COUNCIL ON COURT PROCEDURES
Minutes of Meeting of June 10, 2000
5200 Southwest Meadows Road
Oregon State Bar Center
Lake Oswego, Oregon

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

The following guests were in attendance: Judge Robert P. Jones; Susan Evans Grabe, Public Affairs Attorney, Oregon State Bar; Attorney David S. Barrows, representing the Oregon Association of Process Servers (OAPS); Mr. Jason Crowe, Legislative Chair, OAPS; Ms. Amanda Rich, lobbyist for OAPS; and Attorney Jim Edmonds, representing Oregon Association of Defense Counsel (OADC).

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 9:40 a.m.

Agenda Item 2: Approval of minutes. On motion of Judge Harris, seconded by Mr. Spooner, unanimously agreed to, the minutes of the May 20, 2000 meeting were approved as distributed with the agenda of this meeting except that Mr. Bloom's middle initial was corrected from "H." to "M."

Agenda Item 3: Reports:

3A. ORCP 7 D (see Attachment 3A to agenda of this meeting). Prof. Holland reported that Judge Rasmussen had asked him to inform the meeting that the amendments proposed to ORCP 7 D, as set forth in Attachment 3A, were ready for debate and possible tentative adoption.

Mr. Alexander recognized Ms. Rich of the OAPS, who expressed the thanks of that organization for the efforts of the Council and its Subcommittee to deal with certain problems being encountered by servers. She stated that the OAPS prefers a provision, similar to a Florida statute, which would require employers to cooperate with servers in effecting personal service on employees rather than the proposed amendment, now withdrawn by the Subcommittee, which would authorize a new kind of substitute service by delivery of papers to personnel managers or the like. She added that the OAPS understood the Council's view that enactment of that kind of provision, in the form of an ORCP amendment, would be beyond the Council's authority since it would impose obligations directly on non-litigants.

Several members mentioned that they saw an important distinction between an ORCP 7 provision obligating employers to cooperate in effecting service, as opposed to subpoenas issued pursuant to Rule 55, which also imposed obligations on non-litigants. This difference, they explained, was that, in the latter instance, obligations are imposed by means of a subpoena preparatory to a court order if needed. Ms. Rich stated that OAPS had inquired of employer organizations whether they would object to a statute which would require employers to cooperate in service of papers on employees, that no objections had been raised thus far, but that no definitive responses had yet been received.

Justice Durham expressed concern that, in its efforts to obtain a solution to the problem of serving employees at places of employment, the OAPS might find itself "whipsawed," in the sense of first going to the Council and being told to approach the legislature, then having the legislature respond that it is a matter for the Council to handle.

Mr. Gaylord asked whether the Council might properly recommend enactment of a statute that might solve this problem. Justice Durham suggested that the Council's Legislative Advisory Committee might be able to lend assistance if the legislative process is engaged. Prof. Holland pointed out that, prior to every session, the Chair of the Council sends an letter to the Speaker of the House and the President of the Senate reporting on ORCP amendments finally promulgated, and that this letter might appropriately include a supportive comment about a legislative solution.

Several members commented that, by means of this letter or otherwise, the legislature should be informed that, in declining to promulgate a Rule 7 provision requiring cooperation on the part of employers, the Council was not prompted by substantive opposition to the proposal, but by a belief that it would exceed the Council's statutory authority. Prof. Holland asked Ms. Rich

whether the language of the amendments proposed to ORCP 7 D, in particular the language removing the requirement that residence service first be attempted before office service could be undertaken, was apt from the OAPS's viewpoint, to which she responded that it was.

Mr. Alexander then asked Mr. Bloom, in the absence of Judge Rasmussen, to summarize the proposed amendments and their purposes. Mr. Bloom responded that the purposes of the D(3)(a) amendment were to distinguish between the physical act of delivering papers to someone, as opposed to serving someone who might be a different individual, and to make service more efficient and less expensive by eliminating the requirement that, before undertaking office service, residence service must be attempted. He added that the purpose of the amendment proposed to ORCP 7 D(2)(d)(ii) was to make its language consistent with other provisions of Rule 7, and that the purpose of the amendments proposed to D(4)(a)(i) and (b) was to extend availability of service in motor vehicle accident cases to accidents occurring on "premises open to the public as defined by law," an example of which he said would be a store's parking lot.

Justice Durham suggested some slight changes in the wording of the proposed amendment to ORCP 7 D(4)(a)(i). Specifically he suggested that in lines 28, 33, and 46 of Attachment p. 3A-2 the word "streets" should be reinserted, and that lines 34 and 47 of Attachment p. 3A-2 should be revised to read: "defined by law, of this state, * * *." There was general agreement with this suggestion, and the wording of the proposed amendments was accordingly revised. As thus revised, the proposed amendments to ORCP 7 D were tentatively adopted by unanimous voice vote. (A copy of these amendments as revised is filed with the original of these minutes.)

