

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
(amended February 3, 2006)
Saturday, January 14, 2006
Room 242
William H. Knight Law Center
University of Oregon
1515 Agate Street
Eugene, Oregon

Members Present:

Hon. Richard L. Barron
Hon. Eric J. Bloch*
Benjamin M. Bloom
Eugene Buckle
Kathryn H. Clarke
Don Corson
Martin E. Hansen
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
John L. Svoboda
Hon. Locke A. Williams

Members Excused:

Brooks F. Cooper
Hon. Robert D. Herndon
David F. Sugarman
Hon. Ronald B. Thom

Members Absent:

Hon. Steven B. Reed

*appeared by teleconference

Guests:

None present.

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. Chair Clarke called the meeting to order at 9:40 a.m.

Agenda Item 2: Self-introductions of guests. There were no guests.

Agenda Item 3: Approval of November 12, 2005, minutes. Professor Peterson noted

that legislative fiscal officer John Borden and legislative counsel Bill Taylor were incorrectly listed on the minutes of the November 12, 2005, meeting as members of the Council, that they were guests, and they do not need to attend Council meetings or to be excused. Ms. Clarke noted that Shelly D. Russell was listed as present and absent; Ms. Russell was present. Mr. Bloom suggested that under the Rule 7 proposal on page 5 of the minutes, line 7, the word “agreed” should be inserted after Mr. Cooper. As amended the minutes were approved.

Agenda Item 4: Report on December 14, 2005, hearing before the House and Senate judiciary committees (Ms. McKelvey). Ms. McKelvey reported that Bill Gaylord, Prof. Peterson, Prof. Holland, and she appeared at a hearing before the House and Senate judiciary committees (meeting together) on December 14, 2005, and gave an overview of the Council, examples of rule changes, and what the Council is currently working on. Ms. McKelvey reported that the Council was well-received. The four who presented testimony met afterward with some of the workgroup members and all of the informal comments from the judiciary committees’ members were positive. Ms. McKelvey expressed optimism that there will be a good result at the end of the session. The first workgroup meeting is scheduled on January 27, 2006, at 9:00 a.m. in Salem.

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

Rule 32 Committee Report (Judge Bloch). Mr. Sugarman was not present to give a report. Judge Bloch reported that he had not been in touch with Mr. Sugarman. Judge Bloch planned to meet with Mr. Sugarman early the following week. The Rule 32 Committee Report was deferred to the next meeting in February.

Rule 44(C) Committee Report (Mr. Bloom).

Mr. Bloom reported that Judge Holland, Mr. Svoboda, and he met by telephone conference in which Mr. Cooper was unable to participate due to a recent surgery. The group felt that this concern came out of an isolated incident that prompted Mr. Bloom to suggest a rule change and that there did not appear to be a statewide problem with Rule 44C. The consensus of the committee was that this issue did not require further action, at this time. The Rule 44 issue was removed from the agenda by a consensus of the Council.

Rule 7 True Copy and Service Proposals (Mr. Bloom).

Mr. Bloom reported that little work was done on this proposal due to Mr. Cooper’s unexpected surgery and the recent discovery that Judge Schuman was on the committee.

Mr. Bloom discussed Douglas County attorney Danny Lang’s proposal to add an extra 60 days for service of summonses and said that the committee realized that adding an extra 60 days for service amounted to changing ORS 12.020 and the Council cannot do that.

Mr. Bloom then discussed Mr. Lang's service proposal and reported that the committee did not recommend the proposed change to persons who may be served under Rule 7 because the proposed change would interfere with the attorney client relationship; if the client did not want to authorize his or her attorney to accept service, the proposed change to Rule 7 would trump that. Mr. Bloom also reported that he and Judge Isaacson also felt that the way Rule 7D(4) reads covers the substituted service issue for motor vehicle service, that all the hoops were already in place to jump through, and that substituted service in actions involving motor vehicles was already adequate without making the defendant's attorney a person or entity to be served.

Mr. Bloom next discussed the Rule 7A proposal and reported that he and Judge Isaacson agreed that this could be changed. They felt that the true copy certification was a good idea back when people were hand-drafting documents and had to make changes to pleadings and other documents but it is no longer necessary to write "true copy" on a document, that the attorney's signature is a verification that they are not trying to trick anyone with service copies that are not true and exact copies of the original summons and complaint that are filed. Professor Peterson observed that many Oregon lawyers stamp "true copy" on many court documents and discovery documents in addition to summonses and complaints whereas other states have no "true copy" requirement. Mr. Peterson then asked if it was in any way harmful if the true copy requirement went away. Ms. Clarke pointed out that everything the Council does has to be by a majority of the Council and not just those present and that any proposed change to Rule 7A needs to be prepared with the necessary language and put on the agenda. It was moved and seconded to have the committee draft language for the Rule 7A true copy issue. Ms. Clarke then asked if anyone was going to get back to Mr. Lang on his Rule 7 proposals. Professor Peterson offered to report back to Mr. Lang.

Rule 18 Proposal re Form Complaints (Mr. Bloom). Mr. Bloom reported that he and Judge Isaacson discussed Mr. Lang's Rule 18 proposal a few times and that, under Oregon's well established code pleading requirements, they felt that it was not appropriate to adopt the proposed form pleadings. Mr. Bloom and Judge Isaacson felt that Mr. Lang's proposal to go to California style pleadings and check the box form pleadings to make things simpler was contrary to Oregon's code pleadings requirements and that the Council should not do that. No motion was brought before the Council to continue work on the Rule 18 proposal.

