

**COUNCIL ON COURT PROCEDURES**  
Minutes of Meeting of December 12, 1998  
Oregon State Bar Center  
Lake Oswego, Oregon

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

(Note: Karsten Hans Rasmussen attended a portion of the meeting via speaker telephone.)

The following guests were in attendance: Bob Oleson of the Oregon State Bar; Amanda Williams, of the office of David Barrows, Portland; J.R. (Scotty) Pettigrew of the Oregon Process Servers Association. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

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

**Agenda Item 2: Approval of September 12, 1998 minutes (Mr. Hamlin).** The minutes of the Council's September 12, 1998 meeting were adopted as distributed with the agenda of this meeting, with the exception that in the list of those members present, Bill Gaylord should be included as being present.

**Agenda Item 3: Proposed amendments to Oregon Rules of Civil Procedure (attached) (Mr. Hamlin).**

a. **ORCP 68 C(4).** After brief discussion it was decided that it would not be feasible to vote on the attached tentatively adopted amendments as a package. Mr. Hamlin stated that, since the time during which Mr. Rasmussen could participate in the meeting by telephone was limited, he proposed to begin by consideration of the two alternative versions of the amendments to ORCP 68 C(4).

Mr. Gaylord said that he favored that either alternative be adopted in preference to adoption of neither, but thought that Alternative 1 would be the better choice because he believed it

would result in fewer requests for findings and conclusions being made. Judge Marcus, seconded by Mr. Paradis, moved adoption of Alternative 1. Mr. McMillan asked for clarification of how the two alternative versions differed from one another. Mr. Hamlin responded that Alternative 1 would permit requests to be made at a later time than would Alternative 2. Mr. Alexander commented that, if Alternative 2 were adopted, it would result in findings being requested almost automatically, even in many cases where neither party really wanted or needed them. Judge Dickey said that he preferred Alternative 2 because that was the version preferred by all the judges who had submitted comments.

In response to a suggestion by several members, Mr. Hamlin asked for a straw poll as to preferences between Alternatives 1 and 2. Eleven members then indicated a preference for Alternative 1, and 11 members a preference for Alternative 2. No member indicated a preference that neither version be adopted. Judge Harris then stated that he wished to change his straw vote to support Alternative 1, and Ms. McKelvey stated she wished to change her straw vote to support Alternative 2. Judge Marcus, in response to Mr. McMillan's question as to why he favored Alternative 1, said that in relatively few cases involving attorney fee awards does any party really want findings, and that Alternative 1 would tend to limit requests for findings to those cases where a party really does want them.

Justice Durham noted that, while he was not opposed to Alternative 1, his preference was for Alternative 2, largely out of respect for the view expressed by trial judges, and added that should Alternative 2 prove undesirable in actual practice, he would be willing to see the Council reconsider this issue in the next biennium. Judge Carp expressed agreement with this view. Judge Marcus stated that, as between the two versions under consideration, the clear preference of the Judicial Conference would be for Alternative 1.

Mr. Rasmussen, seconded by Judge Harris, moved that the pending motion be amended to substitute Alternative 2 for Alternative 1. This motion was agreed to by vote of 13 in favor, 7 opposed, with the chair abstaining. Mr. Hamlin then called for a binding vote on the main motion, as amended, to adopt Alternative 2. Mr. Gaylord said that he had been persuaded by the views expressed by Justice Durham, and would therefore vote in favor of the main motion. **The main motion, as amended, was then agreed to by a vote of 23 in favor, none opposed, and no abstentions.**

At this point Mr. Rasmussen said he had to discontinue his telephonic participation in the meeting. Mr. Hamlin, in response to a query from Mr. Gaylord about when consideration would be given to the draft Staff Comments to the amendments just adopted, said he would defer such consideration until later in the meeting so that any member who might have to leave before the conclusion of the meeting would be able to vote on all tentatively adopted

amendments.

b. ORCP 7 D(2)(b) and 7 E. Judge Marcus, seconded by Justice Durham, moved adoption of the proposed amendments to these provisions. Without discussion this motion was agreed to by vote of 22 in favor, none opposed, and no abstentions.

c. ORCP 7 D(3)(a) and 69 A. Mr. Hamlin reminded members that the Council's options were to not adopt either proposed new subparagraph 7 D(3)(a)(iv) or proposed new subsection 69 A(3), to adopt the former without the latter, or to adopt both proposed provisions. At the suggestion of Judge Brewer Mr. Hamlin asked for a straw vote on how much support existed for each of the aforementioned options. This straw vote showed that 13 members favored adoption of proposed subparagraph 7 D(3)(a)(iv) without adoption of proposed subsection 69 A(3), and that seven members favored adoption of both proposed provisions. No member expressed support for the option of adopting neither proposed provision.

