

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of October 9, 1993

Eugene Hilton Hotel
Thornton Wilder Room
Eugene, Oregon

Present: Robert D. Durham Robert B. McConville
 Susan P. Graber John H. McMillan
 Bruce Hamlin Michael Phillips
 John Hart Milo Pope
 Bernard Jolles Charles R. Sams
 John V. Kelly Nancy Tauman

Excused: Sid Brockley
 William Cramer, Sr.
 Nely L. Johnson

Henry Kantor, former Council member and Chair Emeritus for this meeting, and Susan Bischoff, former Council member, were also present.

The following visitors were present: Frank R. Alley III, Hon. Charles S. Crookham, Julie Frantz, Susan Grabe, Charles F. Hinkle, Janet Hoffman, R. William Linden, Jr., Lisa Kloppenberg, Robert Neuberger, Bob Oleson, Karsten Rasmussen, George A. Riemer, Peter Sorenson, Charles Tauman, Bob Udziela, Douglas R. Wilkinson, Charles S. Wilkinson, and Michael L. Williams. (Also present were Maurice J. Holland, Executive Director, and Gilma J. Henthorne, Executive Assistant.)

Agenda Items 1 and 2. Chair Emeritus Henry Kantor called the meeting to order at 9:40 a.m. He introduced the newly appointed Council members present (Nancy Tauman and John McMillan) and called upon them, along with continuing members and others present at the meeting, to identify themselves.

Agenda Item 3. The minutes of the February 27, 1993 meeting, without objection, were approved as previously distributed.

Agenda Item 4. Henry Kantor announced his nominations of John Hart to be Chair and Mike Phillips to be Vice Chair for the 1993-95 biennium. He asked whether there were any additional nominations for either office. Upon hearing none he asked the members to vote either in favor of, or opposition, to his nominees. The members unanimously voted affirmatively on both nominations. He mentioned that he was making no nomination with

respect to the office of Treasurer so that that election might be made by the full Council after appointment of all the new members. Kantor then relinquished the Chair to John Hart. On the Council's behalf Hart thanked Kantor for his fine work and leadership as Chair during the 1991-93 biennium and presented him with a suitably inscribed ygavel and stand.

Agenda Item 5. Chairman Hart then led an open, informal discussion concerning the Council and its future, with particular reference to some criticisms and concerns about it reportedly expressed by some legislators and others during the recently concluded legislative session.

Bob Oleson, Public Affairs Director of the Oregon State Bar, said that the difficulties the Council had experienced during the session were owing to many different factors and reflected very different perceptions of the Council on the part of various legislators. Some legislators resisted continued funding of the Council simply because of the need to make very substantial spending cuts on account of Measure 5. Others opposed continued funding from the General Fund because they think of the Council as a Bar activity that should be supported by OSB funds. Still others seem to be concerned about what they believe to be excessive delegation to the Council of legislative authority. Oleson urged Council members and the Executive Director to make good use of the interim before the 1995 session to "mend fences" with legislators and with representatives of the important organizations having a special interest in the work of the Council, by keeping them better informed and establishing with them a sound working relationship that functions in both directions.

Sen. Karsten Rasmussen stated that the Council inevitably suffers from the fact that some legislators do not like administrative rule-making because they regard it as encroaching upon the legislature's authority, a view he indicated he does not share. It also suffers from a vague, but detectable, perception in some quarters that the Council is riven by "bar politics," in the sense of plaintiffs' versus defendants' interests, rather than in the partisan sense. The feeling of some is not so much that the Council is imbalanced as between those interests, but that it suffers from too much rancor and division along these lines. Sen. Rasmussen urged the Council to be careful to avoid doing anything that would unnecessarily heighten this perception.

Sen. Peter Sorenson recalled that he wrote his third year paper in law school about the then new ORCP under the direction of the late Prof. Fred Merrill and stated that he had always valued the Council. He further stated that, as a legislator, he

wants to support the Council and would oppose putting the rules-amendment process back in the Legislative Assembly.

Judge Charles Crookham briefly recalled the historical background that led to the creation of the Council. The principal purpose of its creation was to retain the rules amendment process within the legislative process but to do this in a manner that streamlined the process and made it both efficient and current.

