

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of June 8, 2002

Oregon State Bar Center

5200 Southwest Meadows Road

Lake Oswego, Oregon

Present: Richard L. Barron Alexander D. Libmann
 Bruce J. Brothers Jeffrey S. Merrick
 Ted Carp Ralph C. Spooner
 Allan H. Coon David F. Sugerman
 Rodger J. Isaacson John L. Svoboda
 Nely L. Johnson David Schuman
 Nicolette D. Johnson

The following attended by speaker telephone: Benjamin M. Bloom, Kathryn H. Clarke, Daniel L. Harris and Shelley D. Russell.

Excused: Lisa A. Amato
 Don A. Dickey
 Robert D. Durham
 Connie Elkins McKelvey
 Karsten Hans Rasmussen

Also present were 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 9:38 a.m.

Agenda Item 2: Approval of minutes (attached). The minutes of the May 8, 2002 meeting were, without objection or correction, approved as distributed with the agenda of this meeting.

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

Sub-item 3a. From the Medical Records Committee (ORCP 44 and 55) (see Attachment 3a to agenda of this meeting) (Mr. Merrick). Mr. Merrick reported that this committee had reached consensus on amendments to Rules 44 and 55 that are needed in order to make them compliant with current HIPAA regulations, with only a very few scrivener's issues relating to details of language left to be finalized. He added that the committee had not ventured beyond the task of ensuring that ORCP 44 and 55 become compliant with HIPAA regulations, such as by attempting to reach one or more compromises on issues that have divided the plaintiffs and defendants bars in recent years apart from a matter as to which there is no disagreement, that is, ensuring that all parties receive identical copies of the same medical records.

Mr. Spooner suggested that Mr. Merrick summarize each of the committee's proposed amendments in turn. In response Mr. Merrick summarized the amendments as follows:

Section 44 E would be amended to delete references to "hospital records," to be replaced by the term "individually identifiable health information" as used in HIPAA regulations. This term is defined in amended paragraph 55 H(1)(a) in conformity with those regulations. In addition to "hospital records," this term would also replace the term "medical records" as the latter appears in the deleted section 55 I. No disagreement was expressed concerning this amendment.

Paragraph 55 H(1)(b) would define "qualified protective order" in conformity with HIPAA regulations.

Paragraph 55 H(1)(c) elicited prolonged discussion. In particular some questions were raised about how its definitional subparagraphs should best be arranged and numbered in the interest of clarity. Prof. Holland observed that designations such as "H(1)(c)(i)(a)" are not authorized by ORCP 1 E. Some members queried whether paragraph H(1)(c) makes sufficiently clear the relationship between a qualified protective order on the one hand and, on the other, the assurances required by subparagraphs (c)(i), c(i)(a), and c(i)(b) in the affidavit or declaration constituting a "satisfactory assurance." Judge Isaacson suggested that the word "representative" be used throughout, in lieu of "attorney," in the interest of consistency of usage.

There were several other drafting changes suggested by various members. Mr. Spooner suggested that, rather than trying to work through all these suggestions at this meeting, Ms. Clarke and Prof. Holland be tasked with finalizing the language of these amendments in the form they will be considered and voted upon at the 9-14-02 meeting. There was general agreement with this suggestion.

Sub-item 3b. From the Jury Innovation Committee (ORCP 59) (Judge Harris). Judge Harris stated that, during the next three months, prior to the 9-14-02 meeting, he would be working with members of the committee with a view to bringing to that meeting a proposed

amendment to Rule 59 that would deal only with the matter of written jury instructions. He added that any amendment proposed at that meeting would reflect a consensus on the part of the committee, and also his own on-going consultations with other interested individuals and organizations as well as comments and observations of Council members at recent meetings. He concluded by stating that all other topics relating to jury innovation, apart from jury instructions, seemed to him to be off the table for the current biennium.

Sub-item 3c. Possible amendment of ORCP 43 B to impose continuing duty to supplement responses to requests for production of documents, etc. (see Attachment 3c to agenda of this meeting) (Mr. Sugerman). At the request of Ms. Clarke Mr. Spooner read the text of Alternative A shown in the aforementioned Attachment 3c. One or more members asked whether, given that failure to comply with this new supplementation duty would be sanctionable, there is need for some amendment to Rule 46 to specify the appropriate sanction.

Mr. Sugerman stated that he and Prof. Holland would consider that question before the September meeting and, if it appeared necessary, prepare an amendment to Rule 46. Apart from whether an amendment to Rule 46 is needed, no objections were raised to Alternative A, which was therefore tentatively adopted by consensus subject to a subsequent vote at the 9-14-02 meeting.

