

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, February 11, 2006
Amended March 10, 2006
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Members Present:

Hon. Richard L. Barron
Benjamin M. Bloom*
Kathryn H. Clarke
Don Corson
Martin E. Hansen*
Hon. Lauren S. Holland*

Hon. Rives Kistler
Connie Elkins McKelvey
Leslie W. O'Leary
Hon. David Schuman
John L. Svoboda

Members Excused:

Hon. Eric J. Bloch
Hon. Rodger J. Isaacson
Shelley D. Russell
David F. Sugarman

Members Absent:

Eugene Buckle
Brooks F. Cooper
Hon. Robert D. Herndon
Alexander Libman
Hon. Steven B. Reed
Hon. Locke A. Williams

* Benjamin Bloom, Martin Hansen, and Judge Holland appeared by teleconference.

Guests:

Susan Grabe, Oregon State Bar.

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

Agenda Item 1: Call to order. Ms. McKelvey called the meeting to order at 9:36 a.m. Ms. McKelvey expressed appreciation to Ms. Clarke for her exemplary service as the first female Chair of the Council.

Agenda Item 2: Approval of minutes. A copy of the minutes of the January 14, 2006, meeting as amended on February 3, 2006, in order to correctly state the proposed change to

ORCP 55 was distributed to the members for review. On motion duly made and seconded, the minutes of the January 14, 2006, meeting, as amended, were approved.

Agenda Item 3: Report on House and Senate judiciary committees' work group on the future of the Council (Ms. Clarke). Ms. Clarke suggested that the Council should present a budget that reflects the actual costs of the Council, including volunteer time of the lawyers, judges, and executive director; donation of space; teleconferencing; materials; and in kind services. Ms. Clarke reported that a rather academic issue was raised, that the Council by design is a non-legislative body that does things which have the effect of law. Ms. Clarke reported that there was also discussion regarding what to do with funding the Council. One proposal was that perhaps the funding could go underneath some other umbrella such as a private agency or the Oregon State Bar, which most agreed would have a negative public perception of lawyers making the rules by which litigation is conducted. Ms. Clarke reported that Bill Taylor suggested that perhaps the Council could fall under the Judicial Department. That suggestion raises another academic question - - separation of powers problem - - the Council would become an agency under the judicial branch which legislates unless the legislature objects. Also, it was unclear whether the Judicial Department would get more money from the legislature simply because it would have the Council under its umbrella.

Ms. Grabe then reported that another proposal was floated, but not discussed, that the Council could be structured and set up similar to the Oregon Law Commission which reports to the legislature. Judge Holland expressed concern that the judges may be placed in a precarious position depending on who funds the Council. Justice Kistler noted that the current structure is already close enough to the edge. Ms. Grabe next commented on the Council's unique position as a quasi-judicial, quasi-legislative body. Ms. McKelvey inquired as to who was on the workgroup and Ms. Clarke replied that it was composed of the same parties as reported during the last meeting with the exception of the addition of attorney Bruce Hamlin. Ms. Clarke reported that the legislative counsel's office appointed three members, which was followed by a discussion as to how many votes they have. Ms. Grabe reported that some of the appointments were staff who said they did not have a vote. Mr. Corson then inquired if the Council was in danger of not existing anymore or simply not receiving funding to which Justice Kistler responded that the Council was not in danger of not existing anymore, simply that the legislative counsel does not know what to do with the Council and that Mr. Taylor's quick fix is to put the Council in the Judicial Department. Ms. Clarke confirmed that it is clear that the legislative counsel's office does not want the Council to go away as they would have to go back to making rule changes and they do not want to do that. Ms. Grabe said that the work group co-chairs, Rep. Bob Ackerman and Sen. Floyd Prozanski, who are both lawyers, support funding the Council; the problem is convincing the other 88 legislators. Ms. Grabe reported that the report from the work group is due by September but, realistically, the legislature starts working on the budget in July or August. Ms. Clarke then confirmed that she and Prof. Peterson would be working on the operational costs of the Council. Members should make a record of their time spent on Council business.

Agenda Item 4: Discussion regarding suggested action items for Council's 2005-07 biennial agenda (Ms. McKelvey).