Mr. Mike Williams, President of OTLA, stated that the ORCP are the "envy of the nation," because they cause civil litigation in Oregon to be fair, efficient and cost-effective. He gave the absence of elaborate and expensive discovery as a prime example of what he regards as a strongly positive feature of the ORCP. He stated that OTLA has always valued and supported the Council, which he said he thinks must get some of the credit for the excellence of the ORCP, and hopes and expects that it will continue to do so. He added that OTLA had supported the amendment requiring a fifteen-member supermajority because of its view that this requirement is more in keeping with Oregon's tradition of consensus decisionmaking. He gave as an example of a recent action that had given OTLA some concern was the very close vote at its December 12, 1992 meeting by which the proposed amendment to Rule 36 to authorize discovery sharing was totally reversed before being withdrawn.

Mr. Frank Alley, Vice President of the Oregon State Bar and member of the Board of Governors, reported that the process of filling existing vacancies had been slowed by changes in the boundaries of Oregon's Congressional districts. He reported that the Board had decided that "residence" for purposes of assuring representation from all five districts means where a prospective member has his or her office, not where the home is located. He added that the Bar is creating two new sections that might be of interest to Council members, one concerning appellate practice and another concerning business law.

Ms. Julie Franz, President of the Oregon State Bar and member of its Board of Governors, stated that the Bar is concerned with fostering the greatest possible degree of "balance" in selecting new Council members, which she explained referred primarily to kinds of practice and areas of specialization.

Mr. Charles Hinkle, member of the Bar Board of Governors and Chair of its Appointments Committee, reiterated that "residence" had been determined to mean where a lawyer's office is located. He added that the effort to select new Council members was focusing upon the Third Congressional district in particular.

Mr. Bill Linden, State Court Administrator, stated that his perception is that the value of what the Council does is not well enough understood by some legislators, as well as others whose support the Council needs. He seconded the point made by Bob Oleson to the effect that it is too late to wait until the middle of a hectic legislative session to build up needed support and good will, and joined Oleson in urging that effective use be made of the time remaining before the 1995 session. He further stated that the Judicial Department always stands ready to assist the Council in this and any other ways possible.

John McMillan asked how the Council's budget process worked, whether this was the product of the Council, some committee thereof, or of staff. John Hart and Henry Kantor responded that the Council has in the past had very little to do with the budget, which is prepared for each biennium by Judicial Department budget analysts, and suggested that it might be useful for the Chair and the full Council to give some thought to this matter prior to the time the next biennial budget is put together. John Hart indicated agreement with this idea.

Judge Robert Durham asked Bob Oleson for his sense of how much legislative opposition to the Council was attributable to actions taken by the Council, to general concerns about undue legislative delegation, and to how much the Council costs. Oleson responded that all of these factors contributed to such opposition as there was, and also endorsed John McMillan's suggestion that the Council give some thought to its budget and the process by which it is set.

Bruce Hamlin raised the question of how the Council will go about complying with the budget note appended to HB 5045. John Hart responded that the Council would have to give some focused attention to that question, either at the next scheduled meeting or quite promptly thereafter. He mentioned that he would probably appoint a subcommittee to determine the Council's response to the budget note and other related questions that have been raised, adding that he was inclined to ask John McMillan to serve as a member. Susan Graber expressed strong agreement with the idea of appointing a special subcommittee.

Agenda Item 6. Maury Holland noted that, in the interest of time, by way of reviewing legislation in the 1993 legislative session affecting the ORCP he would simply refer to part I(d) of his Briefing Memo distributed at the beginning of this meeting, a copy of which is attached to the file copy of these minutes.

Agenda Item 7. By way of summarizing matters held over from the 1991-93 biennium Maury Holland referred to part II(a)(b) and (c) of the aforementioned Briefing Memo.

Agenda Item 8. Maury Holland reported that no correspondence had been received at his office regarding suggested amendment or other proposals regarding the ORCP.

Agenda Item 9. John Hart asked whether, in addition to the items included in Holland's Briefing Memo as held over from the 1991-93 biennium, anyone had other suggestions about the Council's agenda and priorities during the current biennium. It was agreed that this should be discussed in detail at the Council's next meeting, which Hart stated would, unless there was objection, take place at Bar Headquarters on Saturday, November 13, 1993. No objections to this meeting time were expressed.

Agenda Items 10 and 11. John Hart asked whether any member had any additional items of old or new business to raise. Durham stated that greater efforts should probably be made to keep other interested individuals and organizations, such as the Bar's Committee on Practice and procedure, informed in a timely fashion about the Council's activities, including meeting agendas and rules amendment currently under consideration. He also asked whether there is any form of preferred or established process by which suggestions regarding possible rules amendments are placed before the Council. He added a suggestion that it might be a good idea to publish a notice soliciting suggestions and informing interested persons how that should be done, to whom addressed, etc.

