MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, May 13, 2006
Room 281
William H. Knight Law Center
University of Oregon
1515 Agate Street
Eugene, Oregon

Members Present:

Judge Richard L. Barron
Judge Eric J.Bloch*
Benjamin M. Bloom
Eugene H. Buckle*
Kathryn H. Clarke
Brooks F. Cooper
Don Corson
Dr. John A. Enbom
Hon. Robert D. Herndon*
Hon. Lauren S. Holland
Hon. Rodger J. Isaacson
Hon. Rives Kistler
Alexander D. Libmann*
Leslie W. O'Leary*
Judge Steven B. Reed*
Shelley D. Russell*
David F. Sugerman*
John L. Svoboda
Hon. Locke A. Williams

Members Excused:

Hon. Jerry B. Hodson
Connie Elkins McKelvey
Hon. David Schuman*

Members Absent:

Martin E. Hansen

* Judge Bloch, Mr. Buckle, Judge Herndon, Mr. Libmann, Ms. O'Leary, Judge Reed, Ms. Russell, Judge Schuman, and Mr. Sugerman appeared by teleconference.

Guests:

John Borden, Legislative Fiscal Office. Susan Grabe, Oregon State Bar, appeared by teleconference.

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

Agenda Item 1: Call to order. Mr. Corson called the meeting to order at 9:40 a.m.

Agenda Item 2: Approval of minutes. Mr. Corson noted that the reference made to Rule 43C in line 9 of the second paragraph under the Rule 43 Committee Report should to be changed to Rule 43B(2). The minutes for the meeting of April 8, 2006, were unanimously approved as amended.

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 there has been a draft report circulated that is a summary of what Ms. Clarke reported on at the last meeting and that the next meeting of the work group will be held on June 2, 2006.

Agenda Item 4: Committee Reports (Mr. Corson).

Rule 43 Committee Report (Mr. Corson). Mr. Corson discussed the proposed changes to ORCP 43 and the differences between proposed Version A and proposed Version B. Mr. Corson reported that Version A contains language providing 30 days to produce documents and that Version B retains the current system where the parties designate when production is to occur and retains the current language allowing a minimum of 45 days after service of summons for a party defendant to respond to a request for production. Prof. Peterson inquired as to why the additional 15 day grace period (45 days for a response from a party defendant) that currently exists is not in Version A to which Mr. Corson responded that the Council could look at a hybrid of the two versions and provide for 45 days after service of the summons for production by a party defendant in both versions. Mr. Bloom pointed out that a defendant may not contact an attorney until the end of the summons period which is a reason for retaining the current 45 day period.

Mr. Bloom also expressed concern over the deletion of the language regarding the continuing duty to produce documents which come into a party's possession. Mr. Corson noted that the language still provides for a continuing duty and that the change is to require prompt production. Judge Holland also expressed concern over the deletion of the current continuing duty language, that by taking the continuing duty language out there may be an appearance that such duty no longer exists. Mr. Corson pointed out that the amendment is a change from a continuing duty within a reasonable time to a continuing duty for prompt production.

Following further discussion regarding the two policy choices, Mr. Buckle expressed concern over lines 18 and 19 in Version A, providing that the documents must be provided with the response if they are in a party's possession. Mr. Corson then noted that, if something is in a party's possession or custody, it is to be turned over whenever it is due and that, if it comes into a party's possession or custody later on, it is under a party's control. Mr. Corson also noted that, if a party never actually obtains the document requested, then it cannot be produced. Judge Reed inquired, if something came into a party's control at some later point, whether that document or thing would be included within the continuing obligation to produce. Mr. Corson responded that, if something is not within one's possession, it cannot be produced. If it later comes into possession, it must be produced promptly.

Upon conclusion of further discussion Mr. Corson asked for a roll call straw vote for those in favor of having a set deadline of 30 days for production versus the current reasonable

time language. The vote was 18-1 in favor of having a set deadline of 30 days for production of documents. Mr. Corson then called for a roll call straw vote for those in favor of retaining the current 45 day period for production of documents by a party defendant, as reflected in the current ORCP 43 and as reflected in the draft Version B proposal. Ten members were in favor of 45 days for initial production by a party defendant and 9 were in favor of 30 days for initial production.

