposition guidelines in Multnomah and Marion Counties, tougher than the standards these amendments would impose, are further indication of their existence. He

added that he hoped the Council could support what the subcommittee has come up with. Judge Carp asked whether any language proposed would respond to concerns voiced by some members that it would not provide adequate protection against questions clearly beyond the scope of discovery. Judge Dickey responded that the language in the last two lines on p. 2 of the Attachment to Item 6 would provide adequate protection. Judge Brown stated that she had very serious reservations about several features of these proposed amendments, such as the limited circumstances under which they would authorize instructions to deponents not to answer a question, but would nonetheless join in a vote to publish these amendments to get comments from the Bar.

Mr. Alexander said that he was inclined to oppose any amendments that would flatly prohibit instructions not to answer regardless of how far outside the scope of discovery a question might be. Mr. McMillan questioned whether the phrase "unreasonably annoy, embarrass, or oppress" has a sufficiently well understood meaning. Justice Durham responded that this standard will have to be applied by courts on a case-by-case basis, since it implicates what is unreasonable under varying facts and circumstances. He also urged that improvement in the wording of some of these amendments be attempted, such as shifting from the passive to the active voice. Ms. Craine observed that, as perhaps improved by editing, these amendments might have some value for inexperienced lawyers now coming into the courts in large numbers. Several members expressed opposition to publishing these amendments with proposed D(3)(b) included in its present form.

Mr. Hamlin then suggested that, in consideration for guests present from the Oregon Association of Process Servers, discussion might turn to Item 8 of the agenda, with the understanding that, during the luncheon break, the Rule 39 subcommittee would attempt to revise its proposed amendments to take account of the reservations and concerns that had been expressed regarding them in their present form. This suggestion was generally agreed to.

Agenda Item 8: Report from ORCP 7 D (Mail Agent Service) Subcommittee (see Attachment to Item 8 of this agenda) (Judge Brewer). Judge Brewer noted that the issues presented by the two versions of these proposed amendments had been extensively discussed at the August meeting, and said that he saw no need to recapitulate that discussion. He therefore moved, seconded by Judge Carp, tentative adoption of the version as shown on p. 2 of the aforementioned attachment, that is, addition of a new subparagraph D(3)(a)(iv) to authorize mail agent service under the circumstances therein stated, but without addition of a new subsection 69 A(3) as shown on p. 1 of the attachment. Mr. Hamlin asked whether the two versions of the amendments set forth

in the attachment were unchanged from those discussed at the August meeting. Judge Brewer responded that they were.

Judge Marcus stated that, after much thought about the matter following the August meeting, he had decided that subparagraph 7 D(3)(a)(iv) should not be adopted unless accompanied by subsection 69 A(3). He explained that, without the safeguard afforded by the affidavit requirement, the mail agent service provision could cause real harm to people, and do so for no good reason. He pointed out that the affidavit requirement was not opposed by the process servers, would impose only a negligible burden on lawyers, and, most importantly, would be conducive to greater care being taken by lawyers and servers when using this method of service. He also emphasized that, under 69 A(3) as proposed, there would be no doubt but that facts averred in supporting affidavits could be supplemented whenever motions were made to set aside mail agent service.

Judge Brewer stated that, while he had a strong preference for the version not including the affidavit requirement, he was nonetheless prepared to support whichever version was favored by the Council majority. Judge Brewer then invited Justice Durham to summarize the reasons which led him to oppose adoption of D(3)(a)(iv) if accompanied by the 69 A(3) affidavit requirement. Justice Durham responded by noting that, while he had great respect for Judge Marcus' due process concerns, he did not share them with respect to this particular proposal, largely because he did not think it risked unfairness towards people who have deliberately designated their mail agent's address as the place to which communications with them should be directed. He added that he regarded the affidavit requirement as accomplishing nothing beyond adding to the paperwork burden on parties making service, and that when mail agent service is actually challenged, the facts stated in an affidavit would be binding on nobody.

Mr. Hamlin then asked for a vote on whether to publish proposed D(3)(a)(iv) while reserving the question whether also to publish 69 A(3). The vote was 15 in favor, 6 opposed, and 0 abstentions.

Ms. Amanda Williams was then recognized by Mr. Hamlin. On behalf of the Oregon Association of Process Servers and Mr. Dave Barrows, she thanked the Council and the subcommittee for their hard work on this problem. She added that either version of this amendment would be acceptable to process servers, but that she was inclined to agree with the view of Justice Durham and Judge Brewer that the version not including the affidavit requirement was preferable.

Judge Carp, seconded by Mr. Paradis, moved that the version including the affidavit requirement be published in addition to

the version that did not. Mr. Hamlin queried whether proposed 69 A(3) was intended to refer to a single affidavit furnished by the party making service, and whether there might be instances where more than one affidavit, possibly from different affiants, might be needed or helpful. In response to this question, and to Judge Marcus' noting that the reference in 69 A(3) should be to D(3)(a)(iv) rather than D(3)(a)(ii), there was general agreement that line 31 on p. 1 of the Attachment to Item 8 should be revised to read: "D(3)(a)(iv) of Rule 7 unless the plaintiff shows by affidavit that the plaintiff has ...." Judge Carp's motion then carried by a vote of 12 in favor, 9 opposed, and 0 abstentions.

Agenda Item 7: Report regarding proposed ORCP 68 C(4) amendments (see Attachment to Item 7 of this agenda) (Justice Durham). Justice Durham recalled that, at the August meeting, straw votes were taken showing substantial support for what appears on p. 3 of the aforementioned attachment as "Proposal C" (hereinafter "C") and, with some possible suggested changes, for what appeared as "Judge Barron's Proposal" on p. 4 of the Attachment to Item 4 of the 8-15-98 agenda. He explained that, following the August meeting, he discussed those few suggested changes with Judge Barron, who expressed no objection to them, which were reflected in "Judge Barron's Proposal No. 2" (hereinafter "2") on p. 4 of the Attachment to Item 7 of this meeting's agenda.

