MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, April 8, 2006
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Members Present:

Benjamin M. Bloom
Eugene Buckle
Kathryn H. Clarke
Don Corson*
Dr. John A. Enbom
Martin E. Hansen*
Hon. Robert D. Herndon
Hon. Lauren S. Holland
Hon. Rodger J. Isaacson
Hon. Rives Kistler
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:

Hon. Richard L. Barron
Hon. Eric J. Bloch
Brooks F. Cooper
Hon. Jerry B. Hodson
Alexander Libman

Members Absent:

Hon. Steven B. Reed

* Don Corson and Martin Hansen 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 9:35 a.m.

Introductions of new members. Ms. McKelvey introduced Dr. John A. Enbom, the Council's recently appointed public member, to the Council.

Agenda Item 2: Approval of minutes. Prof. Peterson noted that the corrections suggested by Mr. Corson were made to the Rule 43 discussion and to the proposed amendment to ORS 1.730 in the minutes for the meeting of March 11, 2006, and copies of the March 11, 2006, minutes as amended on April 7, 2006, were distributed and approved. Prof. Peterson reported that, regarding ORS 1.730, he reread the Attorney General's letter of December 7, 2004. It was 11 members who had voted in favor of the proposed amendment to ORCP 32 and the argument was made that the affirmative votes of 12 members were required to go forward. The intent of the amendment is to make it clear that, if there is a quorum, the Council can proceed with its ordinary business and approve agenda items by a majority of the quorum, limited only by the super majority requirement specified on ORS 1.730(2)(a) to promulgate an amendment.

Agenda Item 3: Committee Reports (Ms. McKelvey).

<u>Rule 32 Committee Report</u> (Judge Bloch). Ms. O'Leary presented the Committee report in the absence of Judge Bloch. Ms. O'Leary reported that the Committee held an ORCP Rule 32 summit meeting at Lewis & Clark Law School on April 3, 2006, to discuss proposed changes to Rule 32, specifically the provisions about the claim form, and whether the claim form should be mandatory or discretionary with the court. Judge Bloch presided over the meeting. Ms. O'Leary also reported that the *cy pres* issue was discussed briefly and the position of the Council; that a *cy pres* or fluid recovery amendment was substantive and, therefore, a legislative matter; was related to those who attended the summit. There was broad agreement that a *cy pres* or fluid recovery amendment was not and should not be proposed by the Council. Ms. O'Leary reported that the meeting was well attended with a balance of individuals from both sides.

Ms. O'Leary noted that Judge Henry Kantor had presented good examples from his experience as both a judge and a litigator in class action cases of when the claim forms requirement worked and when it did not work. Ms. O'Leary reported that Bob Stoll, Phil Goldsmith, Kathy Wilde, and Rick Yugler presented some examples where the claim forms were not effective for one reason or another.

Ms. O'Leary reported that, at the end of the session, it appeared that everyone in the room was receptive to the possibility of an amendment that would make the decision as to whether claim forms are necessary discretionary with the court. There was not a concensus whether that decision should invoke directly or indirectly a provision for fluid recovery. The position was clear on behalf of the banking and business representatives that they would not be in favor of a fluid recovery.

Ms. O'Leary related that there was some discussion about Senate Bill 216-A, that the business and banking lobbying groups had made certain that that bill did not pass and would make every effort to see that any future similar bill would not pass, but are considering a rule change to make the claim form discretionary as long as it does not somehow allow the court to institute a fluid recovery. Ms. O'Leary observed that the next step is for the Committee to get together and to draft a rule change that would accommodate both sides. Ms. O'Leary also noted that the attendees at the ORCP 32 summit meeting desire to be involved in the drafting process to make certain that their concerns are met. Ms. O'Leary reported that the Committee is scheduled to meet again on April 14, 2006, but that she would not be able to attend.

Mr. Sugerman then gave a brief history of the last biennium's proposed amendment to Rule 32 for Dr. Enbom's benefit . Ms. Grabe attended the Rule 32 summit and noted that Bill Linden and the business lobby made it very clear that the Council should not take up the *cy pres* issue. Mr. Sugerman reported that he believed he heard Ken Sherman say that his clients were prepared to discuss the possibility of a change in the claim form process and that all of the Council members in attendance and all of the plaintiffs' lawyers, with one exception, felt that the claim form process could and should be separated out from the *cy pres* issue, and that it is for the legislature to take up the issue of *cy pres* if it is so inclined.