Ms. Clarke suggested modifying the language that a party served in accordance with subsection B(1) of the rule is under a continuing duty during the pendency of the action to produce promptly any items responsive to the request and not objected to which come into the party's possession, custody, or control. There was then discussion regarding integrating the 45 day language in B(2) such that a request shall not require a defendant to produce, allow inspection or copying, or allow entry or other related acts before the expiration of 45 days after service of summons unless the court specifies a shorter period of time. Mr. Corson noted that the second sentence would read that, otherwise, within 30 days after service of a request in accordance with subsection B(1) and then continue with the language in Version A. Mr. Corson then asked for a vote on Rule 43 Version A, as amended, reflecting the 45 day initial period and, otherwise, 30 days and noting Ms. Clarke's suggested language regarding the continuing duty to produce documents during the pendency of the action. Mr. Sugerman, Ms. O'Leary, and Ms. Russell all voiced concern regarding not being able to follow all the changes through the teleconference and noted that they would like to see the proposed changes in print and for review at the next meeting on June 10, 2006. There was then a motion and unanimous vote to place the proposed revision to Rule 43 on the September calendar with all revisions to be available at the Council's June 10 meeting.

Mr. Corson then addressed the proposed commentary regarding the trial court's inherent authority to require a party to produce a privilege log. Judge Issacson wondered if a comment recognizing a court's inherent authority to require a privilege log might by inference be read to suggest that courts do not have inherent authority to require other acts. After some discussion regarding whether a commentary was necessary, Mr. Corson asked if there was a motion to add a commentary and, if not, the Council would not add the commentary to Rule 43. There was not a motion to add the commentary.

Rule 32 Committee Report (Judge Bloch). Judge Bloch reported that the Committee had a recent small workgroup meeting at the Oregon State Bar on May 12, 2006. ORCP 32F(2), which is the rule that requires a claim form to be filed by potential takers in a class action for money damages was discussed. Currently, the claim form is the means by which a verdict on liability becomes a determination of the amount of the judgment to be entered by the court. Judge Bloch reported that there had been movement on allowing flexibility regarding not having to use the claim form in every circumstance. Judge Bloch said that, at the last work group meeting with lobbyists, there was consensus that the best approach would be incremental steps toward loosening the claim form requirement. Judge Bloch noted that there was a recognition that class actions are sometimes settled on the liability issue which then takes the case outside the requirements of the rules and allows the lawyers to determine ways to distribute the funds, not necessarily relying upon the use of claim forms. Therefore, there could also be some flexibility in the cases that do not settle. Judge Bloch pointed out that there are situations where the takers are well documented. Judge Bloch recalled that the claim form is a product of the

1970's and observed that technology has changed the courts' capacity to identify individuals who might be able to take under a class action and that a rule should be designed to allow for flexibility in those situations. Another example is where the amount to be paid out is a known small amount, where the transaction costs of using claim forms may equal the damages at issue, and the judge and the attorneys agree that the claim form is not appropriate. Judge Bloch also noted that the rule probably cannot be written to define a "small" claim, but thought there might be a way to amend the rule to allow a judge and the attorneys who recognize that the amount to be paid out is not large enough to require a claim form to use alternatives to the claim form. Judge Bloch reported on another situation addressed at the last work group meeting. Where the plaintiffs in a class action are disabled, it may be inappropriate to require special needs persons to fill out a claim form. The current rule requires the members of the class to submit a statement; therefore, it may be just a matter of adding language making it more clear that the form could be filled out by a representative or guardian. Judge Bloch reported that Portland attorney Bruce Hamlin, a work group member, volunteered to draft language addressing the discussed situations and to get the draft to the committee work group next week. Judge Bloch informed the Council that he is planning on having another meeting of the work group the week prior to the Council's next meeting on June 10, 2006, in order to work on Mr. Hamlin's proposed draft to ORCP 32 and will hopefully have a proposal for the Council's next meeting on June 10, 2006. Judge Bloch relayed that he expects additional input from work group member Ken Sherman's clients between June and September and that the first draft presented at the June meeting likely will not be ready to vote on until the September meeting. Ms. Grabe noted that the feedback from Mr. Sherman's group is critical to the proposed draft.