Bernie Jolles commented that he is a bit puzzled by apparent criticisms that Council members are too divided along lines of those who primarily represent plaintiffs and those who represent defendants. He added that the function of Council members is to exercise their best judgment on matters pertaining to the ORCP and their possible amendment, and that they should not be expected to put out of their minds the lessons and perspectives they have gained from the kinds of practice in which they have engaged.

There being no further new business, the meeting was adjourned at 11:05 a.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

October 8, 1993

To: Chair and Members, Council on Court Procedures

From: Maury Holland, Executive Director *M.H.*

Re: 10/9/93 Briefing Memo

I. Agenda Item 6 - 1993 Legislative Session

a. The most important legislation affecting the Council from the '93 session was HB 2360 as amended, which amended the Council's authorizing legislation, ORS 1.725 - 1.750, in the following respects: i. to require a vote of 15 members to promulgate an ORCP amendment instead of 12 members as in the past; ii. to require that the full verbatim text of any ORCP amendment considered for promulgation be published or distributed to all members of the bar at least 30 days prior to the meeting at which such amendment is finally voted upon; iii. to remove the requirement that one of the 12 Council members appointed by the OSB Board of Governors be a law teacher; and iv. to urge rather than require the Council to hold at least one public meeting in each biennial cycle in each of Oregon's five Congressional districts. (Copy of HB 2360 as amended, and of ORS 1.725 - 1.750 as thereby amended, distributed at meeting.)

b. HB 5045 as amended appropriated the Council's 1993-95 biennial budget. Appended to the official report of the House Appropriations Committee's action on this bill is the following Budget Note:

The Council is directed to work with the House Interim Judiciary Committee, the Senate Interim Judiciary Committee, and the Oregon State Bar to develop recommendations by September 1, 1994 for changes in the substance and process of the Council. The Committee directed the Council to report to the Emergency Board on these recommendations.

The proponent of this budget note was Rep. Kevin Mannix, who hoped to be able to attend the special discussion portion of this meeting, but is unable to do so. In a letter to me dated Oct. 4 '93 he explained what he had in mind as follows:

You may recall that I drafted the budget note in such a fashion that a simple review of operations and re-

commendations as to the future course ought to be sufficient to satisfy the budget note. We do not need any fancy studies with lots of staff time and lots of paperwork. A discussion by the Council, followed by a report summarizing its recommendations, ought to suffice. If any questions develop about this, I will be happy to assist.

c. None of the ORCP amendments promulgated by the Council at its Dec. 12, 1992 meeting were affected by legislation passed in the 1993 session. The following bills were introduced, but not enacted, that would have affected the indicated promulgated ORCP amendment: SB 253, Section 7 C; SB 727, Sections 32 A, B, C, D, E, F, G, H and M; SB 215, Section 39 C.

d. The following legislation was enacted in the 1993 session that amends the indicated sections of the ORCP (copies distributed at meeting): SB 251, Section 70 A; SB 257, Sections 4 K and 78 C; HB 2476, Sections 55 H and 68 C. These amendments are reportedly effective Nov. 3, 1993.

II. Agenda Item 7 - Matters Held Over from 1991-93 Biennium

a. ORCP 55 H - Hospital Records. No final action was taken on several proposals to amend Rule 55, in particular Section 55 H, to deal with some perceived problems relating to subpoenas of hospital records. Chair Henry Kantor appointed a task force to consider these proposals, with John Hart as chair, and David Kenagy and Larry Wobbrock as members. This task force reported that it had not had sufficient opportunity to examine all aspects of this issue or canvass the views of all who had expressed an interest in it.

b. ORCP 32 F. In the wake of the Council's amendments to this rule in Dec. '92, effective Jan. 1 '94, some clarifying surgical repair is needed. Existing F(2) and F(3), together and read literally, impose the controversial "claim form" limitation (it is actually more of an "opt in" procedure) on all types of class actions, including the injunctive/declaratory judgment type maintainable under 32 B(2). The latter is not advocated even by the most adamant defenders of requiring claim forms in B(3) class actions. The language of present F(1)(a) speaks only of B(3) class actions. Although F(1)(a) does not explicitly qualify or pertain to the claim form provisions of F(2) and (3), the general understanding of class action practitioners is that it does.

ORS 1.725-.750 as amended by HB 2360

(Language added in bold; language deleted enclosed in square brackets)

1.725 Legislative findings. The Legislative Assembly finds that:

(1) Oregon law relating to civil procedure designed for the benefit of litigants which meet the needs of the court system and the bar are necessary to assure prompt and efficient administration of justice in the courts of the state.

