

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of October 8, 2005
Oregon State Bar Center
5200 SW Meadows Road
Lake Oswego, Oregon

Members Present:

Richard L. Barron
Eric J. Bloch
Benjamin M. Bloom
Eugene H. Buckle
Brooks F. Cooper
Don Corson
Lauren S. Holland
Rodger J. Isaacson
Rives Kistler

Alexander D. Libmann
Connie Elkins McKelvey
Leslie W. O'Leary
Shelley C. Russell
David Schuman*
David F. Sugerman
John L. Svoboda
Locke W. Williams

*Participated by speaker phone.

Members Excused:

Kathryn H. Clarke
Martin E. Hansen
Robert D. Herndon

Steven B. Reed
Ronald D. Thom

Guests:

John E. Bordon, Legislative Fiscal Office
Susan Evans Grabe, Oregon State Bar

Also present were Maury Holland, Executive Director; Mark Allen Peterson, Executive Director-Designate; and Gilma J. Henthorne, Executive Assistant.

Agenda Item 1: Call to order. In the absence of Ms. Clarke, Vice Chair Ms. McKelvey called the meeting to order at 9:45 a.m.

Agenda Item 2: Self-introductions of members and staff. Members of the Council and of the staff each briefly introduced him- or herself.

Agenda Item 3: Approval of minutes. On motion duly made and seconded, the minutes of the Dec. 11, 2004 meeting were approved as distributed with the agenda of this meeting.

Agenda Item 4: Report on current status and condition of the Council; the budget note review process, etc. (see Attachment A to the agenda of this meeting). In the absence of Ms. Clarke, Ms. McKelvey asked Prof. Holland to make this report. He stated the the current situation could be traced back to about two years earlier when the Council was totally defunded by a special session of the 2003 Legislative Assembly in the midst of the state's fiscal crisis. He added that this defunding raised a question as to whether the Council could continue to function in its present form with no funding support apart from the \$8,000 per biennium provided by the Oregon State Bar for partial reimbursement of members' expenses in traveling to meetings and the willingness of the University of Oregon School of Law's to cover the Council's services and supplies expenses out of its own funds.

He further added that, over the two years since defunding, the Council had proved that, being an essentially volunteer organization, it could function without state funding if that could not be restored, at least in part, at some future time, although it had created some difficulties. As one example of the latter, Prof. Holland mentioned the unwillingness of the University of Oregon School of Law to continue indefinitely subsidizing the Council's services and supplies expenses because of recent severe cutbacks in its own state funding.

Prof. Holland continued by noting that Council members were in unanimous agreement that, with or without state funding, the best interests of Oregon and its judicial system required that the Council continue to perform its mission of periodically amending the ORCP as needed and keeping them up to date. He added that, even apart from Council members, he had not encountered any sentiment among legislators, elsewhere in state government, or among judges or lawyers, in favor of the Council's being abolished or its mission changed, although from time to time a few people have suggested very tentatively that the rules-amending function be assigned to the Oregon Supreme Court, with the Council becoming an ORCP advisory committee.

Prof. Holland then outlined the new arrangements that had been fashioned with Dean Jim Huffman whereby headquarters and staff support for the Council would shift from the University of Oregon School of Law to the Lewis and Clark Law School, arrangements that would permit the Council to continue to function as in the past even in the absence of substantial state funding. He elaborated by saying that Prof. Mark Allen Peterson would become executive director effective Jan. 1, 2006, with Prof. Holland staying on for at least the remainder of the 2005-07 biennium as a non-voting "advisory member." In addition, Lewis and Clark would provide space for the Council's records and archives, as well as for an executive assistant to Prof. Peterson. All of this, he explained, would be provided at no cost to the state until such time as might occur a full or partial restoration of state funding.

Prof. Holland concluded his report by informing members that the 2005 Legislative Assembly had left a "budget note" mandating that, in the interim before the 2007 session, a special work group be created to study the role of the Council and its future. That work group had not yet been constituted, but Mr. Bill Taylor of the Office of Legislative Counsel, who was very familiar with the Council and its work, had been designated its convenor. He added that the budget note provided that one member of this group be a member of the Council, and that the likelihood was that, her health permitting,

Ms. Clarke would fill that slot. He said the expectation was that this work group would finish its work by the end of the current year.

Mr. Borden was asked whether the \$10,000 appropriated by the 2005 legislature to cover expenses incurred by the work group was available to cover any expenses incurred by the Council itself during the 2005-07 biennium, such as for services and supplies. He responded that his understanding was that any amount of this fund left over from meeting expenses of the work group would be available to cover Council expenses, but that this did not carry with it any personnel hiring authority to hire staff paid from state funds.

