

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of April 13, 2002

5200 Southwest Meadows Road

Oregon State Bar Center

Lake Oswego, Oregon

Present:	Lisa A. Amato	Nely L. Johnson
	Richard L. Barron	Nicolette D. Johnston
	Benjamin M. Bloom	Alexander D. Libmann
	Bruce J. Brothers	Connie Elkins McKelvey
	Ted Carp	Shelley D. Russell
	Kathryn H. Clarke	Ralph C. Spooner
	Allan H. Coon	David F. Sugerman
Excused:	Eugene H. Buckle	Jeffrey S. Merrick
	Don A. Dickey	Karsten Hans Rasmussen
	Robert D. Durham	David Schuman
	Daniel L. Harris	John L. Svoboda
	Rodger J. Isaacson	

Also present were: Susan Evans Grabe, Public Affairs Attorney with the Oregon State Bar; Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

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

Agenda Item 2: Approval of minutes. The minutes of the March 9, 2002 Council meeting were, without objection or correction, approved as distributed with the agenda of this meeting.

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 4-13-02 agenda) (Mr. Brothers). Mr. Brothers explained that the problem with the present subsection 34 B(2) is that it gives less protection to a claimant against a deceased defendant than do the pertinent statutes, ORS 115.003 and 115.315, which could not have been intended by the drafters of this subsection. Specifically, he further explained, subsection 34 B(2) provides that an action commenced against a living defendant may be continued against such defendant's personal representative or successor in interest provided the latter is substituted for the named defendant within four months of publication of the notice of the personal representative's appointment required by ORS 115.003, following which the claim "may be barred,"¹ whereas ORS 115.315 provides that an action pending against a decedent on the date of his or her death "may be continued as provided in ORCP 34 B(2) without presentation of a claim against the estate of the decedent."

One member commented that ORS 115.030 and 115.315 appear to be concerned with a matter of probate law, namely, whether and when claims against an estate must be presented to a personal representative, whereas ORCP 34 B(2) deals with the purely procedural matter of substitution of defendants. Mr. Brothers concluded discussion of this item by saying that he would prepare a revised draft of this proposed amendment for consideration at the Council's May 11 meeting.

3b. Proposal to substitute declarations for affidavits throughout the ORCP (see Attachment B to agenda of this meeting) (Mr. Spooner). Mr. Spooner noted that Prof. Holland had completed his initial research into what provisions of the ORCP presently call for affidavits, and also into the question of whether either substituting declarations for affidavits, or making declarations an optional alternative to use of affidavits, might create inconsistencies with a variety of ORS provisions requiring affidavits. He added that all members appeared to be agreed that if use of declarations is to be introduced into practice under the ORCP there must be absolute assurance that knowingly false statements of material fact contained in declarations would be subject to prosecution for perjury to the same extent as is true of affidavits. He further added that there might be some members who were somewhat wary about omitting the greater formality associated with affidavits, particularly the administration of an oath or affirmation.

Prof. Holland stated that his examination of the perjury statutes in chapter 162 of the ORS had convinced him that in order for knowingly false statements of material fact contained in

¹ORS 115.003(3)(d).

a declaration to be subject to perjury prosecution on the same basis as such statements contained in an affidavit, certain statutory amendments would be needed since the present perjury statutes, in particular ORS 162.065(1), require that a false statement be "sworn," which he was quite certain means that the statement must have been given under oath or affirmation. However, Ms. Clarke queried why a knowingly false statement of material fact contained in a signed declaration would not be subject to prosecution as an "unsworn falsification" under ORS 162.085, which, if so, would obviate any need for statutory amendments.

Mr. Libmann reported that the OSB Practice & Procedure Committee ("P&PC"), of which he is a member, had reacted very positively to the suggestion that use of declarations as alternatives to affidavits be authorized. Ms. Russell noted that declarations were being used in lieu of affidavits in the U.S. District Court without any apparent problems, and that practitioners in that court appeared to be finding declarations more convenient and saving of time than affidavits.

