

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
(Amended April 7, 2006)
Saturday, March 11, 2006
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Members Present:

Hon. Richard L. Barron
Hon. Eric J. Bloch
Eugene Buckle
Kathryn H. Clarke
Brooks F. Cooper
Don Corson
Martin E. Hansen*
Hon. Robert D. Herndon
Hon. Jerry B. Hodson
Hon. Rodger J. Isaacson

Hon. Rives Kistler
Alexander Libman
Connie Elkins McKelvey
Leslie W. O'Leary
Shelley D. Russell
Hon. David Schuman
David F. Sugerman
John L. Svoboda
Hon. Locke A. Williams

Members Excused:

Benjamin M. Bloom
Dr. John A. Enbom
Hon. Lauren S. Holland

Members Absent:

Hon. Steven B. Reed

* Martin Hansen appeared by teleconference.

Guests:

Susan Grabe, Oregon State Bar.

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

Agenda Item 1: Call to order. Ms. McKelvey called the meeting to order at 9:32 a.m.

Introductions of new members. Judge Jerry B. Hodson briefly introduced himself.

Agenda Item 2: Approval of minutes. Copies of the minutes of the February 11, 2006, meeting as amended on March 10, 2006 (in order to correctly state that Mr. Bloom

believed that Mr. Corson, not Mr. Cooper, was going to draft something by the next meeting regarding the Rule 7A "true copy" requirement) were circulated. Ms. McKelvey made an additional correction, that it was Sen. Ginny Burdick who made the inquiry about the *cy pres* issue and where the money goes.

Agenda Item 3: Report on the second meeting of the House and Senate judiciary committees' work group on the future of the Council (Ms. Clarke). Ms. Clarke reported that the work group had met for the second time and that a second draft of the work group's report is being worked on. Ms. Clarke related that there was discussion over a suggestion that the Council could be managed under the judicial branch which raised administrative and legal concerns. Ms. Clarke noted that the consensus of Sen. Floyd Prozanski and Rep. Robert Ackerman is to leave the Council operating as it has been, that they need to look for a foundation for keeping the Council, and that one of the ways to accomplish this is by looking at the services the Council provides to the state. Ms. Clarke reported that the Executive Director is working on putting the costs of operating the Council in a format log in accordance to the style of log the Legislative Fiscal Office prefers to review. Ms. Grabe also reported that the feeling from the Legislative Counsel's Office now seems to be that the Council should stay the way it is, but that the Council needs a champion within the Legislative Counsel's Office. Ms. Grabe observed that the Legislative Fiscal Office wants all of the smaller stand alone budgets, such as the Council's budget, consolidated into larger agencies' budgets. Ms. Grabe emphasized the importance of getting David Richardson and others in the Legislative Counsel's Office to realize the importance of keeping the Council budget funded. Ms. Clarke noted the importance of getting the Council budget report finished.

Agenda Item 4: Committee Reports (Ms. McKelvey).

Rule 7A Committee Report (Mr. Bloom). Mr. Cooper gave the Committee's report in the absence of Mr. Bloom. Mr. Cooper summarized the drafted change to Rule 7A, deleting the portion of the rule requiring certification of the summons and complaint as true copies. Mr. Cooper noted that Rule 17 already puts the obligation on the serving party, by the attorney's signature, to certify that pleadings are not being presented for an improper purpose and clearly service of a summons or complaint that is not an exact and complete copy of the original would violate Rule 17. There was some discussion concerning how or if the proposed rule change would affect other documents attached to a summons other than a complaint (e.g. a petition) after which it was moved and seconded to place the Rule 7A amendment on the September calendar for a vote to publish. The vote to approve the Rule 7A amendment was unanimous, 17-0. Ms. Clarke reminded the Council that placing amendments on the September calendar is not binding, that the amendments could come back off the shelf for further discussion at any time prior to the September meeting.

