

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, November 12, 2005
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Members Present:

Hon. Eric J. Bloch
Benjamin M. Bloom
Eugene Buckle
Brooks F. Cooper
Hon. Robert D. Herndon
Hon. Lauren S. Holland
Hon. Rodger J. Isaacson
Hon. Rives Kistler

Alexander Libman
Connie Elkins McKelvey
Leslie W. O'Leary
Shelley D. Russell
Hon. David Schuman
Hon. Ronald B. Thom

Members Excused:

Hon. Richard L. Barron
Kathryn H. Clarke
Don Corson
Martin E. Hansen
Hon. Steven B. Reed

Shelley D. Russell
David F. Sugarman
John L. Svoboda
Hon. Locke A. Williams

Guests:

Susan Grabe, Oregon State Bar. Joseph O'Leary, Council to the Judiciary Committee of the Oregon State Senate. Danny Lang, appeared briefly by telephone.

Also present were Mark A. Peterson, Executive Director; Maury Holland, Executive Director; and Tresa G. Cavanaugh, Assistant to Mark A. Peterson.

Agenda Item 1: Call to order. In the absence of Ms. Clarke, Vice Chair McKelvey called the meeting to order at 9:38 a.m.

Agenda Item 2: Self-introductions of members, guests and staff. Judge Robert D. Herndon and Joseph O'Leary briefly introduced themselves. Mark Peterson gave a summary of his background and then introduced Tresa Cavanaugh.

Agenda Item 3: Approval of minutes. Judge Bloch noted he did not make the comment that he thought there might be some problems concerning IME's that need fixing as shown on page 4 of the minutes of the October 8, 2005, meeting. Mr. Bloom acknowledged that he made the comment regarding IME's. On motion duly made and seconded, the minutes of the October 8, 2005, meeting as amended were approved.

Agenda Item 4: Report on Council budget issues and request for reimbursement forms (Professor Peterson). Prof. Peterson reported that there is \$2,908.36 in the expense budget that has not been spent and requested that members submit expense reports for the last biennium. Prof. Peterson suggested spending that portion of the budget if the Council is not expecting to have Lewis & Clark Law School subsidize the administrative costs of the Council. Prof. Peterson passed out expense reports and requested that they be submitted at the end of the meeting. Prof. Peterson noted that the deadline for submitting the reports for the last biennium is November 15, 2005.

Agenda Item 5: Discussion regarding suggested action items for Council's 2005-07 biennial agenda (Ms. McKelvey).

Rule 32 Committee Report. Mr. Sugarman was not present to give a report. Prof. Peterson reported that there had not been a meeting of that committee and then went on to refer to the letter from Senator Ginny Burdick and the copy of A-Engrossed Senate Bill 216. A discussion then proceeded concerning the legislature's desire to do something with regard to Rule 32 both in terms of the notice provisions and a *Cy pres* claims provision. Prof. Peterson suggested that it would be useful if the Council could achieve a consensus and move forward on the Rule 32 issue. Prof. Peterson reported that the measure had passed in the Senate Judiciary committee, but if the Council does not make a decision on Rule 32, it is possible that the legislature will amend the rule without the Council's input. Prof. Peterson suggested that, even if the Council could not come to a consensus on the Rule, that it could at least provide a body of thinking for the legislature to consider.

Mr. O'Leary then shed some light on the history of the bill before the Senate Judiciary Committee. Senate Bill 216 was brought by the Attorney General's office and originally proposed as a means by which excess funds that were unclaimed could be diverted to the Attorney General's office. The bill was then amended in its final form to divert the funds via the Attorney General to the Common School Fund. It went to the floor of the Senate but did not go to a vote and was re-referred to Senate Judiciary, then did not go further. The testimony at the Committee hearing was that Senate Bill 216 was strongly opposed by Jim Gardner who is a lobbyist for several large corporations. Mr. O'Leary reported that Mr. Gardner informed the Judiciary Committee that the Council was actively working on the *Cy pres* recovery issue and suggested that the legislature allow the Council to do the work as they are the experts.

Ms. McKelvey reported that there is a Council committee expressly addressing the Rule 32 issue. Ms. McKelvey also reported that Senator Burdick wants an appropriate representative

of the Council to advise her as to the status of the review of Rule 32 and requests that the Council consider making a recommendation in light of Senate Bill 262A.