3C and 3G. ORCP 54 E (Justice Durham) (see Attachment 3C) /// 3 G. ORCP 44 A (Justice Durham) (see Supplemental Attachment 3G). Justice Durham stated that the disagreements with these proposed amendments expressed at the May 10 meeting were in terms of substantive policy, not language. He suggested that further consideration of this matter be put over to the July 15 meeting and that, pending that meeting, he and other members of the Subcommittee would be in a reactive mode, awaiting any suggestions which might be forwarded by Council members or others having an interest.

Mr. Bloom then introduced Mr. Jim Edmonds as a representative of OADC. Mr. Edmonds stated that OADC had some concern about being timely informed about the successive versions of proposed amendments to ORCP 44 A (IME's) and 44-55 (health care records), and also about some aspects of their content.

Justice Durham said that he had expected to have a conversation with Mr. Spooner concerning any possible objections to the proposed 44 A amendments (see Supplemental Attachment G to the agenda of this meeting) on the part of OADC, but that this had not yet occurred. Mr. Alexander told Mr. Edmonds that consideration of amending 44 A was then only in the stage of having a first draft, and assured him that there would be plenty of time and opportunity for OADC, along with anyone else having concerns, to have their input considered.

Justice Durham then commented that a great deal of the work in developing the presently proposed amendments to 44 A was done by Ms. Clarke and Mr. Spooner. He added that the work of the Subcommittee had included research into what has been done in at least 15 other jurisdictions, and that the amendments now under consideration represented compromises between the most and the least intrusive solutions which have been put in place elsewhere. As an illustration of a more intrusive procedure which the Subcommittee had rejected Justice Durham mentioned a requirement that all parties would be entitled to have counsel present at an IME. He further added that the Multnomah County guidelines concerning IME's were no longer in force, which meant that all of Oregon's approximately 160 trial judges have been left with no consistent or uniform direction about how to rule on the conditions under which IME's are conducted. He further observed that the present proposals leave fairly broad discretion to the trial court to fashion different conditions when called for by different cases, and largely rely upon enforcement of conditions to which parties have agreed in writing by authorizing sanctions when they are violated. He stated that it was an important protection for examinees that they be permitted to make a record, provided it is done in a non-obtrusive manner and that the record be available to all concerned, including the examining doctor.

Mr. Alexander observed that there have been indications that the bench would, generally speaking, welcome a formal rule on this subject. Mr. Edmonds stated that he did not believe that OADC was in the least opposed to having a rule providing guidance for IME's, but that, of course, it was concerned that any rule adopted be a fair and workable one. Mr. Spooner commented that the principal concern of OADC appeared to be to minimize discovery of examining physicians and to ensure that they are not harassed.

Discussion of these matters concluded with general agreement that further discussion of the amendments proposed to Sections 54 E and 44 A would be put over to the July 15 meeting.

3B. ORCP 44/55 (see Attachment 3B) (Mr. Gaylord). Mr. Alexander began discussion of this item by noting that the

effort to resolve various problems reportedly being encountered in connection with ORCP 44 and 55 had consumed a great deal of time and energy over the course of four years, and during all that time the effort had been to achieve three fundamental goals as to which it would be hard to imagine anyone seriously disagreeing. Those goals, he recalled, were to reduce the copying burden on records custodians, to protect patients' privileges and privacy rights, and to make sure that all parties obtain the same records. He added that the frustration, in light of those widely shared goals, appeared to remain achieving adequate consensus on exact amending language by which they might be better accomplished. He raised the question whether the task of making voluminous and often multiple copies of records, about which doctors seem to complain so bitterly, might be shifted in some way to parties and their attorneys.

Mr. Gaylord then referred members to the report of the Subcommittee meeting on June 5, 2000 (see Attachment 3E additional pp. 40-44). He commented that many medical offices, particularly smaller ones, were obviously concerned about what they perceived would be the onerous copying burden which the proposed amendments would impose. He added that he thought this concern was overdrawn, and stemmed in part from failure to understand that making multiple copies in response to a single subpoena should be considerably less burdensome than having to respond serially to multiple subpoenas.

The Subcommittee, he explained, had given serious consideration to a procedure whereby custodians would be required to produce only one copy of requested records, with the party obtaining that copy being responsible for producing additional copies and distributing them to other parties who requested them. However, he said, some Subcommittee members saw serious difficulties with that sort of arrangement, foremost among which was that it could expose requesting parties to quite lengthy delays in obtaining copies. Mr. Spooner commented that if any particular party is to shoulder the burden of making and disseminating copies, he thought it should be the claimant.

Several members expressed their opinion that it seemed unfortunate that the procedures would have to be made more complex and burdensome than they otherwise might be because of some element of distrust among members of the bar. In response it was stated that instances where distrust might justifiably exist were relatively few, but that an amended rule must take account of those instances, which it was said might amount to no more than one percent of the cases. Ms. Chase remarked that, in her experience, it was very difficult to obtain sanctions for failure to furnish complete and accurate records.

Mr. Gaylord resumed his report by noting that the proposed amendments included one new feature which was intended to allay concerns, usually of defense counsel, about plaintiffs withholding records based on their own judgments about privilege, privacy regulations, or undue breadth of requests or subpoenas. That new feature, he said, was the requirement that the party against whom discovery is sought maintain a privilege and objection log, so that other parties would know what was being withheld and the grounds for doing so.