Rule 32 Committee Report (Judge Bloch). Ms. O'Leary presented the Committee report in the absence of Judge Bloch. Ms. O'Leary reported that the Committee explored the idea of having the claim form not mandatory, but discretionary. The Committee also proposed that Judge Bloch call a meeting at Lewis & Clark Law School in May and have present Judge Henry Kantor as well as James Gardner and other outside representatives of the plaintiffs' and defendants' bar. The Committee will also invite Prof. Ed Brunet to offer his insights. Ms. O'Leary reported that Judge Bloch would like to have one meeting, and possibly two, to get the

dialog going. Ms. McKelvey expressed concern about the May time frame to which Ms. Grabe responded that waiting until May would be too late and encouraged the Committee to have the first meeting in April because, if the Committee waited until May, it would run into summer conflicts. Ms. McKelvey suggested that it would be helpful for the Committee to draft a letter to Senator Ginny Burdick for the Council to review. Ms. Grabe noted that Senator Burdick wants clarification as to whether it is more appropriate for the Council or the legislature to look at the *cy pres* issue. Ms. Clarke expressed concern whether or not the Council should even be looking at what happens to the unclaimed funds that, perhaps, the Council should only be addressing Senator Burdick's question. Mr. Corson agreed that the Council should stay with what it is designed to do, making rule changes, and that the Council should not be involved in the *cy pres* issue. Mr. Sugerman expressed the view that the Council should only be addressing the claim form itself, that whatever consequences flow from that and how damages are distributed is for the legislature to address, not the Council. Justice Kistler suggested preparing a letter to Senator Burdick that the *cy pres* issue is outside of what the Council does. Ms. Grabe asked to be involved in the Rule 32 Committee. A letter to Senator Burdick is to be drafted for presentation at the next Council meeting in April.

Rule 43 Committee Report (Mr. Corson). Mr. Corson reported that the proposal before the Council at this meeting reflects the suggestions of various people and is presented as a working draft for the Council's consideration and feedback. Mr. Corson reported that the proposal reflects several changes, including (1) giving parties a fixed period of time of 30 days to produce documents; (2) requiring that a writing be sent within 30 days stating that the documents have been provided or will be within the time allowed (unless objected to); (3) identifying which documents are responsive to which request; (4) if the party does not have a document requested in the party's possession or custody, but the document is within the party's control, stating that a reasonable effort has been made to obtain it; and (5) an express waiver of objections if the responding party fails to timely object. Mr. Corson suggested that a party should not feel that bringing a motion to compel is the wrong thing to do and noted that the current proposal would make it incumbent upon the requesting party to file a motion to compel within a reasonable time. Mr. Sugerman suggested that the rule needs to allow for different scenarios. Mr. Corson reported that the proposal addresses medical records as documents that may be within a party's control and that the 30 day rule does not apply to documents not in a party's possession or custody. Mr. Buckle expressed the opinion that it is good to have a 30 day timeline because of the busy nature of the practice which leads to delays in production, that there should be a time frame for production and that, if needed, an attorney can ask for an extension. Mr. Buckle added his opinion that the lawyers will generally work it out, but that there needs to be a timeline for production. Judge Herndon expressed concern that the dockets will get filled by extra filings of motions to compel and Mr. Sugerman expressed concern about the Council encouraging more motion practice. Mr. Libman pointed out that most requests for production already have within the language of the request that the documents be produced within 30 days and that the proposed changes will mandate what is already the usual time frame for production. Mr. Libman also noted that the changes appear to be an effort to create procedural guidelines instead of attorneys receiving as a response, "here are your documents, you figure it out." Judge Isaacson pointed out that there are two advantages to having a time frame for submission of documents: 1) that it would be easier to get *pro se* litigants to comply, and 2) it will assist lawyers (particularly young lawyers) who have having difficulty with their own clients. Judge Isaacson noted that the problem with having language to produce within a "reasonable time"

places the burden upon judges to determine what a reasonable amount of time is for production. Mr. Cooper related his concern that the exchange of documents is a part of practice that is least amiable to rule changes and sees a great opportunity for those who want to use the rules as weapons of distraction. Ms. Clarke suggested the use of comments at the end of the rule to: 1) address that the 30 day requirement could be modified by agreement of the parties and, and 2) refer to courts' inherent authority to require a privilege log. Justice Kistler inquired if there are situations where the 30 day deadline would not work because of a need for the documents within a shorter period of time and would that result in a need to file a motion to have those documents submitted within that shorter period of time to which Mr. Cooper responded that it would not be bad to have judicial oversight in those situations. Mr. Buckle raised a concern regarding requests for production by letter where one party does not copy all parties and that some parties would be unaware of the exchange of documents. Ms. McKelvey closed the discussion by requesting that the Committee continue working and have a draft with the proposed changes for the next meeting.