Ms. Grabe noted that Ms. O'Leary did an excellent job drafting the letter to Senator Ginny Burdick and that Joe O'Leary had made it clear that the Senator is expecting a letter from the Council clarifying what changes to Rule 32 are appropriate for the Council to address and what changes are appropriate for the legislature. Ms. Grabe also expressed that there should be more defense counsel at future meetings as she felt that the meeting had many more attorneys from the plaintiffs' bar than the defendants' bar, and that there should be follow up telephone calls.[1] Ms. Clarke requested that the minutes reflect the names of the individuals who were invited to the Summit.[2] Prof. Peterson noted that everyone on the Rule 32 Committee's list of known stakeholders was invited, that a couple of the lobbyists were invited in the days just prior to the meeting due to difficulty in obtaining current contact information, and that some of those lobbyists were in attendance. Ms. McKelvery thanked Prof. Peterson for putting together the summit, that this kind of forum is the Council at its very best. Ms. McKelvey also thanked Ms. O'Leary for drafting the letter to Senator Burdick. Judge Isaacson asked if the draft letter implies that the courts have more authority to do something than they really do, to which Judge Holland suggested that it may be appropriate to leave the language out of the draft letter to the effect that any issues not addressed by the legislature would be addressed by the court. Ms. Clarke asked if the courts have inferred a *cy pres* type of recovery in other jurisdictions which Judge Isaacson confirmed and that the other possibility is through the existing unclaimed property statutes. Mr. Bloom also expressed concern regarding the language in the draft letter noting that the courts will address issues not taken up by the legislature. It was decided to remove the last sentence in paragraph three of the draft letter referring undecided issues to the legislature or the courts and that the letter, with this change, was approved. Ms. McKelvrey will send the letter as modified.

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[1]Non-Council invitees attending the summit meeting were: Phil Goldsmith, Bruce Hamlin, Judge Henry Kantor, Bill Linden, Tim Martinez, Steve Murrell, Spencer Neal, Kevin Neeley, John Neupert, Joe O'Leary, Ken Sherman Jr., Christopher Slater, N. Robert Stoll, Christine Tracey, Kathy Wilde and Richard S. Yugler.

[2]David S. Barrows, Gary M. Berne, Richard Butrick, Gordon E. Crim, Darrell Fuller, James Gardner, Phil Goldsmith, Bruce Hamlin, Victor J. Kisch, Bill Linden Jr., Tim Martinez, Mark Nelson, Andrew J. Morrow Jr., John F. Neupert, Joseph A. O'Leary, Thomas A. Perrick, Nancie Potter, John Powell, Richard R. Rasmussen, Kenneth Sherman Jr., and Richard S. Yugler were the original invitees to the summit. Some of the original invitees were unable to attend and some sent alternate representatives.

Prof. Peterson observed that Judge Kantor made a suggestion that, if the individual claims are all of a small value, the small value of the individual claims would be an appropriate criterion for the judge to consider to guide his or her discretion to waive the claim form. Prof. Peterson also noted that Kathryn Wilde reported that she has had developmentally disabled clients where the claim form has been an issue and Spencer Neal reported that he has had clients with limited English proficiency. Ms. Wilde and Mr. Neal argued that in such situations, it should be left to the discretion of the court whether or not claims forms need to be submitted. Ms. O'Leary recalled that one of the factors to be considered is the effective administration of justice and pointed out that, in the Taco Bell case, litigating over each claim form makes it burdensome on the court. Prof. Peterson noted for the record that follow-up calls were made to the Rule 32 invitees to the summit meeting.

Rule 43 Committee Report (Mr. Corson). Mr. Corson reported that the Committee agreed in concept to all but one of the proposed changes to Rule 43B. The Committee had not reached an agreement as to when a response to an ORCP 43 request would be due and submitted two versions of a proposed amendment. One version is a proposal where the Rule specifies the time for production as 30 days unless the court provides otherwise or the parties agree otherwise. Mr. Corson added that version B2 retains the current rule's approach to time for production, that the requesting party specifies the time for production. Mr. Corson posed the question, whether the rule should specify the time for production or whether the parties should specify the time for production.

Mr. Corson reported the in the proposed new Rule 43B(2)(a) there is a new requirement for a written response that states either the responding party is giving to the other party now what is in the responding party's current possession, or that the responding party will be providing the documents or things within the period of time unless they are objecting, and that the documents will either be labeled or otherwise organized according to the request. Mr. Corson reported that, if a document or thing is not within a responding party's possession but is within the party's control, the responding party must include a statement that reasonable efforts are being made to obtain the document or thing. If the documents or things are not in the responding party's control, that party has to say so. Mr. Corson said that section 43C is to just make the Rule consistent with 43A and 43B(1), that the Rule also can apply to entries on to land. Section D retains the idea that, if a party is going to make an objection, they must make the objection. Section 43B(3) has a new, clarifying provision, that if a responding party does not make an objection as allowed, that party has waived the objection. Under 43B(4) current language has been reworded but contains the existing requirements that there is a continuing duty to produce. Rule 43B(5) is somewhat modified, that if a requesting party is going to file a motion to compel, it must do so within a reasonable time, that the "shall standard" is being applied.