Justice Durham noted that the first sentences of both proposed amendments were identical except that "C" included in line 26 the phrase "on the record" following "conclusions of law," whereas "2" did not. He added that the most important difference between the proposals was that "C" would permit requests for findings and conclusions as late as the seventh day following the latest date for filing objections unless the court allows a later request, whereas "2" would require that requests be included in the title of statements or objections. Justice Durham stated that, with respect to that difference, while prepared to support "2", he was inclined to favor "C" because it would give a party seeking attorney fees an opportunity to see any objections filed before deciding whether to request findings and conclusions, with the result that fewer requests would likely be made.

Judge Brown noted that "C" included "on the record" in line 26, while that phrase did not appear in "2". Justice Durham responded that "on the record" was implied in "2". Judge Brown asked whether oral findings and conclusions would suffice provided they were "on the record." Justice Durham replied that his intention was that they would. Judge Brown asked why the word "special" was needed to modify "findings," to which Justice Durham replied that "special findings" was a well understood term

used throughout the ORCP. Judge Marcus noted that in line 12 of "2" the singular "objection" appears, whereas the plural "objections" should be used since that is the form used elsewhere. There was general agreement that "objection" should be changed to "objections." Mr. Gaylord commented that the most important difference between "C" and "2" was the time when waiver would occur, and that he favored "C" as best reconciling all opposing interests.

Several members raised the question whether a waiver under either "C" or "2" would effect a waiver on appeal as well as in the trial court. Justice Durham commented that no provision of the ORCP can directly determine what is waived or preserved for purposes of appeal, but that, for obvious reasons, appellate courts normally determine that any contention waived in the trial court is thereby not preserved for purposes of appeal. Several members also raised the question whether the party which appeals from an attorney fee ruling must request findings and conclusions or otherwise waive them, or whether no waiver would be found provided at least one party had timely requested them. Justice Durham stated that neither "C" nor "2" explicitly resolved that question, which he thought was best left to the appellate courts. Several members wanted these minutes to reflect the members' clear understanding that a failure by a party to request findings or conclusions would not preclude that party or any other party from assigning error on appeal with respect to the trial court's ruling on attorney fees, but would prevent the trial court's failure to make findings and state conclusions, or any error ruling upon which would, in the judgment of the appellate court, require such findings and conclusions, from effectively being assigned as error.

Mr. Gaylord commented that he hoped this prolonged discussion had not caused members to lose sight of the need for an amendment dealing with findings and conclusions in the context of rulings on attorney fees. He also reiterated his strong belief that "C" was preferable to "2" because the former would be less conducive to requests being made routinely even when no party ultimately wanted them. Judge Brown suggested that in line 24 of p. 3 of the attachment, the word "written" be inserted between "On" and "the," with which there was general agreement.

Judge Brewer suggested that, in view of the similarity between Rule 62 and what proposed 68 C(4)(e) was intended to accomplish, it might be sensible to adopt the following parallel language from section 62 A: "In the absence of such a demand for special findings, the court may make either special or general findings." Mr. Hamlin pointed out that this quoted language makes nothing turn upon which party or parties make or fail to make the demand. Justice Durham stated that he found considerable merit in the idea of adopting the language of the

second sentence of section 62 A and proposed that it be made the last sentence of "C".

Justice Durham then moved, and was duly seconded, that both "C" and "2" be published as alternatives, with the following revisions as agreed upon in the course of this discussion:

1. With respect to "C", in line 24, p. 3 of the attachment, the word "written" would be inserted between "On" and "request; and the final sentence would be deleted and replaced by the following: "In the absence of a request under this paragraph, the court may make either general or special findings of fact and conclusions of law regarding attorney fees."

2. With respect to "2", in line 12 of p. 4 of the attachment, change "objection" to "objections"; in line 7 of the same page, insert "on the record" between "conclusions of law" and "regarding," and delete the final sentence and substitute: "In the absence of a request under this paragraph, the court may make either general or special findings of fact and conclusions of law regarding attorney fees."

Justice Durham's motion carried by a vote of 14 in favor, 5 opposed, and 0 abstentions.

Mr. Rasmussen, seconded by Judge Dickey, moved that only "2", revised as shown above, be published. Mr. Brothers stated that he agreed that only the version deemed better by the Council should be published. Mr. Hamlin said he thought the Council's posture would be improved if the Bar was afforded an opportunity to express preferences between alternative versions of amendments. Mr. Rasmussen's motion failed to carry by a vote of 6 in favor, 12 opposed, and 0 abstentions.

Agenda Item 6 (Resumption of discussion). A draft of proposed amendments to sections 39 D and E was distributed to members which contained further revisions, made by Mr. Rasmussen and other members during the luncheon break, responsive to the earlier discussion of this item. After brief discussion, a motion was made and duly seconded to publish these tentatively adopted amendments as thus revised. This motion carried by a vote of 18 in favor, 0 opposed, and 0 abstentions. These amendments as tentatively adopted are shown in "Proposed Amendments to Oregon Rules of Civil Procedure," a copy of which is filed with the original of these minutes.

Agenda Item 9: New business (Mr. Hamlin). Mr. Hamlin reminded members of the importance of full attendance at the 12/12/98 meeting because of the statutory requirement of at least 15 affirmative votes in order to promulgate an ORCP amendment.

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

Agenda Item 11: Adjournment (Mr. Hamlin). Without objection Mr. Hamlin declared the meeting adjourned at 1:10 p.m.

Respectfully submitted,

Maury Holland
Executive Director