

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of January 8, 2000
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present: J. Michael Alexander William A. Gaylord
Lisa A. Amato Daniel L. Harris
Benjamin M. Bloom Rodger J. Isaacson
Bruce J. Brothers Mark A. Johnson
Ted Carp Michael H. Marcus
Kathryn S. Chase Connie Elkins McKelvey
Kathryn H. Clarke John H. McMillan
Allan H. Coon Karsten Rasmussen
Robert D. Durham Ralph C. Spooner

Excused: Richard L. Barron
Lisa C. Brown
Don A. Dickey
Virginia L. Linder
Nancy S. Tauman

The following guests were in attendance: Ms. Robin LaMonte, of the Legislative Fiscal Office; Ms. Colleen Kinney, of the Department of Administrative Services (Budget and Management Division); Mr. Jason Crowe, Legislative Chairman of the Oregon Association of Process Servers (OAPS); Ms. Pat Bennett, President of the OAPS; Ms. Amanda Rich, a lobbyist representing the OAPS. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Mr. Alexander) Mr. Alexander called the meeting to order at 9:35 a.m. He welcomed the guests in attendance.

Agenda Item 2: Approval of October 30, 1999 minutes. The minutes of the 10/30/99 meeting were unanimously approved as previously distributed, except that the date shown in Agenda Item 2 as the date of the previous meeting was corrected from October 30, 1999 to December 12, 1998.

Agenda Item 3: Election of Council officers and members of the Executive Committee for the year 2000. Mr. Gaylord, seconded by Ms. Chase, moved nomination of the following officers for the year 2000: Mr. Alexander to be Chair, Mr. Spooner to be Vice Chair, and Mr. McMillan to be Treasurer. This motion was agreed to by unanimous voice vote. Judge Marcus, seconded by Judge Coon, then moved that nominations be closed, and this motion was agreed

to by unanimous voice vote.

Agenda Item 4: Proposal of the OAPS regarding ORCP 7 (see Attachment "OAPS" to agenda of this meeting) (Mr. Alexander). Mr. Alexander recognized the guests associated with the OAPS for the purpose of explaining their proposal for amendments to Rule 7. Ms. Rich stated that the OAPS wished the Council to consider two important difficulties she said were being experienced by members of that organization in serving summonses and complaints and, if possible, try to devise solutions. The first of these difficulties, she explained, was the refusal by many large employers to cooperate with private process servers when the latter were attempting to make personal service on employees at the place of employment. This lack of cooperation, she added, usually meant the added time and expense of calling upon deputy sheriffs to effect service.

Ms. Bennett elaborated on this difficulty, adding that several employers were taking the position that private process servers, as opposed to deputy sheriffs, are not welcome on their premises even for the legitimate purpose of serving summonses and complaints. She added that the OAPS was not asking the Council to promulgate an amendment that would necessarily compel employers to do such things take an employee off the production line to accept personal service, but does urge that some provision be added to the ORCP making clear to employers that they have some obligation to cooperate with servers in some manner that would not be unduly disruptive. She suggested as one possibility a provision obligating employers either to accept service on behalf of employees or physically produce employees for personal service.

Mr. Crowe introduced himself as currently President of Nationwide Process Servers in Portland. He suggested the present requirement, that prior to effecting office service an effort must be made to serve defendants at the residence, led to inefficiency, delay, and additional costs. He therefore asked that this requirement be dropped. Ms. Bennett added that there are occasionally situations when office service is safer than trying to make service at a residence.

Mr. Gaylord said that he thought both of the OAPS proposals distributed at the meeting should be placed on the agenda for further consideration. He noted that providing for service at places of employment might prove more difficult than the other proposal about eliminating the requirement of attempted residence service. Mr. McMillan asked whether the proposal about service at places of employment had been run by the Association of Oregon Industries, to which the response was that it had not been. Judge Marcus noted that authorizing service at places of employment might involve placing legal obligations on non-litigant, third parties, and therefore might be near or beyond the limits of the Council's statutory authority.

