

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of October 13, 2001

5200 Southwest Meadows Road

Oregon State Bar Center

Lake Oswego, Oregon

Present: Lisa A. Amato Nicolette D. Johnston
Richard L. Barron Alexander D. Libmann
Benjamin M. Bloom Shelley D. Russell
Ted Carp Ralph D. Spooner
Kathryn H. Clarke David F. Sugerman
Don A. Dickey John L. Svoboda
Robert D. Durham

NOTE: Jeffrey S. Merrick attended by speaker telephone.

Excused: Bruce J. Brothers Nely L. Johnson
Allan H. Coon Connie Elkins McKelvey
John F. Folliard, Jr. Karsten H. Rasmussen
Daniel L. Harris David Schuman
Rodger J. Isaacson

Visitors: Susan Evans Grabe, with the Oregon State bar, was a guest at the meeting.
Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. Mr. Spooner called the meeting to order at approximately 9:35 a.m.

Agenda Item 2: Self-introductions of members and staff . Before the self-introductions, Mr. Spooner requested that a moment of silence be taken in remembrance of the September 11 tragedy after which each member introduced himself or herself, including Jeff Merrick, who was attending by speaker telephone. Regarding the meeting schedule for the biennium (see attached list of proposed meeting dates), Mr. Spooner said that there would probably be eight meetings and that the proposed dates should be marked on calendars. He then quickly reviewed the Council's activities and what would be expected of Council members. He hoped that any amendments could be finalized by August of 2002 so that the Council could look at the proposed rule changes prior to the September meeting.

Prof. Holland mentioned that the Council has a list serve e-mail address where messages can be sent to all members with just one address as follows: **coep@law.uoregon.edu**. He stated that this is a good way to communicate between meetings.

Agenda Item 3: Approval of 12-9-00 minutes (attached to 10-13-01 agenda). Justice Durham pointed out that in the fifth paragraph of page 4 at line 6, the word "take" should be removed where it appears the first time. With that correction, the minutes were unanimously approved.

Justice Durham also noted three typographical errors in Attachment A to the agenda:

A-2, fourth line from the bottom of the page, change "awarde" to "awarded"

A-3, in section D(3), sixth line from the end, change "srit" to "writ"

Agenda Item 4: Review of 2001 legislative session (see Attachment A to agenda of 10-13-01 meeting) (Prof. Holland). Prof. Holland reported that Mr. Spooner and he had appeared before the joint subcommittee on public safety of Ways & Means to request that the Council be funded for the 2001-03 biennium at roughly the same level as in the 1999-01 biennium, and that the subcommittee unanimously voted to provide that support. He added that, though a few questions were asked, no member of the subcommittee expressed any hostility towards the Council.

Prof. Holland further reported that the bill to amend ORS 1.735 to delete its "exact language" requirement had unfortunately failed of enactment because it was not called for committee hearing in the Senate. He added that he had appeared at the hearing of the House committee to which the bill was assigned to testify in support of it, and that that committee had unanimously voted "do pass." He also observed that there appeared to be not the slightest opposition to the bill on its merits, and that the only reason it failed of enactment appeared to be that it got lost in the end-of-session shuffle.

There followed some discussion about whether sufficient alertness and effort had been shown to advance this bill during the 2001 session. Prof. Holland noted that Susan Grabe and Bob Oleson of the OSB had, as always, been very helpful in giving him a prompt "heads up" whenever anything concerning the Council or the ORCP came up during the session, but that it was very difficult for them, and also for him, to keep close tabs on things that do not happen as opposed to those that do.

Finally, Prof. Holland reported that the legislature had not disallowed or amended any of the amendments promulgated by the Council at its December 12, 2000 meeting.