Judge Carp asked Ms. Grabe how much time remained for the P&PC to consider and draft any statutory amendments authorizing use of declarations in the ORCP might require. Ms. Grabe responded that the P&PC was operating under a May 1 deadline for any statutory amendments to be forwarded to the OSB Board of Governors for its approval for OSB sponsorship in the 2003 Legislative Assembly. Judge Carp observed that, in view of the shortness of available time, this project might have to be deferred to the 2003-05 biennium. Mr. Spooner commented that, in addition to amendments to the perjury statutes, there needed to be amendments to ORS chapter 45 to authorize declarations subject to the penalty for perjury as a permissible form of testimony.

Discussion of this item then concluded with a motion by Judge Carp, duly seconded and unanimously adopted, whereby Prof. Holland was authorized and directed to get some proposed statutory amendments to Ms. Grabe as soon as possible for her to place in the hands of the P&PC. Judge Carp stated that he would try to get in touch with one or more criminal lawyers in the Office of the Attorney General to get their thoughts about any needed amendments to the perjury statutes. Ms. Grabe pointed out that any statutory amendments proposed by the P&PC and approved by the Board of Governors would be subject to revision, if necessary, when they reach the Office of Legislative Counsel, which would provide an opportunity to repair any drafting defects that might exist in proposals forwarded by the OSB.

3c. Report of Jury Innovation Committee. In the absence of Judge Harris Mr. Bloom reported that members of this committee had been provided with copies of *Jury Trial Innovations*, a recent publication of the National Center for State Courts. Mr. Spooner asked Mr. Bloom to inform Judge Harris that the June Council meeting was the target date by which all prospective ORCP amendments should be presented to the Council for discussion, debate, and

tentative approval, and that it would be most helpful if the Committee could have some material ready for distribution as early as the May meeting.

Mr. Libmann noted that there was some coordination occurring between the P&PC and Judge Harris, adding that there had been some discussion in the P&PC about three jury innovation issues, namely, mandatory written jury instructions, alternate juror choice, and jury debriefing. Ms. Grabe noted that while the P&PC had some discussion of these issues, the committee did not plan to forward any proposed statutory amendments concerning jury innovation this biennium.

3d. Report of Medical Records Committee. In Mr. Merrick's absence Ms. McKelvey reported on behalf of this committee. She stated that the general topic of medical records in light of the HIPAA regulations had been divided into three subtopics, namely, whether the distinction should or must, in light of HIPAA, be maintained between hospital and medical records; whether Rule 55, in particular sections 55 H and I, should be rewritten and, if so, how; and preparation of a model qualified protective order and records custodian's affidavit. Ms. McKelvey reported that she is a member of the subcommittee concentrating its efforts on drafting the order and affidavit, adding that she had sent Prof. Holland an e-mail message summarizing the subcommittee's thinking and noting the difference of opinion which then existed. (A copy of this message is filed with the original of these minutes.) She added that the committee seemed inclined toward a single process for obtaining any form of health information, and toward continuing the present 14-day advance notice requirement and opportunity for objection to the scope of requests. She added that the full committee did not believe it to be within its scope to draft any provisions changing the amount or kind of health care information that is discoverable, and therefore has limited itself to amendments dealing solely with the procedures by which discoverable information is obtained, with the clear understanding that any such procedures must be fully compliant with HIPAA.

Ms. Clarke observed that a problem encountered with last biennium's proposals was that they provided too many opportunities to object to discovery requests for health care records, and thus unduly prolonged the process.

Discussion of this item concluded with Mr. Spooner's strongly encouraging this committee not to get too bogged down with discoverability and evidentiary issues about which the plaintiffs and defense bars have contended for years, but to be sure to prepare whatever ORCP amendments might be required in order to assure compliance of the ORCP discovery and subpoena rules with HIPAA.

Agenda Item 4: Old business (Mr. Spooner)

4a. Possible amendments to ORCP 44 A regarding conditions pertaining to court-ordered physical and mental examinations (Ms. Clarke). Mr. Spooner stated that Ms. Clarke and he had agreed to defer further consideration of this item to the May 11 Council meeting, by which time Ms. Clarke will have consulted with some lawyers reportedly having a particular interest in this matter and will report to the Council the result of those consultations.