(2) No coordinated system of continuing review of the Oregon laws relating to civil procedure now exists.

(3) Development of a system of continuing review of the Oregon laws relating to civil procedure requires the creation of a Council on Court Procedures.

(4) A Council on Court Procedures will be able to review the Oregon laws relating to civil procedure and coordinate and study proposals concerning the Oregon laws relating to civil procedure advanced by all interested persons.

1.730 Council on Court Procedures; membership; terms; meetings; expenses of members. (1) There is created a Council on Court Procedures consisting of:

(a) One judge of the Supreme Court, chosen by the Supreme Court;

(b) One judge of the Court of Appeals, chosen by the Court of Appeals;

(c) Six judges of the circuit court, chosen by the Executive Committee of the Circuit Judges Association;

(d) Two judges of the district court, chosen by the Executive Director of the District Judges Association;

(e) Twelve members of the Oregon State Bar, at least two of whom shall be from each of the congressional districts of the state, appointed by the Board of Governors of the Oregon State Bar. The Board of Governors, in making the appointments referred to in this section, shall include but not be limited to appointments from members of the bar active in civil trial practice, to the end that the lawyer members of the council shall be broadly representative of the trial bar [The Board of Governors shall include at least one person who by profession is involved in legal teaching or research]; and

(f) One public member, chosen by the Supreme Court.

(2)(a) A quorum of the council shall be constituted by a majority of the members of the council, and an affirmative vote by a majority of the council is required for action by the council on all matters other than promulgation of rules under ORS 1.735. An affirmative vote of fifteen members [a majority] of the council shall be required to promulgate rules pursuant to ORS 1.735.

ORS 1.725 - 750 as amended by HB 2360, cont'd.

(b) The Council shall adopt rules of procedure and shall choose, from among its membership, annually, a chairman to preside over the meetings of the council.

(3)(a) All meetings of the council shall be held in compliance with the provisions of ORS 192.610 to 192.690.

(b) In addition to the requirements imposed by paragraph (a) of this subsection, with respect to the public hearings required by ORS 1.740 and with respect to any meeting at which final action will be taken on the promulgation, modification or repeal of a rule under ORS 1.735, the council shall cause to be published or distributed to all members of the bar, at least two weeks before such hearing or meeting, a notice which shall include the time and place and a description of the substance of the agenda of the hearing or meeting;

(c) The Council shall make available upon request a copy of any rule which it proposes to promulgate, modify or repeal.

(4) Members of the Council on Court Procedures shall serve for terms of four years and shall be eligible for reappointment to one additional term, provided that, where an appointing authority has more than one vacancy to fill, the length of the initial term shall be fixed at either two or four years by that authority to accomplish staggered expiration dates of the terms to be filled. Vacancies occurring shall be filled by the appointing authority for the unexpired term.

(5) Members of the Council on Court Procedures shall not receive compensation for their services but may receive actual and necessary travel or other expenses incurred in the performance of their official duties as members of the council, as provided in ORS 292.210 to 292.288.

1.735 Rules of procedure; limitation on scope and substance; submission of rules to Legislative Assembly.

(1) The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The rules thus adopted and any amendments which may be adopted from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each regular session and shall go into effect on January 1 following the close of that session unless the Legislative Assembly shall provide an earlier effective date. The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.

ORS 1.725-.750 as Amended by HB 2360, cont'd.

(2) A promulgation, amendment or repeal of a rule by the council is invalid and does not become effective unless the exact language of the proposed promulgation, modification or repeal is published or distributed to all members of the bar at least 30 days before the meeting at which final action is taken on the promulgation, modification or repeal.

1.740. Employment of staff; council hearing requirements. In the exercise of its power under ORS 1.735, the council:

(1) May employ or contract with any person or persons, as the council considers necessary, to assist the council; and

(2) Shall endeavor to hold at least one public hearing in each of the congressional districts of the state during the period between regular legislative sessions.

1.745. Laws on civil pleading, practice and procedure deemed rules of court until changed. All provisions of law relating to pleading, practice and procedure, including provisions relating to form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in courts of this state are deemed to be rules of court and remain in effect as such until and except to the extent they are modified, superseded or repealed by rules which become effective under ORS 1.735.

1.750. Legislative Counsel to publish rules. The Legislative Counsel shall cause the rules which have become effective under ORS 1.735, as they may be amended, repealed or supplemented by the Legislative Assembly, to be arranged, indexed, printed, published and annotated in the Oregon Revised Statutes.