Agenda Item 5: Open discussion of possible ORCP amendment projects for the 2001-2003 biennium.

a. Status of ORCP 44/55 (discovery of health care records) amendment project (Attachment B to agenda of 10-13-01 meeting, "Proposal 2") (Mr. Spooner) Mr. Spooner gave a brief overview of how this project had evolved over the course of the previous two biennia, including the reasons why that effort had not yet resulted in promulgation of any pertinent amendments. Those reasons, he stated, were the intrinsic complexity of the area of discovery of health care records and the considerable difficulty of obtaining agreement among all the significant groups which believe their interests are involved, namely, the plaintiffs bar, the defense bar, and health care providers. He noted that hospitals and health care providers have for some time complained about having to respond to multiple subpoenas for the same records, and that defense lawyers have often complained about discrepancies between records furnished by plaintiffs' lawyers and those furnished in response to subpoenas.

Mr. Spooner concluded these remarks by stating that he thought it would be a shame if the Council's efforts relating to this matter were not continued, which would entail the loss of so much hard work that had already been invested in it, but that he would like to hear the views of members as to what course should now be pursued.

Ms. Amato responded that she believed one reason why previously considered amendments to Rules 44 and 55 had failed to be promulgated was that they were terribly complex, and wondered whether some simpler solution might be devised. Prof. Holland said that he had made a preliminary check into what, if anything, other jurisdictions might be doing in this area, where the difficulties being encountered must be more or less the same as in Oregon, and that he had found nothing by way of recent amendments of discovery rules. Mr. Bloom noted that the lack of amendments in other jurisdictions might be because, under their evidence rules, the filing of a complaint alleging personal injury is a waiver of the physician-patient privilege with regard to that injury.

Mr. Spooner stated that he thought it would be useful to find out, prior to the Council's next meeting, what, if anything, OADC and OTLA might be doing with regard to discovery of health care records. More specifically, he asked Ms. Clarke to make inquiry of OTLA, and Mr. Bloom to make inquiry of OADC, as to whether those organizations have formulated any thoughts about this area, and further whether each would be willing to designate a representative to work with a Council subcommittee, if one is appointed, to pick up where the subcommittee chaired by Bill Gaylord left off its work. At this point, one or more members commented that, in addition to representatives of OADC and OTLA, any subcommittee that is appointed should, if possible, also include representatives of the Oregon Hospital Association and the Oregon Medical Association. There was general agreement with this suggestion. Discussion of this item concluded by deciding to table it for the time being and reconsider it at the next Council meeting.

b. Proposed amendment to ORCP 34 B(2) (Attachment C to agenda of 10-13-01 meeting) (Mr. Spooner). In the absence of Mr. Brothers it was decided to put over this item to the Council's next meeting.

c. Proposal to review and possibly amend ORCP 4 K (Attachment D to agenda of 10-13-01 meeting) (Prof. Holland). Prof. Holland stated that he had been told that existing Section 4 K was causing confusion on the part of some practitioners, and also that the present text of this section had become obsolete with regard to the statutory references it contains. In response to this statement it was decided that it would be determined at the next Council meeting whether any amendment is needed to Section 4 K in light of more specific information to be furnished by Prof. Holland.

d. Other proposals or suggestions (Mr. Spooner). Mr. Spooner noted that, at the beginning of this meeting Judge Barron had provided members with copies of an amendment he suggested to Rule 47 regarding the timing of responses to motions for summary judgment. (A copy of this suggested amendment is attached to the original of these minutes.) Mr. Sugerman commented that this is an issue he is interested in. It was decided to put over consideration of this item until the next Council meeting.

Mr. Spooner asked whether there were other suggestions or proposals regarding possible ORCP amendments. Hearing none, discussion of these items was concluded.

Agenda Item 6: Old business (Mr. Spooner). No item of old business was raised.

Agenda Item 7: New business (Mr. Spooner). Following discussion it was decided that the Council would next meet on January 12, 2002, at which time it would be determined which amendment projects should be undertaken in the current biennium and any needed subcommittees would be appointed. Mr. Spooner asked any members having suggestions or proposals in addition to those discussed at this meeting to send them to Prof. Holland for inclusion on the January 12, 2002 meeting agenda. He added that he hoped to have first drafts of any amendments being considered for promulgation ready for the full Council's consideration no later than the June meeting.

Agenda Item 8: Adjournment (Mr. Spooner). Without objection the meeting was adjourned at 11:30 a.m.

Respectfully submitted,

Maury Holland
Executive Director