4b. Possible amendments to ORCP 36-46 to prescribe duty to supplement certain discovery responses (see Attachment D to agenda of this meeting) (Mr. Sugerman). Mr. Sugerman noted that, in contrast to the earlier draft, this draft amendment would impose a supplementation duty only on Rule 43 requests for production, and not on Rule 44 requests for admissions. Judge Barron asked Mr. Sugerman why he had dropped requests for admissions as subject to a supplementation duty, to which Mr. Sugerman responded that he and some other Council members were concerned that imposing a duty to supplement responses to admissions requests might have the effect of discouraging counsel from conceding or stipulating issues just before or during trial.

Mr. Sugerman then asked for comment as to whether this draft amendment would be improved by any greater specificity about the time by which supplementation must or could occur, in particular whether the phrase "within a reasonable time" is specific enough. Ms. Clarke commented that this amendment might more appropriately relate to Rule 43 rather than Rule 36 since it only applies to requests for production, with which comment there was general agreement that, if promulgated, this amendment should become a new section 43 E.

Mr. Brothers said that he opposed the entire concept of mandatory subsequent disclosures and expressed support for leaving the burden of requesting supplemental responses where it now rests, on the party wishing to obtain supplemental information. Several members suggested that the phrase "within a reasonable time" should be moved to follow the phrase "after the response," with which suggestion there was general agreement. It was also noted that Rule 46 presently provides for no sanction for any failure to comply with a supplementation obligation.

Judge Barron stated that he believed the present language of the discovery rules deals adequately with the question of a continuing duty to supplement responses, and therefore was not inclined to support an amendment directed to this issue. Mr. Bloom commented that an expressly stated supplementation obligation is needed to deal with those lawyers who habitually and deliberately sit on important discoverable information and documents which first become available following an initial response to a discovery request. Judge Johnson stated that any provision for sanctions for violation of a supplementation obligation should make clear what the appropriate standard for imposing sanctions would be, whether, for example, a careless or negligent failure to comply, as opposed to deliberate withholding, would be sanctionable.

Mr. Brothers noted that there is an unintended lack of parallelism between the language in sections 43 A and 43 B which he said could easily be eliminated. He explained that the inconsistency to which he referred was the language in section 43 A about production and permitting inspection and copying, whereas the language of section 43 B speaks only about production and permitting inspection, while saying nothing about copying. No motion was offered in response to this observation.

Discussion of this item concluded with an observation that the "(a)" in the current draft should be changed to "(i)" and the "(b)" to "(ii)," and with a direction to Prof. Holland to work together with Mr. Sugerman in an effort to deal with the issues raised during this discussion, but that they need not concern themselves with a sanction provision.

4c. Possible technical amendment of ORCP 27 B (see Attachment C to agenda of this meeting) (Judge Rasmussen). In Judge Rasmussen's absence it was agreed that this item be deferred to the May 11 Council meeting.

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

5a. Possible amendment of ORCP 7 F (Judge Barron). Judge Barron stated that a member of the Civil Law Advisory Committee had raised a question as to whether the word "promptly" as it appears in subsection 7 F(1) might usefully be modified to read "reasonably promptly." There was general agreement that no such amendment is needed.

5b. Possible amendment of ORCP 70 A(2)(a)(ii) (Judge Carp). Judge Carp commented that he had some concern about the paragraph 70 A(2)(a)(ii) requirement that a judgment debtor's Social Security number be shown along with his or her name and other identifying information on judgment forms. He added that in this era of "identity theft" the linking of names with Social Security numbers might pose some risk to judgment debtors. It was agreed that Judge Carp and Ms. Amato would consider this question and, if they concluded that an amendment to this provision would be appropriate, present it at a future Council meeting.

5c. Future Council meetings (Mr. Spooner). Mr. Spooner emphasized the importance of having the fullest possible attendance at both the May 11 and the June 8 Council meetings to ensure that the latter target date is met for getting all proposed amendments in reasonably close to finished form. The importance of the May and June meetings was all the greater, he added, because of the recurring difficulty in having full attendance at the July and August meetings, when many members are either on vacation or need to attend professional meetings.

Agenda Item 6: Adjournment (Mr. Spooner). Without objection Mr. Spooner adjourned the meeting at 11:45 a.m.

Respectfully submitted,

Maury Holland
Executive Director