

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of May 8, 2004

5200 Southwest Meadows Road

Oregon State Bar Center

Lake Oswego, Oregon

Present: Lisa Amato Nicolette D. Johnson
Richard L. Barron Alexander D. Libmann
Ted Carp Connie Elkins McKelvey
Robert D. Durham David F. Sugerman
Eugene H. Buckle John L. Svoboda
Kathryn H. Clarke David Schuman

The following attended by speaker telephone: Benjamin M. Bloom, Allan H. Coon, Russell B. West.

Excused: Eric J. Bloch
Bruce J. Brothers
Don Corson
Martin E. Hansen
Daniel L. Harris
Nely L. Johnson
Shelley D. Russell
Ronald D. Thom

Also present were: Attorney David S. Barrows, Portland; Ms. Gwen Dayton, Vice President and General Counsel for Oregon Association of Hospitals and Health Systems, Lake Oswego; Attorney Scott O. Pratt, Portland.

In addition, Maury Holland, Executive Director, and Gilma J. Henthorne, Executive Assistant, were also present.

Agenda Item 1: Call to order (Ms. Clarke). Ms. Clarke called the meeting to order at 9:37 a.m.

Agenda Item 2: Approval of minutes. On motion duly made and seconded, the minutes of the Council's April 10, 2004 meeting were approved as previously distributed.

Agenda Item 3: Reports and recommendations (Ms. Clarke):

3a. ORCP 46 A(2): Judge Velure's proposed amendment (see Judge Carp's draft proposal distributed at this meeting, a copy of which is attached to these minutes) (Judge Carp for the committee). Judge Carp reported that the committee recommended tentative adoption of the bold italicized sentence as shown in his memo. He reminded members that the purpose of this amendment was to ensure that a clear and complete identification of the materials of which production is sought would appear on the first page of the motion, primarily for the convenience of judges ruling upon such motions.

Justice Durham suggested that the word "written" modifying "motion" was redundant, and that the proposed new sentence should be revised to read: "Any motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover." Mr. Bloom pointed out that no particular sanction seemed to be provided for failure to comply with the first page requirement. Judge Carp responded that he did not believe that any specifically authorized formal sanction was needed or appropriate. Motion judges could simply "chew out" counsel who failed to comply.

In light of the fact that members had not been able to consider this proposal prior to this meeting, it was agreed that its further consideration be deferred to the June meeting.

(Without objection, the following two items were taken up out of the order shown on the meeting agenda.)

Agenda Item 5: New business (Ms. Clarke):

5e. ORCP 54 E: Proposal by Procedure & Practice Committee of Oregon State Bar (see Attachment H to this meeting agenda) (Mr. Steven H. Pratt for the Procedure & Practice Committee). Mr. Pratt stated that the Procedure & Practice Committee believed that ORCP 54 E required clarification in two related respects, the first being whether an offer of settlement does, or does not, include the claimant's costs, disbursements, and attorney fees, and the second being whether the latter are to be included in determining whether a claimant who has rejected an offer subsequently obtained a judgment more favorable than the amount offered. He invited members' attention to the draft amendment he had prepared, copies of which

were distributed at the meeting and one is attached to these minutes, entitled "PROPOSED AMENDMENTS TO ORCP 54 E."

Mr. Pratt pointed out that, whereas the existing section provided that unless the parties "otherwise agree," an offer of judgment will be deemed not to include costs or fees, which can be sought in addition to the amount offered by filing and serving a statement pursuant to ORCP 68 C(4), the proposed new subsection 54 E(1) would require that every offer must state explicitly whether or not it includes costs and fees. Also, he continued, proposed new subsection 54 E(3) would require the court to include any costs or fees obtained in connection with a contested judgment when an offer had stated that it included costs and fees in determining whether the contested judgment was more favorable to the claimant than the offered judgment. Mr. Pratt concluded by stating that the Committee believed that the language of the existing section 54 E created some potential for malpractice claims.

Justice Durham commented that he believed that some re-writing of section 54 E was called for, basically for the reasons stated by Mr. Pratt, adding that he was not sure the language prepared by Mr. Pratt was precisely what was needed. General agreement with this comment was expressed by the members. Judge West stated that he was in full agreement with Justice Durham's comment. Judge Carp said that any proposed amendment to section 54 E should take account of a Supreme Court decision handed down some years ago, *For Counsel, Inc. v. Northwest Web Co.*, 329 Or 246, 985 P2d 1277 (1999).

Discussion of this item concluded by Judge Carp's offering a motion, duly seconded and unanimously agreed to, suggesting that the Procedure & Practice Committee revisit its proposed amending language, if possible prior to the Council's June 12, 2004 meeting on the agenda of which this item should then be included.

5d. ORCP 55 H: Subpoenas seeking individually identifiable health information (see Attachment G to this meeting agenda) (Ms. Gwen M. Dayton for the Oregon State Bar Health Law Section). Ms. Dayton stated that in 2003, when ORCP 55 H was amended to comply with regulations promulgated under the federal Health Insurance Portability & Accountability Act (HIPAA), employers having individually identifiable health information were included in the amendment by inadvertence. She further stated that the intended coverage of this amendment was, like the HIPAA regulations, limited to hospitals, health care providers, health plans, and health care clearinghouses. She added that compliance with section 55 H as amended was creating some difficulties for some employers.

Ms. Clarke commented that her understanding of the amendment was that its intended coverage was very broad. Ms. Sugerman remarked that, given the amount of time and effort which the Council devoted to this matter so recently, he questioned the appropriateness of returning to it so soon. Ms. Johnston stated that many employers resent having to respond to

subpoenas for health care information, and are discouraged by the amended section from maintaining them even when they might be useful both to them and to employees. Ms. Dayton stated that the Health Law Section wished to bring this matter to the Council's attention, but did not feel strongly in favor of an amendment to exclude employers from section 55 H's coverage.