Judge Bloch suggested that the Council allow the committee to move forward in responding to Senator Burdick's request. Justice Kistler voiced concern that the issue appears to go beyond procedure and into substance, that whether the money goes to the Attorney General's fund for indigent defense or goes to the Common School Fund seems beyond the realm of procedure and that it may be a substantive policy matter which may be beyond the expertise of the Council. Prof. Holland confirmed that the reason that the Council has had difficulty before with this issue is precisely what Justice Kistler's concern is and suggested that perhaps the *Cy pres* part should be left for the legislature to decide, that the Council has never decided where money goes. Prof. Peterson noted that there had been testimony that the *Cy pres* funds could go to the state land's division as unclaimed property, as opposed to allocating toward any particular recipient, that it could be treated as unclaimed property, and the interest could go to the Common School Fund, and that may be a little less political and substantive.

Judge Bloch then referred to the minutes of the October 8, 2005, meeting and recalled that, on the merits, there was majority support in the Council to go forward with the amendment dealing with the claims form. Judge Bloch proposed that the committee go forward and focus on the claims form issue again and not move forward with the *Cy pres* issue at this time. It was noted that Oregon is in the minority, possibly the only state, that always requires a claim form.

There was then further discussion that the committee should make contact with bankers and the business community. Ms. McKelvey asked Judge Bloch and Mr. Libmann to communicate with the banking community as well as other interested parties.

Rule 44 Committee Report.

Mr. Bloom reported that the committee met a couple of times and consists of Mr. Cooper, Mr. Svoboda, and himself. Mr. Bloom reported that there is a concern that allowing reports of examinations by experts violates the expert discovery ban by obtaining the report. A suggested compromise is to blacken out the names of the experts. Mr. Bloom reported that the committee was working on a couple of alternatives and will have something for the Council to review at the next meeting. There was discussion that Rule 44C is more of a problem for practitioners than for judges. There was also discussion of Rule 44A's practice regarding who can be present, whether a recording can be made, etc. Judge Holland offered to be on the committee after Ms. McKelvey noted that there are two different parts of Rule 44 and asked if anyone else wanted to join the committee. Ms. McKelvey then asked if there was a consensus of the group whether they should look at the Rule 44A IME issue this year. The Council decided not to look at the IME issue.

Motion to amend to add punitive damages (Mr. Buckle). ORS 31.725. ORCP 23. Concern of timeliness issue. There was a question of whether there should be a time limit after filing the complaint and before trial to add punitive damages out of concern for prejudice to

defendants. Mr. Cooper suggested that any rule we promulgate should be flexible, not a bright line, hard and fast rule.

Judge Bloch commented that having a time limit reduces the tension of last minute motions and that last minute motions are a source of constant aggravation for judges wanting to move forward with trials. Ms. McKelvey noted that there seemed to be a consensus to move forward and asked for volunteers to work on the issue of late filings. Ms. O'Leary, Justice Kistler, and Mr. Buckle volunteered to work on this committee.

Serving opposing counsel a copy of a discovery subpoena (Mr. Buckle). This is covered in Rule 55D(1). No action required on this issue.

Changing the deadline for filing third party complaints from 90 days after you are served, to the equivalent of the federal rule (Mr. Buckle). ORCP 22C(1). Mr. Buckle noted that the federal rule is not substantially different. Judges can overrule and allow filing of third party complaints after 90 days. After 90 days the Oregon rule requires both agreement **and** leave of the court. Prof. Holland commented that, a prior Council decided they liked the language of "and" instead of "or." The Council decided not to move forward on this issue.

Judge Thom suggested that the Council look to the Oregon State Bar PLF for what they see as problems in the ORCPs for practitioners. Ms. McKelvey offered to call the PLF to find out what traps they see in the Rules for practitioners.

Responding to a Request for Production and must a written response be "filed" (Mr. Buckle). ORCP 43B. There was discussion regarding the frustration with not getting responses to requests for documents; that responses are too long, too short, or not at all; and not getting responses in an organized fashion. Prof. Holland commented that failure to respond results in waiver of objections to the discovery. Need to respond or object. Judge Herndon commented that large amounts of judicial time is spent on motions to compel. Ms. McKelvey commented that it sounds like this service of a response to a RPD issue does not need a committee, that one individual could probably draft something for the Council to consider. Prof. Holland offered to draft a response to this issue.

Change ORCP 47E re "unnamed experts" (Mr. Buckle). There was discussion addressing concerns about the summary judgment rule where, in opposition to summary judgment, the opposing lawyer can submit an affidavit saying "I've got an expert" that will raise an issue of fact. Ms. McKelvey commented that this is a problem, but probably not one the Council should address as it is hard to fashion an additional remedy where an attorney is willing to file a false affidavit. Mr. Cooper suggested practitioners ask the expert on cross examination the date the expert was retained by the party. No action on this issue.