Rule 63 and Rule 64 Committee Report (Kathryn Clarke). Ms. Clarke reported that the proposal from Jim Nass, Appellate Legal Council, addressed a problem that has appeared in the appellate courts, the filing of a notice of appeal from a judgment before the 10 days in which a party can move for a new trial or for a judgment notwithstanding the verdict has expired and the post-judgment motion is timely filed. Rule 63 and Rule 64 require such motions to be ruled on in 55 days but the filing of the notice of appeal divests the trial court of jurisdiction to rule on such motions. Part of the problem is, if the motion precedes the notice of appeal and the court rejects the appeal, how to compute the running of the 55 days, part of which ran prior to the filing of the notice of appeal. Ms. Clarke reported that Mr. Nass' suggestion is for the Council to do the same thing that is done with ORCP 71, to retain jurisdiction within the trial court to rule on the motions and that any modification of the appeal that is required by the trial court's ruling would be handled according to the appellate court rules. Ms. Clarke suggested that perhaps Chapter 19 needed to be amended. Ms. Clarke then reported that Judge Schuman, Justice Kistler, and she met with Mr. Nass and Mr. Nass drafted a proposed amendment to Rule 63 and Rule 64 and agreed to seek an amendment to Chapter 19 to allow the trial court to retain jurisdiction to decide Rule 63, Rule 64, and Rule 71 motions. Ms. Clarke reported that the proposed amendment to ORS 19.270(1) will either come from the Judicial Department or from the Oregon State Bar through Ms. Grabe and that she would bring the draft language to the Council meeting in June. The amendments will be to Rule 63D and Rule 64F to say that, notwithstanding a filing of a notice of appeal, a party can file a motion under those rules within the 10 day time limit, that the trial court can rule on the motion after which the party must serve a copy of the trial court's order on the appellate court, and then any modification of the appeal would be taken pursuant to the appellate court rules. Justice Kistler noted that there are two different situations: 1) that if the notice of appeal preceeds the motion for a new trial as a valid

notice of appeal, then the problem is that the trial court loses jurisdiction and 2) if motion for new trial precedes the notice of appeal, the notice of appeal may be premature because there is not yet a final judgment. Justice Kistler reported that Mr. Nass's approach would give the trial court jurisdiction in the situation where the notice of appeal is premature and hold the appeal until the trial court reaches a decision on the motion with the appeal proceding if the trial court denies the post trial motion. Judge Williams inquired about the omission of service of the motion upon the appellate court in the proposed draft to Rules 63 and 64 as is done in Rule 71. Ms. Clarke explained that Rule 71 applies to the situation where the notice of appeal is pending and an individual moves for relief from judgment in the trial court and that, under Rule 63 and Rule 64, there would be no reason to serve the motion for a new trial on the Court of Appeals if a notice of appeal had not yet been filed. Justice Kistler noted that typically the trial court resolves motions for a new trial or for judgment notwithstanding the verdict relatively quickly. Upon motion duly made and seconded, there was a unanimous vote to place the proposed draft amendments to Rule 63 and Rule 64 on the September calendar.

Break: Following the break, Mr. Corson introduced Mr. Bordon to the members of the Council.

Agenda Item 5: Old business

Rule 9 Consensual Service by E-mail (Judge Holland). Judge Holland reported that Everett Jack was going to have someone appear by teleconference as a liaison from the Oregon State Bar's Procedure and Practice Committee for the Rule 9 discussion during the Council meeting. Judge Holland reported that the there were no further changes to the proposal concerning the language that would allow for consensual e-mail service noting that, under proposed Rule 9G, such consent must be in writing. Prof. Peterson reported that he had just received some legislative proposals from the E-Filing Task Force of the Oregon State Bar with, among other things, proposed changes to Rule 9. Judge Holland noted that any changes to Rule 9 should coordinate with the UTCR's, the Legislative Counsel, and the Oregon State Bar. Mr. Corson then proposed that the Council proceed with the Rule 9 proposal and then discuss as a separate issue the legislative proposals from the Oregon State Bar. Upon motion duly made and seconded, there was a unanimous vote to place the Rule 9 proposal on the September calendar.