A. Committee Reports (Ms. McKelvey).

Rule 7A Committee Report (Mr. Bloom). Mr. Bloom reported that he thought that Mr. Corson was going to get something back to him, and that he would draft something by the next meeting regarding the Rule 7A "true copy" requirement. A discussion then followed concerning a related proposal to allow 120 days after filing to complete service to which Ms. Clarke noted that the Council could give 120 days to complete service, but cannot modify the statute of limitations. Prof. Peterson reported that he did reply to the author of the three proposed changes, Danny Lang, regarding the Council's response to Mr. Lang's three proposals.

Rule 32 Committee Report (Ms. McKelvey). Ms. McKelvey reported that Senator Burdick again asked who can make changes in class actions. Ms. McKelvey read an email to the Council that she received from Mr. Sugarman suggesting that he would like to resign as chair of the Rule 32 Committee. In his email, Mr. Sugarman said that he would be happy to help the committee but should no longer chair it and suggested soliciting outside assistance. Mr. Sugarman recommended Phil Goldsmith, John Rich, and Nancy Potter for resources. Ms. McKelvey suggested placing Ms. O'Leary on the Committee with Judge Bloch as chair. Ms. Grabe noted that Rule 32 is a lightning rod issue, that there was criticism from the business community in the last biennium of a perceived lack of input from that community, and that the Rule 32 Committee should make contact with the business community and put in writing a request for input from the business community. Ms. Clarke voiced concern that Judge Bloch may not be able to accept the responsibility/time commitment of getting letters out to the business community to which Prof. Peterson offered his assistance in getting letters out and providing office space for meetings. There followed discussion concerning *cy pres* recovery, that since it is an issue under Rule 32, the Committee should address it and recommend a proposal to the OSB's Procedure and Practice Committee. Ms. Grabe reported that the legislature wants to know what the Council thinks about the *cy pres* issue and where the money goes. Prof. Peterson recalled for the Council that Judge Bloch thought the Council should focus on the claim form and that Mr. Sugarman thinks that, if the Council amends the claims form provisions, that may resolve some of the other issues. Ms. McKelvey then closed by accepting Mr. Sugarman's resignation as chair of the Rule 32 Committee, transferred Mr. Sugarman to the Rule 43 Committee, and appointed Ms. O'Leary to the Rule 32 Committee. Ms. McKelvey said she would follow up with Judge Bloch and have a report from the Committee at the next meeting.

Rule 43 Committee Report (Mr. Corson). Mr. Corson reported that the Committee met once. Professor Holland circulated equivalent rules from other jurisdictions. Judge Barron drafted proposed changes and Mr. Corson and Mr. Hansen had proposed modifications. Mr. Corson reported that the proposals are to make clear that, when the time for production is up, then the receiving party is required to produce the documents, that they are not to send a response saying that they are going to produce the documents someday. Mr. Corson reported that the proposed changes include a response that makes clear whether or not documents responsive to the request exist and, if there are documents which are responsive, they must be produced. The

proposed changes are to clarify the time frame for a requesting party to move to compel and, if a party does not object to production within the time specified in the request, then the recipient party has waived any objections. Mr. Corson reported that Mr. Buckle, Judge Barron, Judge Bloch, Mr. Hansen, and Professor Holland are also on the Committee and that the Committee regretted losing Ms. O’Leary but appreciated gaining Mr. Sugarman. Mr. Corson reported that the Committee will have something drafted for the Council’s consideration the next meeting, although it will not be a final draft.

Rule 55F(3) Committee Report (Mr. Corson). Mr. Corson spoke with prior members of the ORCP 55 Committee and noted that all of the pieces of Rule 55 interrelate and that it is the longest rule in the book because of HIPPA. Mr. Corson said his intention is to make it clear that if you want to get individually identifiable health information, you have to go to 55H, you cannot get it through 55F(3). Ms. Clarke suggested a cross reference to subsection H, that a clause could be added “other than individually identifiable health information as defined in subsection H(1),”. Ms. McKelvey asked Prof. Peterson to add the clause for the Council’s vote at the next meeting, as there were not enough members to vote on this change at this meeting.