Punitive Damages Proposal (Justice Kistler). Justice Kistler reported that Ms. O'Leary, Mr. Buckle, and he worked on this issue and it was their recommendation to leave it alone and "let sleeping dogs lie." Justice Kistler reported the proposed rule change came about because of the problem of people waiting until the last minute to amend to add punitive damages and that there currently is language in ORS 31.725(3)(b) that says, if a defendant is prejudiced, then a judge can deny a motion to amend. Justice Kistler felt that there were some Oregon constitutional questions concerning whether the Council could make rule changes that would supercede statutes. Professor Holland briefly related his response to Justice Kistler's concern. To Professor Holland's surprise the language of ORS 1.735 and ORS 1.745 did appear to give the Council the authority to amend existing procedural statutes and there was a case involving the federal rules that seemed to support the position that procedural rules could supercede procedural

statutes. Professor Holland noted that the Council had never asserted that kind of authority and there could be political sorts of repercussions from people who would be surprised that the legislature would have given the Council authority to make rule changes that would supercede statutes. Professor Peterson suggested that, whatever the correct position, a change in the rules that will supercede existing statutes creates the kind of ambiguity that the Council should avoid. If a proposed rule change might invalidate an existing statute, the Council should advise the legislature to the end that, if the rule is not rejected or modified, the legislature will be cognizant of the need to amend or repeal the affected statute. Justice Kistler reported that the committee's recommendation was to do nothing.

Rule 43 RPD Response Proposal (Prof. Holland). There was lengthy discussion concerning whether or not the way the rule reads allows a response such as, "I'll get back to you with the documents," to serve as a response or if the response is to include the documents requested. It was discussed that attorneys often do not get the documents requested and are forced to file motions to compel. It was agreed that the rule is not very clear and Ms. Clarke assigned a committee consisting of Mr. Hansen, Mr. Corson, Judge Bloch, Judge Barron, and Prof. Holland to come back to the Council with a proposal for possible changes to Rule 43.

Rule 38B Uniform Foreign Deposition Proposal (Judge Bloch). Judge Bloch reported that he has not had an opportunity to look at this proposal and has not received any additional information on this issue from his trial court administrator, Doug Bray. Judge Bloch reported that he would get back to the Council regarding this proposal at the February meeting.

Agenda Item 6: Elections of Officers (Ms. Clarke). Ms. Clarke discussed the customs of alternating between the plaintiffs' bar and defense bar and that the vice-chair moves up to the chair position. Prof. Holland said that this is normally done with somebody from the floor nominating the vice-chair and then someone moves to close the nominations. These nominations are done separately. It was moved and seconded that Ms. McKelvey be elected to serve as chair of the Council. Ms. McKelvey was unanimously elected to serve as chair on the Council. Mr. Corson was nominated and his nomination was seconded for the position of vice-chairperson. Mr. Corson was unanimously elected as vice-chair. Prof. Holland noted that Ms. McKelvey's election to the chair becomes official with the passing of the gavel.

Agenda Item 7: Confirmed date and site of the next meeting for 9:30 a.m. on February 11, 2006, at the Oregon State Bar.

Agenda Item 8: Old business (Ms. Clarke). Ms. Clarke reported that Ms. McKelvey had not had an opportunity yet to contact the PLF regarding what the PLF sees as problems in the ORCP's for practitioners. This item was placed on the agenda for the next meeting.

ORCP 63 and 64 (Judge Schuman). Judge Schuman reported that Jim Nass had a question regarding these rules and asked to discuss this issue at the next meeting.

ORCP 55A. Mr. Corson noted that he looked at 55F, allowing a litigant to issue a subpoena when the issuer just wants the recipient to provide documents, and discovered ORCP 55F(3) contains verbage, “other than a hospital”, which appears to be from back in the old days prior to the amendment (55H) pertaining to “individually identifiable health information.” Mr. Corson made a suggestion that the Council remove the words “other than a hospital” and add the words “other than individually identifiable health information”, after the phrase “to produce books, papers, documents or other tangible things.” Ms. Clarke agreed that the “other than hospitals” phrase was a relic and requested that Mr. Corson draft something in writing for Ms. McKelvey and Ms. Clarke to review.

Number of Members. Ms. Clarke noted that the Council only has 22 members and that the Council is lacking a public member. Justice Kistler said that Justice Durham is the point person on appointment of the public member to the Council and that he has been busy with family matters. It was determined that the Council’s actions are not void due to a vacancy.

Agenda Item 9: New business (Ms. Clarke).

Rule 9 Consensual Service of Documents by Email. This proposal was a late submission and the Council decided to review it and discuss it at the February meeting. Judge Holland volunteered to contact the Bar committee and touch base with them as to the work they have done on this issue.

Judge Thom’s Resignation: Prof. Holland reported that Judge Thom was resigning from the Council. Ms. Clarke said she would contact Judge Rasmussen to name a judge to fill the vacancy.

Council Quorum: Ms. Clarke then discussed her concerns regarding having an official quorum of the Council. Ms. Clarke suggested that the statute needs to be changed to read that any changes need to be by a majority of the quorum, not a majority of the Council. Ms. Clarke asked if the Council could draft the language to present to the legislature. Prof. Peterson offered to draft the proposed change to ORS 1.730(2)(a).

Presentation of Appreciation for Prof. Holland’s 15 years of service. The Council presented Prof. Holland an ornate pipe case in appreciation for his years of service to the Council noting that, during the last two years, he graciously volunteered his time after the legislature allocated no funds for the executive director position.

Adjournment. The meeting was adjourned at 11:30 a.m.