Rule 44C Reports (Mr. Buckle). There was discussion regarding the question about whether the rule also allows discovery of other reports and notations from individuals other than

physicians, such as nurses. This issue will be consolidated with the other Rule 44C issue that Mr. Bloom, Judge Holland, Mr. Svoboda and Mr. Cooper are working on.

ORCP 38(B) [Ms. McKelvey (submitted on behalf of Doug Bray, Multnomah County Trial Court Administrator)]. Ms. McKelvey reported that this rule contains Oregon's implementation of the Uniform Foreign Deposition Act, that it is out of date, and should be updated to contain the current version. Judge Bloch said he would follow up.

Rule 7 Proposal. Danny Lang of Deschutes County appeared briefly by teleconference. Due to difficulty communicating via the speaker telephone and a cellular telephone, Ms. McKelvey asked that the members look at the proposals for Rule 7, which would be discussed at the next meeting. Prof. Peterson informed the Council that there were three proposals from Mr. Lang; 1) a proposal to eliminate Rule 7A's true copy requirement; 2) sample pleadings for simple cases under Rule 16 or 18; and 3) a proposal to have commencement under Rule 3 satisfy the statute of limitations to avoid traps for the unwary under ORS 12.020. Mr. Bloom, Judge Schuman, Judge Isaacs, and Mr. Cooper to review Mr. Lang's proposals in preparation for the next meeting.

ORCP 63 and 64 (Judge Schuman). Ms. McKelvey asked if there were any other amendments. Judge Schuman reported that Jim Nass asked if an issue regarding the 55 day time period for ruling on a JNOV or new trial motion under Rule 63 and Rule 64 could be put in the agenda for the next meeting. The problem occurs when a notice of appeal is filed during the 55 day period.

Agenda Item 6: Discussion regarding future meeting dates. The consensus of the members was that the Council would next meet on January 14, 2006, in Eugene.

Agenda Item 7: Old business (Ms. McKelvey).

Budget Note. Mr. O'Leary reported that the interim judiciary committees have remained separate committees. Mr. O'Leary reported that the House committee consists of Chair Rep. Wayne Krieger, Vice-Chair Rep. Andy Olsen, Rep. Bob Ackerman (resigning at the end of the year), Rep. Jeff Barker, Rep. Vicki Berger, Rep. Kevin Cameron, Rep. Greg MacPherson, and Rep. Gene Whisnant. Rep. Greg MacPherson was identified as the one lawyer on the House committee. The Senate committee consists of Chair Sen. Burdick, Vice-Chair Sen. Charles Starr, Sen. Roger Beyer, Sen. Floyd Prozanski, Sen. Charlie Ringo, Sen. Vicki Walker, and Sen. Doug Whitsett. Senators Prozanski and Ringo were identified as the two lawyers on the Senate committee. Mr. O'Leary reported that Senator Burdick and Representative Krieger intend to meet together at the same time, convene the committees at the same time, and have joint agendas and joint work plans. The first meeting of the two committees is tentatively scheduled for December 14, 2005, during which time the Council will be on the agenda at about 1:45 p.m. Mr. O'Leary expects that the members of the work group to examine the Council will be identified and formally approved by the committees. Mr. O'Leary informed the Council that many, if not most of the members of the interim judiciary committees do not know what the Council does,

that they do not realize what their responsibility is regarding the budget note, and that the task is to educate them as to what the Council is and does and what its functions are. Mr. O'Leary suggested that both the Chair and the Executive Director of the Council be present at the meeting to inform and advise the interim judiciary committees. Mr. O'Leary also advised the Council members to contact their local representative or senator to discuss the Council and the budget note. The Legislative Fiscal Office will brief the interim committees on the budget note. The deadline for the report on the Council's future will be sometime before September of 2006.

Agenda Item 8: New business (Ms. McKelvey). Prof. Holland gave a brief history regarding Council elections, which are traditionally held in December. He informed the Council that, as a matter of tradition, whoever is elected into the vice-chairperson position normally becomes the next chairperson and the nomination oscillates between plaintiffs' lawyers and defendants' lawyers from term to term without opposition. Prof. Holland pointed out that since Ms. McKelvey is a defendants' lawyer, that the next elected vice-chairperson might be from the plaintiffs' bar. The Council agreed that the election for the next chairperson and vice-chairperson will be held during the next meeting on January 14, 2006.

Agenda Item 9: (McKelvey). Adjournment. The meeting was adjourned at 11:30 a.m.