Discussion of this item concluded with general agreement that the OAPS proposals should be included on the 1999-2001 agenda, along with any other proposed amendments to Rule 7, including Mr. Bloom's suggestion that ORCP 7 D(4)(a) be clarified with regard to its application to private premises open to the public, such as parking lots. (See Mr. Bloom's 1-5-00 memo, copies of which were distributed at this meeting, and a copy filed with the original of these minutes.). It was further agreed that the OAPS and other proposals regarding Rule 7 would be studied by a subcommittee consisting of Mr. Bloom, Ms. Clarke, Mr. Johnson, and Judge Rasmussen.

Agenda Item 5: Discussion and decisions regarding 1999-2001 biennial agenda (see Attachments A - F of agenda of this meeting) (Mr. Alexander)

a. ORCP 44 and 55. Mr. Alexander asked Mr. Gaylord to bring the Council up to date on the issues regarding Rules 44 and 55, especially Sections 55 H and I, on which the subcommittee¹ formerly chaired by Judge Anna Brown was resuming work.

Mr. Gaylord referred to a letter dated 1-7-00 which he had faxed to the other members of this subcommittee, and to Judge Brown, summarizing where he thought matters stood. (A copy of this letter is filed with the original of these minutes.) He said that there existed eight drafts of proposed amendments, but that no amending language was then quite ready for submission to the Council. He proceeded to summarize the goals of the subcommittee as follows: i. to restore to the rules a clear opportunity for a person whose records to object to their production before they are produced by the hospital or health care provider on the ground of their being categorically privileged or outside the scope of discovery, ii. to give a person whose records are sought a clear opportunity to make objection to specific information contained in the records, on grounds of privilege or as being outside the scope of discovery, after the records have been copied by the hospital or health care provider, but before being sent to the requesting party, iii. to facilitate reliable and complete disclosure of discoverable health care records to parties entitled to receive them without requesting parties having to rely on disclosures by adverse parties, iv. to eliminate or minimize the need for repetitious subpoenas or requests, and repeated handling and disputing of the same records, v. to preserve the option of a simple request for production when that is workable, vi. to give clear guidance to health care providers about what is required on their part, vii. to eliminate arbitrary distinctions between

¹Ms. Amato, Ms. L. Brown, Ms. Chase, Mr. Spooner, and Ms. Tauman.

"hospital" and "health care" records while being consistent with definitions and procedures found in ORS Chapter 192, viii. to take advantage of existing sanctions for non-compliance with requests or subpoenas, and ix. to retain the convenience of the present rules whereby subpoenaed records may be provided without attendance at a deposition or trial.

Mr. Gaylord further commented that a somewhat novel procedure was then under consideration whereby the party seeking records would serve two documents on the party whose records are sought, with the latter in turn serving the documents on the health care provider. These documents would be a subpoena duces tecum describing the requested records and a consent form signed by the patient or other person authorized to consent to their release. An instruction sheet would also be provided to the records custodian which would indicate that the requested records should be placed in separate sealed envelopes and forwarded in a single package to the patient or patient's attorney, who would then have an opportunity to inspect them before forwarding them to the requesting party assuming there were no objections of privilege or scope.

Mr. Gaylord concluded this summary by referring to proposed new regulations prepared by a private organization called the Health Privacy Project, which could have an impact on the subcommittee's work. (A copy of those regulations is filed with the original of these minutes.)

b. Jury reform. Ms. Alexander referred members to Attachment E to the agenda of this meeting and to a packet of materials regarding jury reform (copy filed with original of these minutes) previously mailed to members by Judge Harris, and called upon Judge Harris to present this item.

