

## COUNCIL ON COURT PROCEDURES

Minutes of Meeting of May 11, 2002

5200 Southwest Meadows Road

Oregon State Bar Center

Lake Oswego, Oregon

Present: Benjamin M. Bloom Nely L. Johnson  
Eugene H. Buckle Nicolette D. Johnston  
Kathryn H. Clarke Alexander D. Libmann  
Allan H. Coon Connie Elkins McKelvey  
Don A. Dickey Jeffrey S. Merrick  
Robert D. Durham Ralph C. Spooner  
Daniel L. Harris David F. Sugerman  
Rodger J. Isaacson John L. Svoboda

Excused: Lisa A. Amato  
Richard L. Barron  
Bruce J. Brothers  
Ted Carp  
Karsten Hans Rasmussen  
Shelley D. Russell  
David Schuman

Also present were: Bob Oleson, Public Affairs Director, Oregon State Bar; Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

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**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 April 13, 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).\***

\*Sub-items under Agenda Item 3 were, without objection, taken up out of the order shown in the agenda of this meeting.

**3d. Proposal to authorize use of declarations as alternatives to affidavits throughout the ORCP (see Attachment B to agenda of this meeting) (Prof. Holland).** Prof. Holland reported that he had attended the May 3 meeting of the Oregon State Bar Practice & Procedure Committee (P&PC) to request that it consider and approve the proposed ORS and ORCP amendments shown in Attachment B for forwarding to the Board of Governors for its approval as a legislative package for pre-session filing and sponsorship by the Oregon State Bar (OSB) in the 2003 Legislative Assembly. He explained that he had acted in this unusual manner because May 3 was the date of the last meeting of the P&PC and of the Board of Governors before the May 15 deadline by which legislative proposals for pre-session filing by the OSB must reach the Office of Legislative Counsel. He also noted that it had seemed important to him that both the ORS and the ORCP amendments be contained in the same bill to avoid any possibility of one, but not the other, becoming law.

Prof. Holland further explained that he had made clear to the P&PC that, although it was generally favorable to authorizing optional use of declarations in lieu of affidavits, the Council had not yet approved the specific language of the ORS and ORCP amendments contained in Attachment B, and also informed the P&PC that, if the Council subsequently decided to disapprove or change any of those amendments, he would immediately so notify Ms. Susan Evans Grabe so that they could be recalled or modified accordingly. On that understanding the P&PC endorsed the proposed amendments, which were subsequently approved by the Board of Governors.\*\*

Judge Johnson suggested that the following language be added at the end of proposed ORS 45.025: "A declaration may be submitted in place of, or instead of, an affidavit whenever the use of an affidavit is permitted or required." However, several members questioned whether an amendment of that sort, which would appear to authorize use of declarations in a wide variety of contexts remote from the ORCP, such as in search warrant applications or attestations of wills, would be advisable. There followed a lengthy discussion of whether any ORS amendments authorizing use of declarations should be limited to the context of the ORCP as opposed to being more general and open-ended.

No motion to amend was offered, but there was general agreement that any statutory amendments should be limited to the specific purpose within the Council's charge; that is, limited to authorizing use of declarations in lieu of affidavits at all places in the ORCP where the latter are now called for. The reason expressed for thus limiting the scope of proposed ORS

\*\*The final version of these ORS and ORCP amendments as forwarded to the Legislative Counsel is as shown in Attachment B to this meeting agenda modified as shown in the document entitled "May 14, 2002. By FAX to Susan Evans Grabe from Maury Holland," filed with the original of these minutes.

amendments was that the Council's function has to do with the ORCP, not general law reform, and is not in a position to undertake the broad inquiries and consultations that would be appropriate in connection with statutory changes of a more encompassing character. A minority of members, however, expressed a preference for not limiting any statutory amendment to use of declarations in the context of the ORCP.

Discussion followed as to whether use of declarations under penalty of perjury might open up some problems not presented by affidavits. Mr. Sugerman observed that notaries are required to confirm the identity of affiants. Judge Harris commented that he had never known an affidavit to be challenged on the basis of doubts about the actual identity of the affiant. Justice Durham stated that he favored changing the language of proposed ORS 45.025 to the active voice in order to make clear who is exercising the authority it would confer.

Discussion of this item concluded with general agreement that Prof. Holland would undertake to revise the proposed ORS amendments to reflect the comments and suggestions raised in the course of it, and get any such revisions to Ms. Grabe not later than May 14. No revisions of the proposed ORCP amendments set forth in Attachment B were suggested.

**3a. Proposal to amend ORCP 34 B(2) (see Attachment A to agenda of this meeting) (Mr. Brothers).** Without objection the Council decided to postpone further consideration of this sub-item until a meeting when Mr. Brothers could be present.