Judge Isaacson asked whether the medical people understood the difference between having to make multiple copies, but at one time in response to a single subpoena, as opposed to having to make multiple copies serially in response to different subpoenas from different parties. Mr. Gaylord responded that he had explained this carefully to Mr. Tom Cooney, who represents the Oregon Medical Association, and that the latter seemed to agree that avoiding a series of subpoenas in any single case would be helpful. Mr. Gaylord added that one possibility which might be considered would be a requirement that all parties join in the first subpoena or, if they failed to do so, would waive the right to issue additional subpoenas. He further added that some greater effort should perhaps be made to convince the medical profession that the amendments currently under consideration were drafted with their concerns in mind, and that the burden they would impose should prove to be less than under the current rules.

Prof. Holland observed that one factor which complicates practice in this area is that Oregon does not adhere to the majority rule whereby filing a claim for injuries has the effect of waiving the physician-patient privilege with respect to those injuries. The fact that Oregon does not adhere to that waiver rule, he said, means that 55 I subpoenas always seek material which is privileged, and therefore need not be produced except to the extent the patient chooses to do so. Judge Carp stated that the Council has no authority to change rules of evidence. Mr. Gaylord took issue with the assertion that Oregon's was the "minority position."

Discussion of this item concluded by Mr. Gaylord saying that the Subcommittee wanted more time to try to iron out these problems in close consultation with OADC and any other group having a concern with these matters. In particular, he said, the Subcommittee would like to consider whether concerns about delays in obtaining records might be alleviated by reducing from two to one the opportunities for plaintiffs to make objections, even though if the first opportunity were eliminated, that would tend to increase the copying burden on custodians. There is also the need for additional time in which to consider whether a provision should be added concerning who should bear the cost burden of

copying. It was then generally agreed that the amendments proposed to ORCP 44/55 would be placed on the agenda of the August 12 meeting, and that the Subcommittee would use the intervening time to respond to objections, alleviate concerns, and try to broaden the consensus in support of them in the form in which they are finally drafted. Mr. Alexander commended the Subcommittee for its continuing hard work and strenuous efforts.

3D. ORCP 58--Jury Reform (see additional Attachment 3D to agenda of this meeting) (Judge Harris). Judge Harris distributed copies of amendments proposed to ORCP 58 A and B incorporating the following four modest changes from the current sections: 1) authorizing trial judges to permit counsel to make concise statements prior to voir dire, 2) requiring that jurors be instructed at the outset on basic duties and procedures, 3) authorizing interim instructions, and 4) authorizing juror questions. (A copy of the Subcommittee proposals is filed with the original of these minutes.) He stated that, at least for the time being, the Subcommittee had decided not to proceed with earlier proposals regarding alternate jurors, interim jury deliberations, and requiring that jury instructions be in writing. He added that he had polled the Judicial Conference, and found that about 15% of the trial judges now allow juror questions, and that about 60% would do so if the rule authorized it. He further added that on the following Saturday Chief Justice Carson and he would be conducting a discussion session on jury reform at the OADC annual meeting and would elicit the views of participants.

Mr. Gaylord commented that, with respect to proposed ORCP 58 B(9), he thought there was a significant difference between oral and written juror questions, and was inclined to believe that oral questions have the potential for causing serious problems. Judge Harris responded that, at one point in its deliberations, the Subcommittee's language specified that juror questions must be submitted in writing, but had subsequently decided to leave the option between written and oral questions open to leave room for experimentation.

Judge Isaacson questioned the wisdom of modifying the term "legal principles that will govern the proceedings" as it appears in proposed 58 B(2) by the word "elementary" on the ground that it might encourage objections if counsel thinks the judge's instructions went beyond principles that are "elementary." Judge Harris responded that the phrase "elementary principles" came from the Arizona rule, but that he would circle the word "elementary" so that the Subcommittee could consider whether a better word might be substituted.

On motion made and duly seconded, the proposed amendments to

ORCP 58 B included in the Subcommittee's Proposal 1 were tentatively adopted by unanimous voice vote on the understanding that its language could be tweaked prior to the Council's September meeting.

Mr. Alexander then recognized Judge Jones for his comments about whether amendments should allow oral juror questions at the judge's discretion. Judge Jones stated that he had been allowing oral juror questions for about four years, that most lawyers seemed to like this practice and find that it helps them in their own questioning of witnesses, and that the concerns usually expressed about them had not materialized. He added that he was entirely content with the presently proposed (B)(9) since it would keep the option of oral questions open. Mr. Spooner remarked that, while oral juror questions appear to work well in Judge Jones' courtroom, he was nonetheless opposed to authorize them generally. Mr. Gaylord expressed a similar view. There was then expressed general agreement that the issue of whether proposed (B)(9) should be changed to specify that only written juror questions could be used would remain open until the September meeting.

3E (ORCP 22 C) and 3F (ORCP 21 A). It was agreed that these items be put over to the July 31 meeting.

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 12:35 p.m.

Respectfully submitted,

Maury Holland
Executive Director