

***** NOTICE *****
PUBLIC MEETING
COUNCIL ON COURT PROCEDURES
Saturday, March 9, 2002
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

AGENDA

1. Call to order (Mr. Spooner)
2. Approval of 2-09-02 minutes (attached)
3. Progress reports and discussion regarding current ORCP amendment projects (Mr. Spooner):
 - 3a. Proposal to amend ORCP 34 B(2) (Attachment A) (Mr. Brothers)
 - 3b. Proposal to substitute declarations under penalty of perjury for affidavits throughout the ORCP (Mr. Spooner)
 - 3c. Proposal to amend ORCP 31 (Attachment B) (Mr. Svoboda)
 - 3d. Report of jury innovation committee (Judge Harris)
 - 3e. Report of committee considering amendments to ORCP 44/55 (Mr. Merrick)
4. Old business (Mr. Spooner)
 - 4a. Possible amendment to, or comment on, ORCP 68 (Justice Durham)
 - 4b. Possible amendment of ORCP 44 A regarding conditions under which court-ordered physical or mental examinations are conducted (Attachment C) (Ms. Clarke)
 - 4c. Possible amendment of one or more discovery rules to make clear duty to update responses to discovery (Mr. Sugerman)
 - 4d. Tentative adoption of amended Barron amendment to ORCP 47 C (see note on page 3 of minutes of 2-9-02 Council meeting)
5. New business (Mr. Spooner)
 - 5a. Possible technical amendment to ORCP 27 B (Attachment D)
6. Adjournment (Mr. Spooner)

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of February 9, 2002
5200 Southwest Meadows Road
Oregon State Bar Center
Lake Oswego, Oregon

Present: Lisa A. Amato Alexander D. Libmann
Richard L. Barron Connie Elkins McKelvey
Benjamin M. Bloom Jeffrey S. Merrick
Bruce J. Brothers Karsten Hans Rasmussen
Eugene H. Buckle David Schuman
Ted Carp Ralph C. Spooner
Don A. Dickey David F. Sugerman
Robert D. Durham John L. Svoboda
Nicolette D. Johnston

Excused: Kathryn H. Clarke Rodger J. Isaacson
Allan H. Coon Nely L. Johnson
Daniel L. Harris Shelley D. Russell

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

Agenda Item 1: Call to order. Chair Ralph Spooner called the meeting to order at 9:32
m., and welcomed Mr. Gene Buckle as a new Council member.

Agenda Item 2: Approval of 1-12-01 minutes (attached to 9-1-02 agenda). The
1-12-02 minutes were unanimously approved without correction.

**Agenda Item 3: Progress reports and discussion regarding current ORCP
amendment projects (Mr. Spooner):**

**3a. Proposal to amend ORCP 34 B(2) (see Attachment A to 2-9-02 agenda) (Mr.
Brothers).** Mr. Brothers explained that, pursuant to his proposed amendment, an action would
continue against the original defendant unless the personal representative or successor in interest
serves notice of the defendant's death on the claimant and the latter fails to substitute the
personal representative or successor in interest within four months of such service. Justice

Durham noted that the amendment stated nothing about the one-year cap mentioned in both Subsections B(1) and B(2). Mr. Brothers responded that he did not believe any time limit should apply unless the personal representative or successor in interest serves notice of death, in which case the time limit for substitution should be four months from the time of service. Mr. Svoboda asked whether the amendment would apply to small estates where the person expected to file the affidavit might not be a personal representative or successor in interest. Mr. Brothers responded that the existing rule makes no specific or different provision for small estates.

Judge Dickey commented that the language of the first part of Section 34 B states that "the court shall, on motion, allow the action to be continued: . . . [,]" in light of which he stated he thought the language of the amendment had things backwards. There was then expressed some difference of opinion about whether the language of the proposed amendment properly meshes with the language of the first sentence of Section 34 B, in particular, whether the word "unless" should be changed to "if." Judge Barron commented that he agreed with Justice Durham that, regardless of whatever any amendment might provide, the one-year cap should remain in place. Mr. Sugerman noted that ORS chapter 30 contains at least one provision dealing with survival of actions, and stated that any amendment to ORCP 34 B should be carefully checked against any provision of that or other chapters which might also apply in this context. Mr. Brothers remarked that he would do some checking with lawyers who handle estate work. It was also suggested that inquiry should be made of the PLF to ascertain what, if any problems, are being encountered in this area.

Mr. Spooner asked for a straw vote to determine whether the Council wished to proceed further with this item. The vote was 16 to 0 in favor of doing so. Mr. Brothers agreed to act as a committee of one and return the matter for the Council's further consideration at a future meeting following his consultation with one or more estate lawyers and with the PLF.