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

Sub-item 4a. Possible need to amend ORCP 70 A(2)(a)(ii) to avoid linking names of judgment debtors with their social security numbers (Judge Carp). Judge Carp said that he needed to consult with some people on the legislative staff and, depending upon what that consultation disclosed, would prepare something for the Council to consider at the September meeting.

Sub-item 4b. Technical amendment of ORCP 27 B (see Attachment 4b to agenda of this meeting) (Judge Rasmussen). Judge Carp stated that Judge Rasmussen prefers the language in Alternative A, and also noted that the amending language should be added to ORCP 69 B(1)(d), not to ORCP 27 B. In the absence of Judge Rasmussen further discussion of this sub-item was deferred to the 9-14-02 meeting. Prof. Holland said he would contact Judge Rasmussen to notify him of the Council's expectation.

Sub-item 4c. Proposal to amend ORCP 34 B(2) (see Attachment 4c to agenda of this meeting) (Mr. Brothers). Mr Brothers briefly recapitulated the basic purpose of this proposed amendment, which he stated was to shift the burden of finding out about the death of a defendant from the plaintiff to the lawyer representing that defendant, where it more fairly and sensibly belongs. He further explained that, if the notice required by ORS 115.003(3) is mailed

to the plaintiff or the plaintiff's attorney, the burden of substituting as defendant the decedent's personal representative or successor in interest would remain on the plaintiff.

There was prolonged discussion of whether the word "unless," as it appears in line 6 of the proposed amendment, correctly expressed this purpose. There was final agreement that it indeed did express this purpose. Mr. Brothers explained that this amendment can best be understood as being intended to give plaintiffs the same protection against being barred for failure timely to substitute a personal representative or successor in interest as ORS 115.003(3) gives to other kinds of claimants against decedents' estates. He further explained, in answer to a question by Judge Barron, why this amendment contained no reference to the four months that are mentioned in the statute. In other words, he stated that this amendment provided that if a personal representative or successor in interest failed to provide the plaintiff or plaintiff's attorney with notice of the defendant's death during the pendency of the action, the motion to substitute would still have to be made at some point, but would not be subject to any time limitation. Judge Carp commented that this amendment would not change the substantive law regarding claims against decedents' estate in any way, but would simply remove a possible trap which serves no useful purpose.

Ms. Clarke asked whether the amendment might better require delivery or mailing of the death notice to both the claimant *and* his or her attorney, rather than to one *or* the other. Judge Isaacson suggested rewording of line 8 as follows: "to the attorney of the claimant or the claimant if unrepresented, ..." with which suggestion there appeared to be general agreement.

Discussion of this sub-item continued by Mr. Brothers' pointing out that the present draft of this amendment did not require "service" of the notice on the claimant or the claimant's attorney, but simply "delivery" or "mailing." Some further questions relating to the clarity with which the amendment was worded were raised by, among others, Judge Johnson and Ms. Clarke.

At the conclusion of this discussion it was agreed that Mr. Brothers and Prof. Holland would work together on finalizing the language of this amendment in response to several members' comments and queries at this meeting, and that, at her request, a copy of their work product would be forwarded to Judge Johnson before its distribution with the 9-14-02 meeting agenda.

Sub-item 4d. Proposed ORS and ORCP statutory amendments re use of declarations (see Attachment 4d to agenda of this meeting) (Prof. Holland) (for information only). Prof. Holland invited the Council's attention to the ORS and ORCP amendments endorsed by the Procedure and Practice Committee and approved by the OSB Board of Governors for inclusion in the package of proposed legislation that will be sponsored by the OSB in the 2003 legislative session. No objection to these amendments, furnished solely for information, was made.

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

Sub-item 5a. Proposal to amend ORS 1.735 (see Attachment 5a to agenda of this meeting).

Sub-item 5b. Agreement regarding scheduled July 13 and August 10 meeting dates (Mr. Spooner). There was general agreement with Mr. Spooner's suggestion that, rather than holding the meetings scheduled for July 13 and August 10, the more productive use of the three months prior to the 9-14-02 meeting would be to allow the respective committees to continue their work among themselves in attending to any problems of drafting detail which remain unresolved. Prof. Holland reminded members that a convenient means by which committee members could communicate with one another during these three months was by using the Council's list serve address, COCP@law.uoregon.edu. At the conclusion of this discussion Mr. Spooner announced that the next meeting of the Council would be September 14, 2002, when the fullest possible attendance will be of utmost importance. No objection to this modification of the meeting schedule was expressed.

Agenda Item 6: Adjournment (Mr. Spooner). Without objection Mr. Spooner declared the meeting adjourned at 12:08 p.m.

Respectfully submitted,

Maury Holland,
Executive Director