**3b. Report of Jury Innovation Committee (Judge Harris).** Judge Harris reported that this committee had considered the following three possible changes to the alternate juror rule, ORCP 57 F: i. an amendment adopting something like the method used in federal court whereby additional regular jurors are seated in cases where that is deemed appropriate and there are no alternate jurors; ii. an amendment adopting the method used in a few states such as Michigan and Arizona whereby 14 jurors are selected at the outset of the case, the names of all placed in a container, and there is a blind selection of two jurors to be excused as alternates before the jury is sent out to begin deliberations; and iii. retain the present section 57 F except that alternates would not be informed that they are such until the jury is sent out to deliberate, but counsel would know of their identities from the outset of trial. He stated that the committee had early concluded that an amendment along the lines of i. was out of the question given the characteristics of Oregon civil juries, and that there was little or no support for an amendment along the lines of ii.

Judge Harris indicated that the committee would prepare some specific amending language to be added to section 57 F for the Council's consideration at its 6-8-02 meeting. Judge Dickey stated that he was not inclined to favor any amendment to section 57 F because, whatever the findings of the "Williamsburg Study" by the Council on State Courts might have been, he had not

observed any problem about jurors aware from the outset that they were alternates not paying close attention to the evidence. Judge Coon commented that his experience had been the same as Judge Dickey's. Justice Durham suggested dealing with any possible disappointment on the part of alternates at being excluded from deliberations by counsel stipulating that alternates could participate in them. Judge Harris stated that, in light of members' comments, he had become inclined to think that perhaps no amendment regarding alternate jurors was warranted at this time.

Judge Harris further reported that this committee had considered the advisability of amending ORCP 59 B to require that written instructions be prepared and copies provided to jurors in all cases. He added that all committee members agreed in believing that written instructions are highly desirable, and that his inquiries of jurors in his court indicated that they like to have written instructions with them during deliberations. Justice Durham commented that his observation of jury behavior when a trial lawyer was that juries sometimes had great difficulty following complicated instructions.

Judge Coon observed that not all cases involve complicated, difficult-to-follow instructions on the law, and therefore thought any amendment should preserve trial court discretion regarding this matter. Ms. Johnston stated that she had once been a juror in a medical malpractice case where written instructions would have been most helpful. Judge Dickey stated that he thought it important that trial court discretion be preserved, since there are some cases where requiring written instructions would be foolish, adding that there are some districts lacking staff support to get instructions in written form in time. He further stated that, if either party so requests, instructions could be electronically recorded. Mr. Svoboda suggested that, if written instructions are to be required, the amendment should provide that written copies be provided to jurors before the judge gives oral instructions so that a dual learning process would occur.

Discussion of this sub-item concluded by Judge Harris's observing that there remained some hurdles to overcome, and that in consultation with the committee he would work on some amending language for the Council to consider at the 6-8-02 meeting unless his consultation led him to conclude that no amendment is called for. He also observed that it might be useful if a Staff Comment emphasized the value of written instructions in cases where oral instructions alone might leave the jury confused.

**3c. Report of Medical Records Committee (Mr. Merrick).** Mr. Merrick reported that he believed the committee was then within one more meeting, and a bit more tweaking of amending language, of producing amendments that would conform our rules with HIPAA regulations for the Council's consideration at the 6-8-02 meeting. Ms. Clarke commented that, beyond achieving its most urgent goal of achieving conformity with HIPAA, this committee had developed some other ideas by which other health care records discovery problems that have long divided the plaintiffs and defense bars might be fairly compromised and resolved.

**3e. Proposed amendment to ORCP 43 (see Attachment C to agenda of this meeting) (Mr. Sugerman).** Mr. Sugerman stated that these proposed amendments had been drafted by Prof. Holland, and added that he agreed with the need for a sanction to deal with violations of a new supplementation duty. Several members commented that they found the draft language awkward and unsatisfactory, and suggested it should be simplified. Mr. Merrick suggested wording along the lines of "a party has a continuing duty to respond to a request for production within a reasonable time after . . ." Ms. Clarke suggested: "A party has a continuing duty to respond to a request . . ." and leaving out the language about "having complied."

Mr. Sugerman said that, in light of these comments, he would rework the language of this amendment and have it in form for consideration by the Council at the 6-8-02 meeting.

**3f. Technical amendment: Proposed amendment to ORCP 62 F (see Attachment D) (Prof. Holland).** Prof. Holland said that the need for this amendment had been called to his attention by Mr. Bloom in order to change the statutory reference from ORS 19.125 to ORS 19.415(3). Without objection this amendment was approved for inclusion on the agenda of the 9-14-02 meeting for tentative adoption for publication and comment.

**Agenda Item 4: Old business (Mr. Spooner)**

**4a. Proposal to amend ORCP 44 regarding conditions of court-ordered physical or mental examinations (Ms. Clarke).** Ms. Clarke suggested that this item be tabled for the present time, with which suggestion no disagreement was expressed.

**4b. Report regarding possible need to amend ORCP 70 A(2)(a)(ii) (Judge Carp).** In Judge Carp's absence it was without objection agreed to defer further consideration of this item to the 6-8-02 Council meeting.

**Agenda Item 5: New business (Mr. Spooner).** No item of new business was raised. Prof. Holland distributed copies of ORS 12.220 as proposed to be amended by the Oregon Law Commission for the information of members.

**Agenda Item 6: Adjournment.** Without objection Mr. Spooner declared the meeting adjourned at 11:40 a.m.

Respectfully submitted,

Maury Holland  
Executive Director