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

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

The following guests were in attendance: Attorney David S. Barrows, representing Oregon Association of Process Servers (OAPS); Patricia Bennett, President, OAPS, Gloria Carter, member, OAPS, Jason Crowe, Legislative Chair, OAPS, and Amanda Rich, lobbyist for OAPS. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. Mr. Alexander called the meeting to order at 9:32 a.m.

Agenda Item 2: Approval of minutes. The minutes of the February 12, 2000 were, without objection, approved as distributed to members with the agenda of this meeting.

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 on the agenda of this meeting.)

b. Report of ORCP 7 Subcommittee (Judge Rasmussen) (see Attachment B to agenda of this meeting, copies of which were distributed at the beginning of this meeting and a copy of which is filed with the original of these minutes). Judge Rasmussen briefly summarized the proposed amendments to ORCP 7 D as shown in Attachment B and the purposes they were intended to achieve. Mr. Alexander said that the

proposed amending language appeared to accomplish the purposes stated by Judge Rasmussen. Mr. Brothers commented that the provision for service at places of regular employment risked severe embarrassment to persons thus served, and that he was inclined to oppose such service method. Mr. Bloom stated that the full Council should give careful consideration to whether service by delivery to a personnel manager or equivalent would afford adequately reliable notice to meet the standard of due process.

Judge Marcus asked what was meant by the proposed new language in ORCP 7 D(2)(d)(ii) [Attachment p. B-1, lines 6-8]: "or designated by this section to receive service on the defendant's behalf, ..." Judge Rasmussen explained that this proposed language had nothing to do with the proposal regarding service at places of regular employment, but was intended to cover possible situations where the person signing the receipt for a mailing might not be, technically speaking, an agent of the defendant. Judge Rasmussen agreed with the general sense of the members that the Subcommittee should give further thought to whether the language questioned by Judge Marcus would be necessary or appropriate.

Judge Rasmussen then explained the difference between Alternatives A and B [Attachment B, lines 20-26], namely, that if the former were adopted, office service could be made even if no prior attempt had been made to effect service at the defendant's residence, whereas Alternative B would require that at least one such prior attempt be made. Mr. Gaylord queried how Alternative B would work if the plaintiff doesn't know where the defendant resides. Judge Rasmussen commented that adding the words "last known" might solve this problem.

Mr. McMillan stated that he would never vote in favor of an amendment authorizing service at places of employment. He added that, if he were an employer, he would never allow a process server on his premises, and also noted that many businesses have quite a few independent contractors on their premises, applicability to which would be doubtful.

Mr. Alexander asked the guests affiliated with the OAPS whether they wished to offer any comments. Mr. Jason Crowe, Legislative Chair, OAPS, responded that the option of effecting service at places of employment would save a great deal of trouble and expense. He added that the purpose of the proposed amendments now under consideration was not to make the work of servers easier, but to make the process of accomplishing valid service more efficient and less costly. He also said that residence service is always servers' first preference, but that there are circumstances where requiring abode service results in nothing but waste of time and added expense. Ms. Amanda Rich, lobbyist for

OAPS, stated that Rhode Island has a statute making it unlawful for employers to bar servers entering places of employment to make service. Mr. Alexander and Judge Marcus commented that a provision of that sort would exceed the authority of the Council.

Mr. Alexander then called for a straw vote to determine how many members would be inclined to support, and how many inclined to oppose, any provision authorizing service at places of regular employment. Ten members expressed themselves as inclined to support such a provision, and nine members expressed themselves as being inclined to oppose it.

Discussion of this item concluded by Mr. Barrows stating that, after consultation with the OAPS, he would prepare a working paper addressed to the Subcommittee containing that organization's thoughts and suggestions on how these issues might best be resolved. Mr. Alexander stated that any communication from the OAPS would be welcomed by the Council and the Subcommittee. Mr. McMillan commented that it would be helpful if any document prepared on behalf of the OAPS were to include possible legislative solutions. Mr. Barrows expressed the OAPS's appreciation to Judge Rasmussen and other members of the ORCP 7 Subcommittee for the hard work and effort being devoted to this task.

a. Report of ORCP 44/55 Subcommittee (Mr. Gaylord) (see "Final Working Draft - 4/3/00, copies of which were distributed at the beginning of this meeting, and a copy of which is filed with the original of these minutes). Mr. Gaylord briefly recapitulated the principal goals which this Subcommittee has sought to accomplish as follows: i. to preserve the relevant evidentiary privileges both technically and practically; ii. to comply with federal disclosure requirements; iii. to facilitate the full exchange of information as efficiently and at least cost as possible; iv. to limit the burden of compliance on the part of health care providers; v. to ensure that all litigants receive accurate and complete records to the extent they are entitled to them; and, vi. to resolve the existing inconsistencies between Sections 55 H and I.

Mr. Gaylord continued by outlining the methodology by which the proposed amendments would achieve the aforementioned goals. He explained that proposed 44 C(2)(a) would keep in place the existing procedure by which health care records may be obtained by means of a request for production of such records, and also the option of requesting production of a written release to the discovering party, which would then use the release to obtain the records from the records custodian.