3b. Proposal to amend ORCP 47 C (see Attachment B to 2-9-02 agenda) (Judge Barron). Judge Barron stated that the purpose of his proposed amendment was to increase the amount of time before trial for study and consideration of summary judgment motions from 45 to 60 days. He noted that such motions and supporting papers are often quite voluminous and therefore require a considerable investment of time on the part of judges. Mr. Brothers asked whether, in order to accomplish this, it was also necessary to increase the amount of time within which an opposing party must file opposing documents from 20 to 25 days, to which question Judge Barron responded that he did not believe any extension of that time period was necessary. Mr. Bloom remarked that most judges believe the present 45-day period is too short. Mr. Spooner stated that he was not inclined to support extending the time by which summary judgment motions must be filed beyond 45 days. Judge Barron agreed that his proposed amendment could be amended to delete the change from 20 to 25 days within which opponents must file responses. A motion was then duly made and seconded to amend the proposed

amendment to that effect. This motion was agreed to by a vote of 15 in favor, 3 opposed, and no abstentions.*

*No motion was offered tentatively to adopt this proposed amendment as amended.

3c. Proposal to amend the ORCP to substitute declarations subject to the penalties for perjury for affidavits (see Attachment C to 2-9-02 agenda) (Prof. Holland). Prof. Holland recalled that a number of members had previously appeared to agree with the suggestion of Mr. Tom Howser in his 1-10-02 message to Judge Harris that using declarations in lieu of affidavits would save a lot of time and be far more convenient. He added that his preliminary check indicated that amending the ORCP to this effect would not create any conflicts or inconsistencies with either ORS or UTCR provisions which require affidavits in a variety of contexts.

Justice Durham stated that he thought it essential for the Council to determine whether knowingly making false material statements in the form of a declaration would support a prosecution for perjury as they do in the case of affidavits as sworn statements made under oath. Judge Carp said he thought this change to be a good idea, and suggested that Mr. Libmann be asked to coordinate with the Procedure & Practice Committee of the OSB about the possibility that the change would require one or more statutory amendments, with particular reference to ORS chapter 45. Mr. Spooner commented that, in his experience, notaries take their responsibilities in connection with affidavits extremely seriously, such as by checking identifications and maintaining meticulous records. Ms. Amato noted that the use of declarations appears to work satisfactorily in federal courts.

This discussion concluded with a straw vote of 10 in favor, 6 opposed, authorizing Mr. Spooner to contact Mr. Jeffrey A. Johnson, Chair of the OSB Procedure & Practice Committee, about the possibility of that committee coordinating with the Council on this matter so that any necessary statutory changes could be identified and, if it is so agreed, appropriate statutory amending language prepared. One or more members mentioned that the Procedure & Practice Committee works under an early time line, having to complete its work by May preceding a regular legislative session.

3d. Report of jury innovation committee. Mr. Spooner asked whether a member of this committee who was present would provide a quick recap concerning this project. Judge Dickey responded that the committee had not yet formally conferred, but that six topics were likely to be under active consideration: 1) Possibly amending ORCP 57 F to provide that alternate jurors would be informed that they are alternates at the end of trial, 2) reconsider written jury instructions under ORCP 59 B, 3) considering an amendment that would authorize post-trial debriefing of juries in the presence of counsel, 4) plain language jury instructions, 5) requiring exchange of exhibits prior to trial, and 6) peremptory challenges.

Prof. Holland at this point reminded members that if any committee wished to confer between Council meetings there is the option of doing so by telephone conference, particularly when meeting in person is made difficult by members being geographically dispersed. He added that the chair of any committee wishing to hold a telephone conference should contact Ms. Henthorne as much ahead of time as possible, and she will make the arrangements with the telephone company and with committee members.

3e. Report of ORCP 44/55 amendments committee (Mr. Merrick). Mr. Merrick reported that this committee had held a meeting which included Gwen Dayton and Mark Griffin. He stated that this seemed to be an opportune time to undertake this project because of the imminent effectiveness of the federal HIPPA regulations on April 13, 2002, one effect of which has been to make the medical profession particularly amenable to devising solutions in this area that will be helpful to all concerned. He added that the committee had not discussed the possibility of amending ORCP 44 A regarding court-ordered physical or mental examinations because the Council had previously expressed itself as not interested in revisiting those issues.

Mr. Spooner asked whether copies of the HIPPA regulations might be obtained and distributed to all Council members. Mr. Merrick responded that they could be found on Gwen Dayton's website, oahhs.com.