After further discussion, on motion made and duly seconded, the Council voted not to pursue this matter further at this time, 16 in favor and 1 opposed.

[At this point the meeting returned to the order of items as shown on the agenda.]

3b. ORCP 9 F and 10 D: Effective date of fax service (see memo entitled "Proposed Amendments to ORCP 9F and 10D" (Ms. McKelvey for the committee). Ms. McKelvey invited members' attention to a memo entitled "Proposed Amendments to ORCP 9F and 10D," copies of which were distributed to members and one is attached to these minutes. She recalled that this proposed amendment had been suggested by Mr. Bruce C. Hamlin and noted that, in accordance with his suggestion, it would make fax service equivalent to service by personal delivery if accomplished before 5:00 p.m. on a regular business day, meaning that the effective date of fax service would not be subject to the three-day delay as with service by mail.

Several members expressed concern about how, under this proposed amendment, malfunctioning fax machines or unreadable copies of transmittals would be dealt with. Justice Durham commented that he did not believe that fax transmission had reached the point of reliability that would justify treating service by that method as tantamount to in-hand service. One or more members stated that fax transmissions sent late on Friday afternoons would frequently not actually be received until the following Monday morning. Mr. Bloom said that he favored this amendment, adding that fax transmissions show the date and time of receipt. Ms. Clarke questioned whether proof of service by fax would be made by affidavit or declaration, and whether a confirmation of the date and time of actual receipt would have to be attached thereto. Mr. Svoboda questioned whether when a fax is sent to the fax number shown in the Bar Directory, that number would be deemed presumptively correct.

Discussion of this item concluded with a request that Ms. McKelvey prepare a revised amendment for consideration at the June 12 meeting whereby fax service would be equated with service by mail for the purpose of determining due dates of responses to faxed transmittals.

3c. ORCP 32: Proposed amendments regarding class actions (see Attachment A to this meeting agenda) (Mr. Sugerman for the committee). Mr. Sugerman requested that this item be deferred to the June 12 meeting, which request was agreed to.

3d. ORCP 44 A: Proposed amendments regarding court-ordered physical or mental examinations (see Attachment B to this meeting agenda) (Justice Durham for the committee). Justice Durham reported that two members of this committee had submitted written proposals, but those do not necessarily represent the final product which it wished the Council to consider. He added that a committee meeting was scheduled for May 21, 2004 in Judge Johnson's chambers, and that he expected a proposal in final form would be ready for the Council meeting June 12.

Judge Coon said that the issue of recording exams, or allowing examinees' representatives to be present during exams, was not a problem in southern Oregon, and asked whether a significant problem was existing elsewhere in the state. Some members responded that they believed there was somewhat of a problem in various parts of the state, and that clarification on a uniform state-wide basis was called for. Justice Durham commented that the committee was not undertaking a drastic amendment of this provision, but only some modest fine-tuning.

Discussion of this item concluded with general agreement that this matter would be placed on the agenda of the June 12, 2004 meeting.

3e. ORCP 44: Proposed amendments regarding requests for written reports and existing chart notations of examinations relating to injuries for which recovery is sought (see Attachment C to this meeting agenda) (Mr. Bloom for the committee). Mr. Bloom suggested that further consideration of this item be deferred to the June 12 Council meeting and combined with discussion of item 3d above, with which there was general agreement. Justice Durham said that it would be helpful to members if some advance documentation were provided to be studied prior to that meeting.

Agenda Item 4: Old business (Ms. Clarke): No item of old business was raised.

Agenda Item 5: New business (Ms. Clarke):

5a. ORCP 67: Notice to defendant of judgment in excess of amount claimed in original complaint (see Attachment D to this meeting agenda) (Judge Barron). Judge Barron recalled that the purpose of his proposal was to shorten and simplify this rule. Ms. Clarke stated that discussion of this item made her uncomfortable because of her involvement with a case in which a petition for review was then pending. Ms. McKelvey then offered a motion, duly seconded and unanimously agreed to, that further consideration of this item be deferred until the judgment in this case becomes final.

5b. ORCP 83 A(9) and D: Proposed deletion of references to "notice of bulk transfers" (see Attachment E to this meeting agenda) (Prof. Holland). A motion was offered by Judge Schuman, seconded by Judge Carp, and unanimously agreed, to tentatively

adopt the proposal deleting references to "notice of bulk transfers" in these provisions.

5c. Proposals by Ms. Kristen S. David to amend UTCR 5.030 and 5.080 and referred to Council by Mr. Bruce D. Miller (see Attachment F to this meeting agenda) (Prof. Holland). It was unclear whether any ORCP amendment was being proposed. No draft of an amendment was submitted for consideration. Prof. Holland stated that he would get in touch with Mr. Miller and report back at the June 12 Council meeting whether the UTCR committee wished the Council to consider any specific action regarding Ms. David's proposal.

Ms. Clarke stated that last biennium's amendments providing that declarations under oath could be used in lieu of affidavits needed a specific fix, which she said she would try to distribute to members prior to the June 12 Council meeting.

Mr. Svoboda asked whether any contacts with legislators were being made, to which the response was that such contacts would probably have to await the November elections when the identities of members of the 2005 legislature would become known.

Agenda Item 6: Adjournment. Without objection Ms. Clarke adjourned the meeting at 11:23 a. m.

Respectfully submitted,

Maury Holland
Executive Director