

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of January 12, 2002
5200 Southwest Meadows Road
Oregon State Bar Center
Lake Oswego, Oregon

Present: Ted Carp Connie Elkins McKelvey
Kathryn H. Clarke Jeffrey S. Merrick
Allan H. Coon Shelley D. Russell
Don A. Dickey David Schuman
Daniel L. Harris David F. Sugerman
Rodger J. Isaacson John L. Svoboda
Nicolette D. Johnston
Alexander D. Libmann

Note: Bruce J. Brothers attended by speaker telephone.

Excused: Lisa A. Amato Nely L. Johnson
Richard L. Barron Karsten Hans Rasmussen
Benjamin M. Bloom Ralph C. Spooner
Robert D. Durham

Visitors: Mr. Bob Oleson, Public Affairs Director, Oregon State Bar; Attorney Eugene Buckle, Portland, representing the OADC.

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. Ms. Clarke as Acting Chair called the meeting to order at 9:36 a.m. and welcomed Judge David Schuman as a new member of the Council.

Agenda Item 2: Approval of 10-13-01 minutes (attached to 1-12--02 agenda). Mr. Sugerman requested that these minutes be corrected to show that at the 10-13-01 meeting he had suggested that the Council revisit some issues surrounding court-ordered medical exams pursuant to ORCP 44, to which request there was unanimous consent. As thus corrected these minutes were approved as distributed.

Agenda Item 3: Discussion of possible ORCP amendment projects for the current biennium:

3a. Proposal to amend ORCP 34 B(2) (see Attachment A to 1-12-02 agenda) (Mr. Brothers). Mr. Brothers stated that he thought this proposed amendment was quite self-explanatory. He added that it was prompted by the belief that it is unfair to place the burden on a plaintiff to determine that a defendant has died and the amendment would therefore shift the burden of giving notice to the defendant's personal representative. It was agreed that Mr. Brothers would chair a committee to give this proposed amendment whatever additional study seems warranted, that additional members would be appointed to this committee if deemed necessary, and that this matter would be further considered at a future Council meeting.

3b. Proposal to amend ORCP 47 C (see Attachment B to 1-12-02 agenda). After some discussion it was agreed that this matter be referred to a committee chaired by Judge Barron, with Mr. Brothers and Ms. Russell as members, and that it be further considered at a future Council meeting.

3c. Proposal to amend ORCP 44/55. Mr. Merrick stated that the imminent effective date of the federal HIPPA regulations concerning privacy of health care regulations makes it imperative that the Council promptly consider how Rules 44 and 55 need to be amended, with which statement Ms. McKelvey expressed agreement. Judge Coon also expressed his agreement and added that he thought it is important that every effort be made to involve such organizations as the Oregon Hospital Association and the Oregon Medical Association at an early stage in the process in order to achieve a consensus that would not fall apart at the end.

Mr. Gene Buckle was then recognized and informed the Council that the OADC had recently created a governmental affairs committee. He added that he was prepared to act as liaison between the Council and OADC with regard to any efforts to amend ORCP 44/55.

Ms. Clarke then appointed a committee to review Rules 44 and 55 with a view to their possible amendment with Mr. Merrick as Chair, and Mr. Buckle, Ms. Clarke, Mr. Libmann, Ms. McKelvey, Judge Rasmussen, and Mr. Spooner as members.*

*Judge Rasmussen subsequently withdrew from this committee because of the press of other commitments. Mr. Rich Rogers was subsequently added to this committee to provide liaison with OTLA.

3d. Other proposed amendments. Mr. Sugerman stated that, partly on the basis of conversations with two Multnomah County circuit court judges, he was of the opinion that certain issues concerning the conditions under which court-ordered medical exams are conducted pursuant to Rule 44 might usefully be addressed by one or more amendments to that rule. Several members expressed opposition to the Council's revisiting these issues which were thoroughly considered during the 1999-2001 biennium. No formal motion was offered, but it was agreed by consensus that this item be tabled without foreclosing the possibility of it being placed on the current biennial agenda by vote to do so at a future Council meeting.

Judge Harris asked that the Council agree to a continuation of the committee which had worked on the topic of jury innovation during the 1999-2001 biennium resulting in some amendments to Rule 58. This request was agreed to by consensus. It was also agreed that this jury innovation committee would consist of Judge Harris as Chair, and Mr. Bloom, Judge Carp, Judge Dickey, Ms. Johnston, Ms McKelvey, and Mr. Sugerman as members.

Mr. Libmann stated that he is a current member of the Oregon State Bar Procedure and Practice Committee and had been asked by that committee to inquire of the Council whether the latter had any objection to the committee's proceeding to consider some possible amendments to ORCP jury trial provisions concerning such matters as juror discussion of a case prior to being charged when all jurors are present, alternate jurors, and possible improvements to the language of ORCP 58 B. Judge Carp stated that he did not think the Council can, or should try to, control or limit the agenda of the Procedure and Practice Committee, with which view there was unanimous agreement. Judge Carp suggested to Mr. Libmann that, because of the early deadline to which it is subject, he impress upon the Procedure and Practice Committee the importance of timely notification of the Council of any ORCP amendments which it proposes to approve and forward for legislative adoption so that the Council has a reasonable opportunity to provide its input.

Discussion then turned to a communication dated 1-10-02 from Mr. Tom Howser to Judge Harris (a copy of which is attached to these minutes) suggesting that, if and to the extent possible, declarations made subject to the penalties of perjury be substituted for affidavits wherever the latter are called for by a provision of the ORCP. Several members expressed interest in pursuing this suggestion because of the greater convenience it seemed to offer, but queried whether amending the ORCP in this fashion might create inconsistencies with provisions of the Oregon Revised Statutes (ORS). Prof. Holland said that, prior to the February meeting, he would prepare a listing of all ORCP provisions which call for the use of affidavits, and also identify any ORS provisions requiring use of affidavits or which might otherwise complicate the substitution of declarations for affidavits throughout the ORCP.

Agenda Item 4: Election of 2002 Council Officers. The following members were nominated and unanimously elected to the offices indicated for the year 2002: Mr. Ralph Spooner, Chair; Ms. Kathryn Clarke, Vice Chair; Ms. Nicolette Johnston, Treasurer.

Prof. Holland reported that Mr. Jack Folliard has resigned from the Council incident to his retiring from the practice of law. He said he would contact the Oregon State Bar about the need to appoint a practitioner member in place of Mr. Folliard.

Agenda Item 5: Old business. No item of old business was raised.

Agenda Item 6: New business. No item of new business was raised.

Agenda Item 7: Adjournment. Without objection Ms. Clarke adjourned the meeting at 10:45 a.m.

Respectfully submitted,

Maury Holland
Executive Director