Agenda Item 4: Old business (Mr. Spooner). Mr. Sugerma stated that the position previously expressed by the Council was that no I/CME amendments are currently on the biennial agenda, but that they might be added to that agenda if and when the Council so agreed. Mr. Spooner noted that a message had been received from Ms. Clarke expressing an interest in revisiting some I/CME issues, and that prior to the March Council meeting he would have further discussion with her about this matter to find out in particular whether OTLA or OADC was taking any positions concerning those issues or wished to work with the Council on this matter..

Agenda Item 5: New business (Mr. Spooner):

5a. Proposal to amend ORCP 31 C (see Attachment D to 2-9-02 agenda) (Prof. Holland). Prof. Holland stated that, regardless of the merits of this proposal, he seriously doubted that anything having to do with authorization of attorney-fee shifting is within the Council's statutory authority. Mr. Brothers said that he was inclined to agree with Mr. Harris' proposal on the merits. Mr. Svoboda commented that he thought there was an ethics issue here, and would check with the Ethics Committee of the OSB. Prof. Holland said that he would contact Mr. Harris to ask him whether he thought there is any way the problem he had identified could be addressed within the limits of the Council's authority.

5b. Question whether ORCP 68 should be amended to make reference to statute providing criteria for attorney fee awards (Justice Durham). Justice Durham said he had a question addressed primarily to members who are trial judges, and that was whether ORCP 68 might usefully be amended to cite ORS 20.075, which provides the mandatory criteria to be used in ruling on attorney fee requests. One or more members expressed the opinion that such citation or reference might more appropriately be included in comment to Rule 68. It was left that Justice Durham would draft something for the Council's future consideration.

5c. Question whether discovery rules should be amended to make explicit provision regarding duty to supplement, correct, and otherwise update discovery responses (Mr. Sugerman). Mr. Sugerman raised a question whether ORCP 36 or 43 might usefully be amended to add some explicit provision clarifying any duty on the part of parties to supplement, correct, or update on a continuing basis their responses to requests for document production and perhaps other forms of discovery. The consensus of the meeting was that Mr. Sugerman might prepare something specific for the Council's consideration at its March or later meeting. Ms. Amato stated that she would work with Mr. Sugerman on this matter.

Agenda Item 6: Adjournment (Mr. Spooner). Without objection Mr. Spooner adjourned the meeting at 11:34 a.m.

Respectfully submitted,

Maury Holland
Executive Director

During the 1999-2001 biennium the following amendment to ORCP 34 B(2) was proposed by Mr. Brothers, but the Council deferred action on the proposal because of lack of time to consider it. [Matter to be added in **bold underlined**; matter to be deleted *italicized* and enclosed in square brackets []:

"B(2) Against such party's personal representative or successors in interest [at any time within four months after the date of the first publication of notice to interested persons, but not more than one year after such party's death] unless the personal representative or successor in interest serves notice of the death of the party on the claimant and the claimant fails to substitute the personal representative or successor in interest within four months of service of such notice."

Attachment "A" to
3-9-02 Agenda

Attachment B to 3-9-02
Agenda

Note re ORCP 31 and Mr. Harris' Suggestions for its Amendment

Roger Harris' criticisms of Rule 31 would requirement amendment of Section 31 C, the attorney fee provision of the rule. While the points he makes might well have considerable merit, I doubt whether amending Section 31 C in the manner his criticisms imply would be within the Council's statutory authority pursuant to ORS 1.735(1).

Sections A and B of Rule 31 were both promulgated by the original Council in 1978 (effective 1-1-80) and have not been amended by either the Council or the Legislature since then. Section 31 A modified its statutory predecessor, *former* ORS 13.120. Section 31 B also modified former ORS 13.120 along the lines of Michigan Court Rule 210.2 in order to make clearer than it had been under the statute the procedure whereby an interpleading stakeholder which claims no interest in the fund or other *res* could be dismissed from the proceeding prior to the "second stage" of the interpleader wherein the rival claimants duke it out between or among themselves.

However, what is now Section 31 C was added to Rule 31 by the 1991 Legislature. OR LAWS 1991, c. 733 §1. While political prudence might sometimes dictate otherwise, there is no *legal* reason why the Council may not amend an ORCP provision merely because it was enacted by the legislature. In fact, the Council has occasionally done so. However, in addition to having been enacted by the legislature, Section 31 C is clearly an attorney fee-shifting provision, the only one within the confines of the ORCP.

While it might be debatable, in my view fee-shifting provisions do not come within the Council's authority to promulgate "rules governing pleading, practice and procedure, ..." ORS 1.735(1). A provision that would authorize fee shifting or, as Mr. Harris's proposal would do, introduce new limitations, conditions, or restrictions on fee shifting as authorized by the legislature in Section 31 C, would, in my opinion, be beyond the scope of the Council's statutory authority. It seems to me that a provision that would either authorize fee shifting, or narrow that authorization, is clearly distinguishable from such ORCP provisions as Rule 68, which concerns the procedures by which fee shifting is litigated, but does not itself provide any authority for fee shifting. But, obviously, this is an issue for the Council finally to decide.