Old business

Rule 9 Consensual Service by E-mail (Judge Holland). Judge Holland reported that she was unable to discuss this issue with the Oregon State Bar’s Procedure and Practice Committee, but did discuss this with a number of Lane County lawyers and judges. Judge Holland reported that most of the people she spoke with had concerns about using email as a source or method of service. Judge Holland said she would like to defer this issue until the next meeting in order that she could have a chance to talk with the Procedure and Practice Committee. Judge Holland reported that what came out of her meetings in Lane County was that, if email were to be used as a method of service, there would have to be significant safeguards attached and whether that would be in conjunction with the UTCR’s or other methods of insuring that these emails would be noticed by attorneys and not dumped into a spam account. Judge Holland felt this issue needs to be studied significantly. Mr. Bloom expressed that he does not like the idea of electronic service, but feels that the Council should look into making it available for state court practice. He noted that the goal is paper reduction but that, in federal court when a person files electronically, they still have to give the court paper documents for the judges. Mr. Bloom expressed his opinion that this issue should be done in conjunction with other committees, that this is a big step, and the Bar needs to be involved. Judge Holland noted that there is a difference between filing electronically where documents go into a particular account as compared to a party serving another party to a general email account without a method for earmarking service documents. Ms. Clarke addressed the issue of various computer problems that can affect receipt of email. Mr. Hansen reported the he deals with the federal system and does Public Utility Commission work where they want everything filed and exchanged electronically and there is no uniformity in the way the messages come in and that one has to be extremely careful not to delete a notice of a hearing or notice of a deadline because the emails look like spam. Justice Kistler suggested that the perhaps the UTCR’s should be changed for those counties that are using email for hearing notices in order that they are done in a uniform manner. Mr. Corson suggested that the Council should refer this issue to the UTCR committee. Ms. McKelvey suggested that the

Council discuss this matter further at the next meeting. Prof. Peterson suggested that possibly it should be in the ORCP's, and that at the next meeting we should discuss whether there should be a uniform subject line requirement in Rule 9, and whether a Rule 9F type requirement of a response back confirming receipt of the service by email. Mr. Hansen addressed the problem of attorneys who change firms and the forwarding of their emails. Ms. Grabe suggested to Judge Holland that she contact Mark Comstock on the Board of Governor's, who has created a large work group concerning state E-filing and that the work group has been working with members of the judiciary. Prof. Peterson informed Judge Holland that Michael Sussman and Everett Jack, the current chair of the Bar Procedure and Practice Committee, forwarded this issue and suggested that they should be in the loop.

Rule 38B Uniform Foreign Deposition Proposal (Judge Bloch). Judge Bloch was not present to give his report.

Rule 63 and Rule 64 – 55 day issue (Judge Schuman). Judge Schuman reported that he had received an email from Jim Nash that there is a potential glitch that occurs when there is a motion for a new trial which must automatically be denied as a notice of appeal has been filed and the trial court is deprived of jurisdiction. Judge Schuman reported that Mr. Nash suggested a fix using ORCP 71B(2) which would allow the trial court to retain jurisdiction following the filing of a notice of appeal for this purpose (as is the case for ORCP 68 statements for attorney fees). Judge Schuman suggested that he and Mr. Nash could come up with a proposed draft for the next meeting. Ms. Clarke inquired if this issue would require a statutory amendment and believed that the trial court's continuing jurisdiction is defined in Chapter 19. Judge Schuman said they would look at that. Judge Schuman pointed out that a rule or statute could be drafted contingent upon the passage of another statute and avoid one passing without the other. Ms. Grabe suggested that, if the Council proposes a rule change that has a statutory partner, it should be forwarded to the Procedure and Practice Committee who could carry the issue forward.

Input from the Professional Liability Fund (Ms. McKelvey). Ms. McKelvey reported that she left a message with the Executive Director of the Professional Liability Fund inquiring if there were any particular rules over which the Professional Liability Fund had concerns that the Council should be addressing and that she has not heard back. Ms. McKelvey reported that the Executive Director is usually very responsive and assumes that, as she did not hear back from the Executive Director, there are not any particular rules that the PLF is concerned with at this time.