Rule 69B(4) (Mr. Svoboda). Mr. Svoboda reported that there was some concern over changing the rule, whether to make it explicit in the rule as to what steps a plaintiff must take to comply with the new federal act, or to just alert a party to the new federal statute. The new federal statute makes the language "reasonably believes" inadequate and requires affirmative statements that a party must show whether someone is or is not in the military. Mr. Svoboda suggested adding language that one is unable to determine whether or not the defendant is on active duty in the military, such as "unable to locate," and suggested bringing back a draft proposal for Rule 69B(4) for the next Council meeting on June 10, 2006. After further discussion, Mr. Corson suggested including a citation to 50 U.S.C. § 521 in parenthesis within Rule 69B(4).

Rules 7H and 8D Telegraphic Service (Prof. Peterson). Prof. Peterson reported that Mr. Corson had called to his attention that telegraphic service ended in the United States on January 27, 2006, but Council members at the April 8, 2006, meeting were unsure if telegraphic

service continued to be used in other countries or not. Prof. Peterson spoke with Rick Hamilton, the Director of Operations at the designated United States Central Authority (under Article 2 of the 1965 Hague Service Convention) in Seattle, who did not believe that telegraphic service was being used anywhere. Prof. Peterson also spoke with John McCabe, Legal Counsel with the National Conference of Commissioners on Uniform State Laws, who suggested that the Council could safely take out the language regarding telegraphic service, but that an ideal modernization would make provision for electronic service. There was a consensus by voice vote to delete Rule 8D and to place the Rule 8 proposal on the September calendar.

Mr. Corson then addressed Rule 7, noting Mr. Bloom's previous revision to Rule 7A and inquired whether a party can get a return receipt on express mail. Prof. Peterson acknowledged that a return receipt for express mail may be different than for certified or registered mail. Prof. Peterson noted that there were some minor corrections that needed to be made to Rule 7: 1) in paragraph B change "summons" to "summonses"; 2) that throughout the rule there is inconsistent language concerning serving "summons", "copies", "true copies", and "certified true copies"; 3) that there are some references to service of "summons" which should be reworded to "summons and complaint" with some singular and plural errors present, and 4) express mail is included with certified or registered mail in some subsections and in another place there is a reference only to certified or registered mail. Ms. Clarke suggested changing the language in line 9 of page 6 of the draft to "certified or registered return receipt requested, or express mail" in order to be consistent. Prof. Peterson noted that he removed the "D" in 7D6(g), lines 5 and 7 on page 14 which was not consistent with the rest of the rule and that the reference in G on line 16 of page 18 to "of this section" was incorrect. Prof. Peterson also noted that he deleted Rule 7H, relating to telegraphic service of a summons. It was duly moved, seconded, and unanimously voted to remove Rule 8H and to review a final draft of the other proposed changes to Rule 7 at the next Council meeting on June 10, 2006.

Mr. Corson suggested reviewing the memo that was recently received from the Oregon State Bar regarding e-filing and e-service. Prof. Peterson suggested arranging a teleconference between himself, Judge Holland, Susan Grabe, and someone from the Oregon State Bar's Procedure and Practice Committee. Mr. Corson suggested extending an invitation to attorney Mark Comstock to attend the June 10, 2006, meeting.

Prof. Peterson also reported that he received an email from William Taylor, senate and house judiciary committees' counsel, suggesting that the Council needs to look at e-discovery in light of the new federal rules. Mr. Corson suggested that, as e-discovery would take substantial time to review, this issue should be addressed in the next Council cycle.

Mr. Corson noted that there will not be meetings in July or August and that the next meeting will be held on June 10, 2006, followed by September 9, 2006.

Agenda Item 6: (Mr. Corson). Adjournment. The meeting was adjourned at 11:18 a.m.

Respectfully submitted,

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MARK A. PETERSON

Executive Director