Subject: COCP: February 9 meeting
Date: 02/07 2:38 PM
Received: 02/11 5:53 AM
From: KathrynHC@aol.com
To: Maury Holland, mholland@law.uoregon.edu
cocp@law.uoregon.edu

Maury and the Council:

I won't be at the meeting on Saturday; I'll be on a plane to Miami to attend the ATLA convention. (I'm also making an all-too-short visit to the Keys after the convention is over; I feel obligated to report that in view of my earlier envy in January that Ralph Spooner could be in Austria while we were meeting in Lake Oswego. Everyone should rest assured that while you are meeting I will be enduring air travel, which is not a frolic.)

Regarding the minutes of the last meeting: You might add to the footnote on page 2 the fact that I asked Mark Griffin to participate in the committee's discussions because of his expertise regarding HIPAA.

Although I can't be present, I do wish to emphasize my interest in revisiting the issue of compelled medical examinations, and for whatever it's worth I'd make the following comments:

1. The proposed rule change last time had majority approval; it failed only one vote of obtaining the required supermajority.

2. After conversation with representatives from the plaintiff's bar, I feel comfortable in saying to the Council that the issue is still festering, and it will continue to do so. Actual contested motions may be at low tide; but tides are cyclical by nature, and the lack of specific guidelines makes recurrent problems inevitable. This issue will not go away. To some extent, it's a question whether it is better to address the concerns of the plaintiff's bar through rule-making or through appellate court opinion generated by appeal or mandamus. Ultimately, in one forum or another, these issues will necessarily be addressed. I suggest that clarity and consistency are good goals, best achieved by rule-making.

3. I am aware that members of the defense bar have remarked that audio recordings are an appropriate way of resolving disputes between plaintiff and examiner as to what occurred in the examination. Such sentiments are part of my reason for believing that it might be possible to compromise competing interests.

4. Despite the failure to obtain a supermajority last time around, I think the competing interests can best be resolved by a rule modification. I would be willing to serve on a committee; I would suggest that Justice Durham chair that committee; I would also suggest that Gene Buckle be recruited to participate on behalf of OADC.

So much for not being able to endure my own absence. See you in March.

Kathryn Clarke

Attachment D to 3-9-02 Agenda

The following technical amendment of ORCP 27 B has been forwarded by Judge Rasmussen (matter to be added in bold, to be deleted italicized and enclosed in square brackets):

1 **Rule 27 Minor or Incapacitated Parties**

2 * * *

3 **B. APPEARANCE OF INCAPACITATED PERSON BY CONSERVATOR OR GUARDIAN**

4 When a person who is incapacitated or financially incapable, as defined in [*section 1 of this*
5 *1995 Act [c. 664, § 1],*] **ORS 125.005(5),¹ or who has otherwise been committed to a mental**
6 **institution^{1 / 2} or who is subject to the jurisdiction of the Mental Health Division,² who**
7 has a conservator of such person's estate or a guardian, is a party to any action, the person shall
8 appear by the conservator or guardian as may be appropriate or, if the court so orders, by a
9 guardian ad litem appointed by the court in which the action is brought. If the person does not
10 have a conservator of such person's estate or a guardian, the person shall appear by a guardian ad
11 litem appointed by the court. The court shall appoint some suitable person to act as guardian ad
12 litem:

13 * * *

1---1Alternative A

2---2Alternative B

{Note by MJH: If "ORS 125.005(5)" is substituted for "section 1 of this 1995 Act [c. 664, § 1]" in Section 27 B, the same change should presumably also be made in Subsection 27 B(1).}

COUNCIL ON COURT PROCEDURES

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February 27, 2002

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland, Executive Director

RE: David Sugerman's proposed amendment to ORCP 36 (adding new section D)

Please add the enclosed Attachment E to the agenda for the Council's March 9 meeting.
See Agenda Item 4c.

Enc.

ORCP 36 General Provisions Governing Discovery

Proposed new section—

36D. Duty to Supplement Responses

A party who has responded to a request for production or request for admission is under a duty seasonably to supplement or correct the response to include information acquired after the response if: a) the after-acquired information is material; and b) the after-acquired information has not otherwise been made known to the requesting party during the discovery process or in writing.

Comment:

- **Concepts shamelessly lifted from FRCP 26(e)(2)**
- **Applying the duty to depositions seems unduly burdensome for a lawyer representing a large defendant who would be required to monitor multiple depositions.**