Mr. Gaylord stated that he did not regard proposed subparagraph 7 D(3)(a)(iv) and subsection 69 A(3) as alternatives as to which a choice should be registered by a single vote, but as separate proposals as to each of which a vote should be taken. He then moved, seconded by Justice Durham, that proposed subparagraph 7 D(3)(a)(iv), the basic provision for mail agent service, be adopted, but that proposed 69 A(3) not be adopted.

Judge Marcus expressed strong opposition to this motion, stating that inclusion of proposed 69 A(3), with its requirement that due diligence be shown by affidavit, would entail very little extra effort on the part of attorneys, but would cause them to be more meticulous in their efforts to effect service in the appropriate, more traditional manner, and therefore might occasionally protect perfectly law-abiding persons against the possibility of being seriously damaged if mail agent service did not result in actual, timely notice. He added that mail agents are presently under no legal obligation to forward summonses and complaints to their customers when served in this manner, and that the mere fact that a given defendant uses mail agent services should not be understood as evidencing an intent to evade service. He concluded by saying that he would vote against adoption of proposed 7 D(3)(a)(iv) without proposed 69 A(3) because he believed that would pose some risk of harm without any justification for it.

Mr. Hamlin then asked Ms. Amanda Williams, representing the Oregon Association of Process Servers, whether she wished to offer any comments on this matter. Ms. Williams responded that the Association would like to see adoption of proposed 7 D(3)(a)(iv), with or without proposed 69 A(3), but that its preference was for adoption of 7 D(3)(a)(iv) without 69 A(3).

Mr. Gaylord stated that he favored adoption of 7 D(3)(a)(iv) without 69 A(3). He pointed out that customers of mail agent

services have made a voluntary designation of their mail agent's establishment as the place at which they wished to be contacted. He added that he did not believe that adding a requirement of a due diligence affidavit would afford defendants served in this manner any greater level of due process, because if a default were entered and subsequently challenged, the party which had used mail agent service would have to show what efforts had been made to locate the defendant, at which point the affidavit would not be controlling. Judge Brewer expressed agreement with this view, and added that he thought it very important that the chair make clear to members that they could vote in favor of proposed 7 D(3)(a)(iv) without thereby binding themselves either way with respect to proposed 69 A(3). In response Mr. Hamlin stated that the ensuing vote on Mr. Gaylord's motion would be understood to relate only to 7 D(3)(a)(iv), and that if the vote were to adopt that proposal, a separate vote would subsequently be taken on whether to adopt 69 A(3). **On the call of the question, Mr. Gaylord's motion, as thus understood, was agreed to by vote of 21 in favor, none opposed, and no abstentions.**

Judge Marcus, seconded by Ms. Chase, moved adoption of proposed subsection 69 A(3). He reiterated his strongly held opinion that failure to accompany adoption of the mail agent service provision by adoption of the due diligence affidavit requirement would gratuitously create some risk of injustice to mail agent customers, and do so for no good reason. He analogized inclusion of 69 A(3) to the greater protection afforded by installing better brakes on new cars. **On the call of the question, Judge Marcus's motion was not agreed to by vote of seven in favor, 13 opposed, and no abstentions.**

d. **ORCP 39 D and E.** Judge Marcus commented that there appeared to be relatively little support for these proposed amendments, and a belief that, if adopted, they would constitute over-regulation. Ms. Tauman expressed agreement with this opinion. Mr. Hamlin asked Mr. Brothers, chair of the subcommittee which drafted the pending amendments, to recapitulate how they originated and evolved. Mr. Brothers responded that these amendments originated from a request by the OSB Procedure and Practice Committee that the Council consider amending Rule 39 to deal more effectively with what that Committee perceived to be a growing and increasingly state-wide problem of excessive and unfounded obstruction to the taking of oral depositions. Examples of such obstruction provided by the Committee, Mr. Brothers continued, were unjustified instruction by counsel to deponents not to answer questions, argumentative objections to questions, and interruptions of depositions while a question is pending. He noted that, in response to criticisms at a previous meeting, the proposed amendments had been revised to make them less detailed in their proscriptions.