Ms. Grabe then elaborated briefly on the purpose of the interim work group and said that, working with Mr. Taylor, she would do whatever she could to see that the group's legislator-members would be individuals having an understanding of the Council and its role, even though the selection of members was obviously not hers.

Agenda Item 5: Summary of 2005 legislative session (Prof. Holland). Prof. Holland reported that the 2005 Legislative Assembly had taken no action to prevent the ORCP amendments promulgated by the Council at its Dec. 11, 2004 meeting becoming effective on Jan. 1, 2006, but had made some minor stylistic changes to some ORCP provisions that were not the subject to those amendments. He added that, in Ms. Clarke's and his appearance before the Joint Ways & Means subcommittee having cognizance of the Council's budget, all the legislators present expressed their good will towards the Council and their appreciation for its continuing its work after being defunded. He further added that Ms. Clarke urged in particular that the subcommittee recommend appropriation of something on the order of \$10,000 to cover at least the Council's services and supplies expenses during the 2005-07 biennium in light of the University of Oregon School of Law's discontinuation of its subsidy, to which the subcommittee agreed.

Mr. Sugerman reported that, during the 2005 legislative session, the Oregon Attorney General introduced a bill that would have amended ORCP 32 considerably beyond what the Rule 32 amendments considered by the Council during the 2003-05 biennium would have accomplished, including authorizing the court to cy pres any damages recovered beyond the amounts that could be paid to class members. He added that this bill was not enacted, and that among the arguments used by lobbyists who opposed it was that the Council had considered amending Rule 32 along the same general lines as the bill, but had finally decided not to do so.

Agenda Item 6: Discussion regarding suggested action items for Council's 2005-07 biennial agenda (Ms. McKelvey). Ms. McKelvey invited open discussion of amendment projects the Council might consider during the current biennium.

It was agreed that Mr. Sugerman would chair a **Rule 32** committee, with Judge Bloch and Mr. Libmann as members. The focus of this committee was stated to be continued study of the Rule 32 amendments published for comment during the 2003-05 biennium, but not finally promulgated at the Dec. 11, 2004 meeting, together with any other related aspects of class action practice which the committee might deem worthy of consideration. Judge Bloch commented that he remained of the opinion that the

amendments to this rule considered in the 2003-05 biennium commanded considerable support.

Regarding **section C of Rule 44**, Mr. Bloom commented that some lawyers interpret this section as not requiring production of records of examinations by plaintiffs' expert witnesses. He agreed to chair a committee, with Mr. Cooper and Mr. Svoboda as members, to look into this matter and report its finding and any recommendations to the Council.

Regarding **paragraph D(2)(a) of Rule 7**, Ms. Grabe asked the Council what action it wished to take concerning the "Resolution to Amend ORCP 7" submitted by Mr. Danny Lang.¹ The consensus of the members was that Mr. Lang should be invited by Ms. Grabe to attend a future Council meeting at his convenience for further discussion of this item.

Discussion then turned to what consideration, if any, should be given to the amendments to **Rule 44** published for comment, but tabled at the Dec. 11, 2004 meeting. Ms. McKelvey commented that she did not favor revisiting those amendments during this biennium. ~~Judge Bilen~~ ^{Gen. Bloom} said that he thought there might well be some problems concerning IME's that need fixing. Ms. McKelvey asked Mr. Buckle and Mr. Corson to gather their thoughts on this matter and report back to the Council whatever conclusions they might reach.

It was the consensus of the members that the Council's 2005-07 agenda should remain open until the Council's next meeting.

Agenda Item 7: Discussion regarding future meeting dates. The consensus of the members was that the Council would next meet, as scheduled, on Nov. 12, 2005.

Agenda Item 8: Old business (Ms. McKelvey). No item of old business was raised.

Agenda Item 9: New business (Ms. McKelvey). Ms. Henthorne was recognized and thanked on the occasion of her retirement after nearly 30 years of devoted and extraordinarily skilled service as the Council's executive assistant. On behalf of the Council, Ms. Henthorne was presented with a suitably inscribed clock. She was also presented by Prof. Holland with a letter signed by Governor Kulongoski commending her for her service, particularly for continuing it without compensation during the two years since the Council was defunded.

Agenda Item 10: Adjournment. On motion duly made and seconded, the meeting was adjourned at 11:30 a.m.

Respectfully submitted,

Maury Holland,
Executive Director

¹A copy of this document is filed with the original of these minutes.