Ms. McKelvey noted that the Council did not have before it the current Rule which shows an indication of words added or deleted to which Mr. Corson responded that he would be happy to re-format the proposal in red-line style. Prof. Peterson noted that the Committee made substantial changes to the response to requests for production, but could not decide as a Committee what would be received better by the Council with regard to whether to have a specified period time of 30 days to respond or to retain the current "reasonable" standard. Judge Holland asked what were the arguments in favor of reducing the amount of time to 30 days to which Mr. Corson responded that it was a policy decision whether or not the time for production

should be specified in the rule. Mr. Corson said the arguments for specifying the time for production in the rule included: 1) gives certainty to all the parties; 2) provides guidance to *pro se* litigants; 3) assists younger lawyers with recalcitrant clients; 4) fewer disputes as to what is a reasonable time; and 5) follows the FRCP in its style. Mr. Corson reported that arguments against changing the rule in this regard include: 1) we have lived with a "reasonable" time period for a long time, 2) it has worked, 3)it gives flexibility, and 4) parties can ask for longer or shorter periods of time.

Ms. McKelvey expressed concern over the proposed commentary addressing the use of a privilege log. Ms. Russell responded that the federal courts use privilege logs and that it has not been a problem, while there is knowledge that privileged information may exist, the information itself is not disclosed. Ms. Russell also reported that the federal courts use the 30 day for production rule and it works. Ms. McKelvey called for a straw vote and 11 Council members voted in favor of the proposed change to 30 days for production while 6 Council members voted in favor of the current language allowing for a "reasonable" period of time.

Agenda Item 4: 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 has not met again as the workgroup is waiting for a draft report from William Taylor that will be circulated before the next meeting.

Agenda Item 5: Old business

<u>Rule 9 Consensual Service by E-mail</u> (Judge Holland). Judge Holland reported that she met with Everett Jack, who is the chair of the Oregon State Bar Practice and Procedure Committee, and that the Practice and Procedure Committee is not ready at this point for service by email without written consent of the parties. Judge Holland informed the Council that the proposed Rule 9G specifically addresses service by email, that it prohibits service by email absent written agreement of the parties, and that service is not complete without confirmation. Ms. Grabe noted that some courts have e-filing committees, that maybe this issue is not for the Council to address at this time, and perhaps the Council should just keep it on its radar. Mr. Bloom said the federal courts are using e-filing. Judge Herndon noted that e-filing is a large financial commitment and that this issue may be premature for Oregon at this time. There was some discussion regarding various email programs, that not all attorneys use e-filing even if they are on court lists to do so, and concern over the assumption that *pro se* litigants would have access to email. Judge Holland noted that Mr. Jack was going to have a liason present for the Rule 9 discussion, but she had not heard anything further. Ms. McKelvey suggested tabling the Rule 9 discussion for the next meeting, to which the Council agreed.

<u>Rule 63 and Rule 64 - 55 day issue</u> (Judge Schuman). Judge Schumann reported that the Committee met to discuss Jim Nass' proposal regarding the proposed amendments to Rule 63 and Rule 64 allowing the trial court to decide post trial motions while an appeal is pending and that, while the solution is not perfect, it would prevent delays. Draft amendments were discussed. Judge Schuman expressed that he was not sure that this was an issue the Council should address, that it may be a solution in search of a problem. Justice Kistler expressed that it was unclear what the problem was. Judge Schuman suggested that the Council report back that it had reviewed the draft amendments and that the solution might create more problems than the

proposed amendment solved. After some further discussion, Judge Schuman suggested drafting something similar to the federal rule with the assistance of Justice Kistler. Ms. McKelvey noted that a committee composed of Justice Kistler, Ms. Clarke, and Judge Schuman would work on the proposed draft.

Rule 69B(4) (Mr. Svoboda). Mr. Svoboda reported that he had consulted with Judge Holland about what other counties are doing regarding the affidavit required prior to taking a default and making sure the defaulting party is or is not in the military. Mr. Svoboda pointed out that the new federal law requires more of an inquiry and that the Committee is going to combine the requirements of the two and come forward with a rule. Ms. Grabe reported that some other people who have been involved in this have worked on some draft language addressing this issue and will provide it at the next meeting. Mr. Svoboda noted that the Department of Defense has a web site that includes all of the military branches where one can enter in a defendant's social security number and obtain a certificate within seconds as to whether the military has any record of the individual. Mr. Sugerman asked how an attorney would have a social security number. Prof. Peterson asked if the Committee could experiment with the Department of Defense web site. Ms. McKelvey suggested that maybe they could do some research with the Department of Justice's web site for the next meeting.

Agenda Item 5: New Business

Prof. Peterson reported that it came to his attention that effective January 27, 2006, Western Union has discontinued telegram service and addressed the question whether telegraphic service under Rule 7H and Rule 8D is applicable anymore. Mr. Corson noted that Rule 7H addresses the intention to deliver something, including overseas, and that the Council does not want to change it without understanding the implications of it, but that the rule is probably outdated. Judge Herndon suggested the Council should do some research to see if telegraphic service is still being used before changing the rule. Ms. McKelvey asked if anyone wanted to be on a telegram committee and offered to work with Prof. Peterson.

Agenda Item 6: (McKelvey). Adjournment. The meeting was adjourned at 11:00 a.m.