

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of February 12, 2000
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present: J. Michael Alexander William A. Gaylord
 Lisa A. Amato Mark A. Johnson
 Richard L. Barron Virginia L. Linder
 Benjamin M. Bloom John H. McMillan
 Kathryn H. Clarke Karsten H. Rasmussen
 Allan H. Coon Ralph C. Spooner
 Don A. Dickey Nancy S. Tauman
 Robert D. Durham

Excused: Bruce J. Brothers
 Lisa C. Brown
 Ted Carp
 Kathryn S. Chase
 Michael H. Marcus
 Connie Elkins McKelvey

The following guests were in attendance: Attorney David S. Barrows, representing the Oregon Association of Process Servers (OAPS), and Amanda Rich, lobbyist for OAPS. Also present were Maurice J. Holland, Executive Director, and Gilma J. Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Mr. Alexander). Mr. Alexander called the meeting to order at 9:36 a.m.

Agenda Item 2: Approval of minutes of January 8, 2000 Council Meeting (Mr. Alexander). The minutes of the January 8, 2000 Council meeting were approved as distributed with the agenda of this meeting with the following corrections: On p. 2, under Election of Council Officers, change the second sentence to read: "This motion was agreed to and the slate was approved by unanimous voice vote"; on p. 4, third line of second complete paragraph, insert "federal" between "new" and "regulations," and at the beginning of the first sentence under "Jury Reform" change "Ms." to "Mr."

Agenda Item 3: Reports regarding items of pending business (Mr. Alexander). (Note that, in order to accommodate guests, the following items were taken up in the order shown below rather than the order indicated in the agenda of this meeting.)

a. **Report of ORCP 7 Subcommittee (Judge Rasmussen).** Judge Rasmussen stated that drafting of some proposed amendments, responsive to concerns expressed by the OAPS and others, was underway, and that he expected draft amendments would be ready for submission to the Council at its next meeting. Some members

commented that they questioned whether it is within the Council's authority to place obligations on non-parties, specifically employers, such as constituting them agents of employees for purposes of accepting service or mandating that they make employees personally available to be served. Mr. McMillan asked whether any provision should be made to protect employees who might not understand English. Mr. Barrows responded that the OAPS would consider this question, and report any suggestions it might have in that regard to the subcommittee.

b. Report of the ORCP 44/55 Subcommittee (Mr. Gaylord). Mr. Gaylord reported that this subcommittee was working its way through several alternative drafts of proposed amendments to deal with these difficult issues, and that it expected that some specific amending language would be ready for submission to the Council at its next meeting.

c. Report of Jury Reform Subcommittee (Mr. Alexander). In the absence of Judge Harris, subcommittee chair, Mr. Alexander commented that he had been in contact with Ms. Susan Grabe and had discussed with her the fact that, in addition to the Council, at least two other organizations are currently working on the general topic of jury reform, they being the OSB Procedure & Practice Committee and the Civil Law Advisory Committee. Mr. McMillan reported that Judge Harris was in the process of setting up a telephone conference to include all subcommittee members, and expected that would occur in the near future.

Mr. Alexander asked Mr. Spooner to provide him with the name of the president of the Arizona counterpart of the OADC so he might contact the latter to find out how jury reform was working out in that state. Mr. Gaylord stated that he would be opposed to any proposal whereby the identities of alternate jurors would not be disclosed to parties at the outset of trial. Judge Dickey noted that his practice, provided the parties consent, has been to give alternate jurors the option of leaving at the end of trial or remaining throughout the remainder of proceedings strictly as observers.

d. Report of ORCP 44 A Subcommittee (Justice Durham). Justice Durham reported that the subcommittee had been hard at work, particularly in collecting such pertinent material as Oregon cases, rules or statutes from other states, and bar journals. Given the difficulty of the subject and the mass of materials available for study, Justice Durham said he could not give a firm prediction as to when draft proposed amendments would be ready for the Council's consideration.

e. Report regarding ORCP 21 A(3) (defense of prior action pending--see Attachment A to agenda of this meeting) (Prof. Holland). Prof. Holland explained the concern he had with the present provision, and why he thought it should be amended to provide for a discretionary stay rather than an apparently mandatory dismissal. He added that, should the Council

consider amending section 21 A, one issue it should probably resolve is the scope of its application, that is, whether it would apply only to prior actions pending in an Oregon state court, to any federal or state court in Oregon, or to any court in the United States.