Judge Carp said that he wished to express two concerns on

behalf of Mr. Rasmussen, based on the latter's extensive experience in taking and defending depositions and as a current member of the Procedure and Practice Committee. The first concern was that proposed paragraph 39 D(3) could have the effect of unduly restricting the circumstances in which defending counsel might properly instruct a deponent not to answer a question. Mr. Rasmussen's second concern, as related by Judge Carp, was that the Procedure and Practice Committee clearly believed that there is a problem of obstruction of depositions which requires a state-wide response, presumably in the form of one or more amendments to ORCP 39, and that the Committee continues to favor the amendments presently under consideration. Judge Carp added that proposed paragraph 39 D(3) would regulate what goes on at depositions considerably less stringently than do the Multnomah County Circuit Deposition Guidelines and less stringently than is true in federal court. Mr. Brothers commented that, on the assumption that the Council would do something to deal with this problem on a state-wide basis, he had discouraged adoption of a local rule in Deschutes County. Judge Brown expressed surprise that a proposed amendment as controversial as this appeared to be had elicited only one comment in response to publication of the amendment in the advance sheets.

Justice Durham, seconded by Judge Brewer, made a motion to lay this proposal on the table, which he explained would mean that, for the present, the Council would not go on record as either finally adopting or voting down this proposed amendment. He further explained his reason for so moving, which was his sense that not enough information had been gathered concerning the extent and seriousness of the problem to which the proposed amendment would respond to warrant either its adoption or definitive rejection at this point. Judge Isaacson questioned what impact, if any, the Council's deferring decision on this matter would have on adoptions of Supplemental Local Rules intended to address the problem of obstruction of depositions. Mr. Hamlin expressed some concern that if the Council decided to do nothing, even if only temporarily, that might create an impression that the Council is unresponsive to civil practice problems identified by the Bar, specifically the Procedure and Practice Committee, and also might encourage proliferation of Supplemental Local Rules more restrictive of what counsel defending depositions can properly do than anything the Council would seriously consider.

Mr. Gaylord said he was opposed to the motion to table this item. He further stated that the concerns he had expressed at an earlier meeting, that the originally proposed version of 39 D(3) would unduly restrict defending counsel from instructing deponents not to answer questions intruding upon privileged matters and the like, had been satisfactorily met by the subcommittee's revisions as reflected in the currently pending proposal. He added that he believed the Procedure and Practice Committee had acted correctly

in bringing this problem to the Council's attention, and that he had some worry that, if the Council were now to do nothing, the OSB might cause legislation to be introduced which could result in a less desirable solution than what is contained in the current proposal. **On the call of the question, the motion to table this item was not agreed to by vote of four in favor, 16 opposed, and no abstentions.**

Judge Brewer explained that his reason for seconding Justice Durham's motion to table this proposal was not because he disagreed with it, but because he was concerned about the apparent lack of consensus on the subcommittee which prepared it. He further explained that this proposal deals with an area of practice as to which some differences in local rules might be appropriate to reflect differences in experience encountered in various parts of the state. Mr. Brothers reiterated the point that many local bar associations were working on the perceived problem addressed by this proposal, and stated his agreement with Mr. Gaylord's point that if the Council fails to act, other groups might.

Mr. Brothers, seconded by Judge Carp, then moved adoption of the proposed amendments to ORCP 39 D and E. Judge Brown stated that she strongly supported the motion because she believed that the problem of obstruction of depositions is a serious and recurring one which badly needs addressing. Ms. McKelvey stated that she would vote against this motion because she believed the proposal was premature and failed to address some significant issues which she thought required further careful consideration. **On the call of the question, Mr. Brothers' motion was agreed to by vote of 16 in favor, three opposed, and one abstention.**

e. **ORCP 55 I(2).** Judge Marcus, seconded by Judge Carp, moved adoption of the proposed amendments to subsection 55 I(2). **On the call of the question, this motion was agreed to by vote of 19 in favor, none opposed, and no abstentions.** Judge Brown, chair of the subcommittee tasked with studying problems assertedly being experienced in connection with hospital and medical records subpoenas, reported that this subcommittee had met several times during this biennium, had put in a good deal of hard work, but did not have sufficient time to complete its difficult task. She added that this work would presumably be carried over to the 1999-2001 biennium, when the Council and any subcommittee assigned to this project would have the benefit of the considerable work her subcommittee had accomplished, but was unable to complete.

f. **ORCP 70 A(2).** Mr. Hamlin reminded members that these proposed amendments were referred to the Council by the OSB Debtor/Creditor Section, not for promulgation, but for any comments and suggestions the Council might have. He also recalled

that, at the Council's September 12 '98 meeting, Mr. Gaylord's motion was agreed to that these proposed amendments be published in the October advance sheets together with the other ORCP amendments tentatively adopted by the Council, so that comments might be obtained from the bench and bar, and so that the Council would retain the option of promulgating these amendments. Mr Hamlin noted that the reason the Debtor/Creditor Section had asked the Council for any comments members might have, rather than that the Council promulgate these amendments, was that the amendments were integral parts of legislation which the OSB would cause to be introduced in the 1999 legislative session.