Judge Harris noted that Arizona has not yet done a great deal by way of adopting new rules beyond adopting a rule permitting jurors to take notes which is already a part of Oregon's legal culture. Mr. Johnson commented that these proposals could get the Council involved in how the public perceives trial by jury. Mr. McMillan suggested that he felt some uneasiness about the Council involving itself in something as fundamental as jury trial, to which Mr. Alexander responded that the present ORCP already address several aspects of that institution. Judge Marcus commented that it is an interesting question whether the issues relating to jury reform, as alluded to in Attachment E, are better dealt with by legislators, whose authority derives from having been elected by the people, or by the Council, whose authority derives from its expertise. Judge Carp, speaking as a member of the Practice & Procedure Committee, emphasized that that Committee was very anxious for the Council to take a good look at the matters mentioned in Attachment E. Mr. Brothers observed that the matters broached in Attachment E mostly relate to things that some judges are already doing as a matter of their own discretion, and

therefore the issue confronting the Council is whether it would be useful for the ORCP to provide express authority for them that would be uniform throughout the state.

Judge Marcus mentioned that Judge R. P. Jones had suggested that the Council should promulgate a new ORCP provision regarding whether a plaintiff may have a representative attend an independent medical examination (IME).

Following a short break, Judge Harris offered a motion, duly seconded, that a subcommittee be appointed and authorized to prepare specific proposals for the Council's consideration. This motion was agreed to by unanimous voice vote. Judge Carp, Mr. Johnson, Ms. McKelvey, and Mr. McMillan were appointed to serve with Judge Harris as members of this subcommittee.

c. **ORCP 44 A (IME's)**. General agreement was expressed that the issues broached in Mr. Michael Brian's letter dated 10-26-99 (copy filed with original of these minutes) should be placed on the 1999-2001 agenda. A subcommittee was appointed for this purpose consisting of Ms. Clarke, Justice Durham, and Mr. Spooner.

d. **ORCP 36 (expert discovery)**. There was general agreement that this item would not be included on the 1999-2001 agenda.

e. **ORCP 22 C(1) (impleader)**. Mr. Spooner offered a motion, duly seconded, that Prof. Holland be directed to draft a proposed amendment for the Council's consideration that would solve this problem. The motion was agreed to by unanimous voice vote.

f. **ORCP 21 A(3) (defense of prior action pending)**. Mr. Johnson said that he was aware of a case which implicated the present rule and it caused a problem. There was general agreement expressed that Prof. Holland draft a proposed amendment responsive to any problem caused by this subsection.

g. **ORCP 63 C (waiver of new trial)**. General agreement was expressed that this item would not be included on the 1999-2001 agenda.

h. **ORCP 60 (dismissal without prejudice as alternative to direction of verdict)**. General agreement was expressed that this item would not be included on the 1999-2001 agenda.

i. **ORCP 13 B and 19 C (whether denials of allegations of affirmative defenses need be included in a response)**. There was general agreement that, if there is an inconsistency between these sections, the problem does not arise often enough to warrant the Council's attention as an item included on its 1999-2001 agenda.

j. **ORCP 54 E (offer of judgment; possible conflict of**

interest). Justice Durham agreed to report back to the Council as to whether an amendment to this section would be advisable and, if so, to submit a draft amendment for its consideration.

k. ORS 1.735(2) ("exact language" requirement). It was agreed that Justice Durham and Judge Harris would consider whether to address this issue and, if so, how.

l. ORCP 32 N(1)(e)(v), 62 F, 82 B (technical corrections). It was agreed that these corrections of references to the Disciplinary Rules and the Oregon Revised Statutes could be voted on as tentatively adopted amendments at the September 2000 meeting.

m. ORCP 34 B(2) (elimination of need to substitute a personal representative for deceased insured defendant). It was agreed that Mr. Brothers would prepare a draft amendment for the Council's consideration.

Agenda Item 6. Old business. No item was raised.

Agenda Item 7. New business. No item was raised.

Agenda Item 8: Adjournment. After reminding members that the next meeting of the Council would be on February 12, Mr. Alexander, without objection, declared the meeting adjourned at 12:07 p.m.

Respectfully submitted,

Maury Holland
Executive Director