Justice Durham said that his understanding of the present 21 A(3) was that it placed a pleading burden on a party which wished to raise the issue of a prior pending action, but did not place any particular obligation on the court. Mr. Bloom stated that his understanding was that he, along with other members, was supposed to work on this issue, and that he would prepare a memo to the Council before further deliberations on this issue. He added that he thought that, even after a motion to dismiss on the basis of a prior action pending has been granted, the court retains discretion to delay ordering entry of judgment of dismissal, which would be the functional equivalent of a stay of dismissal. Mr. Spooner commented that his experience suggested that the present language of the provision affords adequate flexibility. Judge Linder briefly described a recent case where, in the context of a divorce and property division, the Oregon court lost subject-matter jurisdiction following its initial dismissal because a court of another state granted a divorce to the parties.

Discussion of this item concluded with appointment of a subcommittee to consider it further consisting of Mr. Bloom, Mr. Johnson, and Judge Linder.

f. Report regarding ORCP 22 C (impleader and comparative fault--see Attachment B to agenda of this meeting) (Prof. Holland). Prof. Holland reminded members that a problem with this provision had been encountered by a Portland practitioner, who phoned him to bring it to the Council's attention. The problem appeared to be, he continued, that 22 C permits impleader of a third-party defendant only when a third-party plaintiff alleges some form of liability running from the former to the latter, which is not the case in situations where the relatively new comparative fault statutes apply. In addition to attempting to deal with that problem, Prof. Holland added that his proposed amendment would also shorten the time within which a third-party complaint may be served without leave of court or agreement of other parties from 90 to 30 days, and would provide that when that period has expired, service of a third-party complaint would require either consent of the other parties or leave of court, but not both.

The general sense of the members was that the 90-day period had worked well, and therefore should not be changed. Judge Barron stated that he thought the requirement in the present language, that both consent of the parties and leave of court are needed to authorize service of a third-party complaint after 90 days, should be retained. Justice Durham commented that he would have difficulty with any provision which authorized joinder of new

parties merely for the purpose of comparing their possible fault with that of the original defendant.

At the conclusion of this discussion Mr. Alexander appointed Judge Barron, Mr. Bloom, and Mr. Gaylord as a subcommittee to consider this matter further and report back to the Council.

g. Report regarding ORCP 67 C(2) (limitation of damages awarded by judgment--see Attachment C to agenda of this meeting) (Prof. Holland). Several members noted that this issue had a history, including a period of time when no specific amount of damages needed to be stated in the prayer for relief. No members expressed a sense that any problems are being encountered under the current language of this subsection. Mr. Spooner's motion, seconded by Judge Dickey, to table this item was then agreed to by unanimous voice vote.

h. Report regarding ORCP 34 B(2) (substitution of personal representative). In Mr. Brothers' absence, further discussion of this item was deferred to a future meeting.

i. Report regarding ORCP 54 E (possible conflict of interest) (Justice Durham). Justice Durham reminded members that the issue had been suggested to the Council for its consideration by footnote 4 in *For Counsel, Inc. v. Northwest Web Co.*, 329 Or 246, P2d (1999). The question is whether the existing language of 54 E creates a possibility of a conflict of interest between a client and his or her attorney when an offer of judgment is made. Justice Durham added that, to the extent a difficulty does exist under the current language of the provision, it will not be simply to craft a solution, and that he would welcome suggestions from other Council members or possibly appointment of a subcommittee to work with him. In response to this suggestion Ms. Amato, Mr. Johnson, and Ms. Tauman agreed to serve with Justice Durham as a subcommittee to address this issue.

j. Report regarding "exact language" requirement of ORS 1.735(2) (Justice Durham). Justice Durham reminded members that Judge Harris and he had been appointed to give some thought to this statutory matter. He added that he had not yet been able to get together with Judge Harris, but expected that that would happen reasonably soon, and that whatever conclusions they reached would be reported to the Council in a timely manner.

Agenda Item 4: Old business (Mr. Alexander). Prof. Holland reminded the meeting of the letter dated 12-15-99 from Mr. Richard Weill suggesting that any provisions of the ORCP which require that lawyers execute affidavits should be changed to require certifications instead. There was general agreement that, at some future meeting, Prof. Holland would report to the Council on all ORCP provisions requiring affidavits on the part of attorneys where substitution of certification might be appropriate.

Agenda Item 5: New business (Mr. Alexander).

Discussion occurred as to the advisability of holding the scheduled March Council meeting. This concluded with general agreement that the March meeting would not be canceled at this time, but that, depending on information Mr. Alexander would receive from the ORCP 44/55 and other subcommittees as to their progress with drafting, he would retain the option of canceling the March meeting should that seem desirable.

Agenda Item 6: Adjournment (Mr. Alexander). On motion made, duly seconded, and agreed to, the meeting was adjourned at 11:55 a.m.

Respectfully submitted,

Maury Holland
Executive Director