Mr. Hamlin asked whether there had been any reaction on the part of the Debtor/Creditor Section to the fact that the Council had published these amendments for the purpose of possibly promulgating them independently of anything the OSB might do by way of proposed legislation. Prof. Holland replied that the Debtor/Creditor Section was pleased to have the Council's support for these amendments, but added his own caution that for the Council to independently promulgate these amendments might not be wise, first because the statutory amendments of which these subsection 70 A(2) amendments are a part might not be enacted and, secondly, because if the statutory changes are enacted and these amendments are also promulgated by the Council, the former would have an earlier effective date than the latter, thereby possibly creating confusion.

Judge Marcus moved that these amendments be endorsed, but not promulgated, by the Council, but this motion was not seconded. Mr. Gaylord then moved, seconded by Judge Isaacson, that a formal vote of members be taken on whether to endorse these amendments and, if the amendments were thus endorsed, that the Legislature be informed, both of the fact of the Council's endorsement and of the reason the amendments were not promulgated. **This motion was then agreed to by vote of 19 in favor, none opposed, and no abstentions.**

**g. Staff Comments.** Several members suggested revisions to Staff Comments to one or more of the amendments adopted for promulgation as prepared by Prof. Holland. He, with accustomed docility, agreed that all suggested revisions would be reflected in the Staff Comments as published.

**Agenda Item 4: Election of 1999 Legislative Advisory Committee ("LAC").** Mr. Hamlin declared the floor open for nomination of members to compose the 1999 LAC. The following were unanimously so elected: Mr. Alexander, Judge Dickey, Mr. Gaylord, Judge Linder, and Mr. McMillan.

**Agenda Item 5: Election of 1999 Officers.** Justice Durham nominated the following members for the offices indicated, to serve during the year 1999: Mr. Hamlin to be Chair, Mr.

Alexander to be Vice Chair, and Mr. McMillan to be Treasurer. Mr. Hamlin asked for any additional nominations. There were no such nominations. Judge Brewer moved, and was duly seconded, that nominations be closed, and this was unanimously agreed to.

**Agenda Item 6: Old business.** Judge Brown said that it would be useful for the Council to confirm the authority of the Rule 55 subcommittee to continue its work during the interim period before the Council's first meeting in the coming biennium. Mr. Hamlin replied that he was sure that he was expressing the sense of the Council in stating that any work which the Rule 55 subcommittee, its chair, and members could manage to accomplish during the interim period would be most welcome and appreciated. He added that he anticipated that a Rule 55 subcommittee would be reappointed at the Council's first meeting in the 1999-2001 biennium, comprised of continuing members willing to serve, to which other members might be added.

Judge Brown circulated a copy of a recent order and opinion of Multnomah County Circuit Court Judge David Gernant ordering a party to permit the adverse party to depose certain of the former's intended expert witnesses. Several members stated that they would like to have a copy of this order and opinion, and Prof. Holland said he would make and send copies to all members.

**Agenda Item 7: New business.** Justice Durham mentioned that Chief Justice Carson had recently commented to him about how the "exact language" requirement of ORS 1.735(2) is so rigid that it would prohibit the Council from acting upon suggestions received during the comment period following publication of tentatively adopted amendments in the October advance sheets, regardless of how much they might improve draftsmanship, but without changing the meaning of published amendments. The example used by Chief Justice Carson was that ORS 1.735(2) would prohibit the Council from changing "phone" to "telephone." Justice Durham stated that he was inclined to agree with the Chief Justice's comment, and would like to see the Council give some consideration to how this procedural problem might be addressed, possibly, though not necessarily, by asking the Legislature to amend or repeal ORS 1.735(2). Mr. Hamlin expressed agreement with this thought.

**Agenda Item 8: Adjournment.** Without objection Mr. Hamlin declared the meeting adjourned at 12:31 p.m.

Respectfully submitted,

Maury Holland  
Executive Director