Proposed Amendment to ORS 1.730(2)(a) (Professor Peterson). Prof. Peterson reported that this proposed statutory amendment was at the former chair's suggestion regarding a question as to whether the Council can conduct any business if there is not a quorum of the members. Ms. Clarke read the existing statute and noted that the focus needs to be on how to get work done if there is not a majority of the council present at a particular meeting. Prof. Peterson suggested that the Council could continue to do business while getting ready to promulgate rule changes but the current language is less clear than would be desirable. Ms. Grabe then suggested that this issue should also be raised with the work group.

Public Member Appointment (Ms. Clarke). Ms. Clarke reported that the Supreme

Court had appointed Dr. John A. Enbom as the public member, but was not sure if a letter had been sent to him at this point. Prof. Peterson reported that Judge Jerry Hodson has been appointed to replace Judge Thom. The Council is therefore currently fully staffed.

Meeting Attendance. Ms. Clarke expressed concern regarding the importance of members attending the meetings, that the Council cannot function without a full quorum. Ms. Clarke said she would send an email addressing the need to have a quorum present at meetings in order that the Council may function.

New Business

Rule 69B(4) (Prof. Peterson). Prof. Peterson reported that the former Soldier's and Sailor's Relief Act has been amended and that Ms. Grabe and Judge Isaacson had raised the issue that Rule 69B(4) has language which refers to an act which no longer exists and that the affidavit called for in Rule 69B(4) may need to require more information to comply with the current federal law. Prof. Peterson reported that the affidavit requires stating whether or not the defendant is in the military service and showing necessary facts to support the affidavit, which is under the new federal law or, if the plaintiff is unable to determine whether or not the defendant is in the military service, stating that plaintiff is unable to determine whether or not the defendant is in the military service. Prof. Peterson reported that there is a question of how to meet the requirements of the first part of the affidavit, are they or are they not in military service and showing the necessary facts to support that affidavit. Prof. Peterson reported that Judge Isaacson was alerted by the Judicial Department that the old affidavit may not be sufficient anymore. Prof. Peterson reported that he looked at the statutes and the language was close, but was not sure if one had to affirmatively state the reasons that one could not determine whether someone was in the military or not. Prof. Peterson suggested that, at a minimum, the reference to the federal statute needs to be updated. Ms. Grabe reported that she sent an email to the Oregon State Bar's Military Assistance Panel regarding this issue and learned that the Rule 64B(4) affidavit is not adequate. There was discussion as to whether or not the military would give out information if an individual is a member of the military and whether the federal statute is more protective than Rule 69B(4). Ms. Grabe suggested that there should be a point person to contact the Military Assistance Panel. Mr. Svoboda volunteered to be the liaison between the Council and the Military Assistance Panel. Justice Kistler questioned whether the Oregon statute prevents a default in more situations than the federal statute would and, if it does, is it a problem that the Oregon statute would be more protective than the federal statute. Ms. Clarke noted that the Oregon statute requires a "belief" that the defendant is or is not in the military service while the federal statute requires a showing. Justice Kistler recommended that the Oregon rule should conform to the federal statute. Ms. Grabe reported that the chair of the Military Assistance Panel is Charlie Williamson and Karna Gustafson is the person who raised this issue arising from some cases she has had and suggested that they both be contacted. Judge Holland offered to assist Mr. Svoboda with getting information from the judiciary. Ms. Grabe suggested that they also contact Pete Sheppard for additional assistance with addressing the Rule 69B(4) issue.

May 13, 2006, Meeting. Ms. McKelvey announced that she will be out of town the weekend of the May 13, 2006, meeting and that Mr. Corson will chair the meeting on May 13, 2006, if the meeting can be held in Eugene. It was agreed to hold the May 13, 2006, meeting in Eugene. Prof. Peterson said he would work with Prof. Holland regarding reserving a room at the Law School and assuring a working teleconference telephone.

Agenda Item 9: (McKelvey). Adjournment. The meeting was adjourned at 11:00 a.m.