Mr. Gaylord further explained that proposed 44 C(3) is the

take-off point for a new concept relating to obtaining health care records directly from records custodians. Proposed 44 C(3) provides that health care records may be obtained, at least within the confines of formal discovery, from a party exclusively by the alternative methods set forth in 44 C(2)(a) or (b), or from a health care provider exclusively by the methods set forth in proposed 55 H, which incorporates several existing statutory definitions and is also drafted to assure compliance with existing federal disclosure requirements. He further noted that H(2) contemplates an innovative procedure for obtaining health care records directly from health care providers, including but not limited to hospitals, which calls for prior service on the party whose records are being sought of a subpoena directed to the appropriate custodian, together with an "Authorization to Disclose Health Care Records" in compliance with ORS 192.525(3). He added that, pursuant to federal disclosure requirements, certain kinds of hospital and other kinds of health care records may not be obtained by subpoenaing the records custodian unless the subpoena is accompanied by the authorization of the patient. He also pointed out that all of the critical terms employed by the proposed amending language incorporates existing statutory definitions, so there should be no uncertainty as to their precise meaning.

Mr. Gaylord continued by stating that a great deal of careful thought had gone into ensuring that objections to discovery, either by way of privilege or as being beyond the proper scope of discovery, are protected both in theory and practice. The most frequent stage at which any objections could be raised would be within 14 days after service of the subpoena and authorization on the party whose records are sought, when such party could serve written objections on the discovering party. That party would then have the option of moving for an order to compel pursuant to ORCP 43 B. The party whose records are sought would also have the option of moving for a protective order, limiting the obligation to produce records, pursuant to ORCP 36 C. Another innovative feature of the proposed amendments is the provision for a "Statement of Instructions," to be prepared by the party whose records are sought and served by that party on the custodian along with the subpoena and the authorization. Proposed 55 H(6)(a)(i) is intended to reduce the burden of discovery on parties and also on records custodians by providing that the names of all parties or their attorneys wishing to obtain copies of the records may be included in the instructions.

Ms. Amato stated that the Subcommittee had made every effort to ensure not only that its proposed amendments would work with existing federal and state law, but also that they will work with a law which Congress is now in the process of enacting. She added that Congress has missed the 8/21/99 deadline for passing a

comprehensive privacy act, and that the Secretary of Health and Human Services has also missed the deadline for implementation of regulations. She said, however, that the Subcommittee had carefully studied the Secretary's proposed regulations, and, subject to only one concern, has concluded that the proposed ORCP 44 and 55 H and I amendments will be entirely consistent with such regulations. That single concern, she added, is that the specific language of the "Authorization to Disclose Health Care Records," as set forth in proposed 55 H(2)(b), must comply with regulations as to which the Secretary is still seeking comments. The Subcommittee will, of course, keep a close watch on how those federal regulations emerge in final form.

Ms. McKelvey stated that, while she greatly appreciated the very hard and thoughtful work done by the Subcommittee, she nonetheless had some concerns as an attorney who often represents medical defendants. One of those concerns, she said, was that the number of stages at which the plaintiff's attorney can object to records requests or subpoenas, and the need to first serve that attorney, could lead to delays in obtaining records needed for other discovery and in preparation for trial. By her calculation, she added, under the proposed amendments it could take as much as two months to obtain health care records, and that could pose problems given the fact that trials are often scheduled for 12 months after filings of complaints. She added that her second concern was that the proposed amendments appear to require authorizations in all cases where health care records are requested or subpoenaed, but, she pointed out, such authorizations are required only for records which contain information about certain matters, such as HIV testing. Her third concern, she concluded, was that, if a plaintiff happened to be out of the country, there might be an extended delay before his or her attorney could obtain the required signature.

Discussion of this item concluded by Mr. Gaylord's asking any member who wished to comment on these proposed amendments to forward such comments to the Subcommittee as promptly as possible, hopefully early enough so that the Subcommittee will have them prior to the May 20 Council meeting. Justice Durham commented that he thought it extremely important that any members absent at this meeting be brought up to date on the issues they raise, so that the Council has the benefit of everyone's possible concerns and suggestions at the earliest possible date.

c. Report of Jury Reform Subcommittee (Judge Harris) (see memo by Judge Harris dated April 4, 2000 faxed to all members, a copy of which is filed with the original of these minutes). Judge Harris reported that the Subcommittee was inclined to limit its consideration to the first five items shown in his April 4 memo. He asked for the members' approval for this

project to be discussed at the forthcoming meeting of the Judicial Conference, which was unanimously agreed to. He added that the Subcommittee will keep in touch with similar work that is underway on the part of the OSB Procedure and Practice Committee and of the Civil Law Advisory Committee, and with judges in Arizona. Judge Harris concluded this report by saying that the Subcommittee plans to bring more refined proposals for possible amendments which might be needed to ORCP 57 through 59 at the Council's June meeting.

NOTE: Agenda Items 3d through 3i were deferred to one or more future meetings of the Council.

Agenda Item 4: Old business. No item of old business was raised.

Agenda Item 5: New business. No item of new business was raised.

Agenda Item 6: Adjournment. Without objection Mr. Alexander declared the meeting adjourned at 12:03 p.m.

Respectfully submitted,

Maury Holland
Executive Director