Rule 55F(3) Committee Report (Mr. Corson). After being duly motioned and seconded, the proposed change to Rule 55F(3) was unanimously approved, 17-0, to be placed on the September calendar for a vote to publish.

Old business

Rule 9 Consensual Service by E-mail (Judge Holland). Judge Holland was not present to give the report. The item was placed on the agenda for the next Council meeting on April 8, 2006.

Rule 38B Uniform Foreign Deposition Proposal (Judge Bloch). Prof. Peterson reported that he had communicated with Douglas Bray, the Trial Court Administrator for Multnomah County who was the source of this rule change proposal, that this proposal should be taken off of the agenda and tabled for now as, although the language of Rule 38B is obsolete, the Interstate Depositions and Discovery of Documents Act (IDDA) is currently undergoing revision and the Council should wait until the next biennial cycle when the IDDA is in final form before proposing to amend Rule 38B. Ms. McKelvey noted for the record that proposed changes to Rule 38B would be tabled for now.

Rule 63 and Rule 64 - 55 day issue (Judge Schuman). Judge Schuman reported that changes can be made to rules 63 and 64 without making statutory changes and that the Committee will have a draft for the next Council meeting in April.

Proposed Amendment to ORS 1.730(2)(a) (Professor Peterson). Prof. Peterson reported that this issue came up in 2004 when a vote on the proposed changes to Rule 32 was moved to the September calendar at a meeting with less than a supermajority of the Council members present, and the Council's authority to conduct any business when a supermajority of its members was not present was challenged. The proposed change is designed for the Council to be able to move forward with its routine work, if a quorum is present, even if a supermajority of its members is not present. Ms. Grabe suggested that this proposed change to the statute should go to the legislative work group and the OSB Procedure and Practice Committee. Judge Herndon expressed his opinion that this proposal does not need to go to the work group. Ms.

Grabe agreed that the proposed change to ORS 1.730 should be carried by the OSB Procedure and Practice Committee and that she would go back to Senator Prozanski to see what his thoughts are. Mr. Sugerman inquired if there should be approval of the language of the proposed change to the statute by the Council. Upon motion moved and seconded, the Council unanimously voted, 17-0, to approve the language of the proposed change to the statute and to seek legislative approval of the change.

Rule 69B(4) (Mr. Svoboda). Mr. Svoboda reported that the current rule makes reference to a federal statute that does not exist anymore, having been changed in 2003, and that clearly there is a need to change the language within the rule. However, he questioned how much more needs to be put in the rule because the new federal statute appears to have expanded the inquiries that must be completed as to a defendant's possible military status and reflected in the affidavit. Mr. Svoboda reported that there was a packet of new material that went out to the bench and that he talked to Judge Holland about that but does not have a proposal for a rule change yet. Mr. Svoboda said that he plans to have a rule modification proposal shortly. Mr. Svoboda noted that the new federal law makes reference to the affidavit and that Rule 64B(4) appears to require changes to come into compliance with the federal requirements for the affidavit, if a party is going to take a default. Prof. Peterson noted that the new rule requires more of a diligent search and inquired if the military would tell an attorney if the defendant is in the military. Mr. Cooper responded that that information is available from the Department of Defense's website; however, a social security number is required and that for the few recent affidavits he has prepared, he supplied information as to all of the steps he took to determine if someone was in military service or not.

New Business

No new business matters were presented.

Agenda Item 6: (McKelvey). Adjournment. The meeting was adjourned at 11:05 a.m.