

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
9:30 a.m.
Saturday, June 10, 2006
Room 2
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Members Present:

Hon. Eric J. Bloch	Alexander D. Libmann
Benjamin M. Bloom*	Connie Elkins McKelvey
Kathryn H. Clarke	Leslie W. O'Leary
Brooks F. Cooper	Shelley D. Russell
Don Corson	Hon. David Schuman
Hon. Jerry Hodson	David F. Sugerman
Hon. Lauren S. Holland*	John L. Svoboda
Hon. Rodger J. Isaacson	
Hon. Rives Kistler	

Members Excused:

Hon. Richard L. Barron
Eugene H. Buckle
Dr. John A. Enbom
Martin E. Hansen
Hon. Robert D. Herndon
Hon. Locke A. Williams

* Mr. Bloom, Judge Holland, and Prof. Peterson appeared by teleconference.

Guests:

Bruce Hamlin, Ken Sherman, Harry Latto, John Borden, and David Nebel.

Also present was Tresa G. Cavanaugh, assistant to Mark A. Peterson.

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

Agenda Item 2: Approval of minutes (Ms. McKelvey). Judge Schuman noted that the minutes incorrectly reflected that he was in attendance at the Council meeting on May 13, 2006, and that the minutes should reflect that he had an excused absence. Mr. Corson noted that there was an error in the number of the votes in favor of modifying Rule 43 to allow 30 days for production; the minutes reported a vote in favor of 20-1 and should reflect 18-1. The minutes, as amended, were unanimously approved.

Agenda Item 3: Report on the third 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 met again on Friday, June 2, 2006, in Salem and that a draft report had been prepared by Bill Taylor, Judiciary Committee counsel, and that the work group had discussed certain amendments and suggestions to the draft report. Ms. Clarke related that Senator Floyd Prozanski asked that Ms. Clarke, Bruce Hamlin, and Susan Grabe assist in redrafting the report and that there would be another meeting of the work group to finalize the report before presenting it to the interim judiciary committees. Ms. Clarke reported that the work group is attempting to meet some of the concerns of the Legislative Fiscal Office regarding a perceived lack of budgetary accountability and, perhaps, a need to codify existing procedures related to the assistance given to the Council by the Judicial Department through their accounting personnel in the form of writing the checks, writing the reports, and related accounting assistance with the Council retaining the ultimate responsibility for the funds. Ms. Clarke noted that she believed that the Council already has the statutory authority to enter into contracts but some modification may be needed for purposes of entering into a contract with the Lewis & Clark Law School for the services of the Executive Director and clerical services. Ms. Clarke reported that there was a consensus to leave the Council in its current form and that there are concerns regarding placing the Council within the Judicial Department, not the least of which is a separation of powers issue because there would be a legislative body within the judicial branch. Ms. Clarke noted that there was a feeling on the work group that the Council should remain an independent entity.

Agenda Item 4. Council Budget Request for 2007-2009 (Ms. Clarke).

Ms. Clarke noted that the Council is in its second biennium with no or minimal funding and the work group is recommending a return to the funding the Council had received prior to the 2003-2005 biennium which was approximately \$100,000. Ms. Clarke then asked if it would be possible to get a consensus from the Council as to whether it is appropriate for the budget request to be made for the same sums for the same expenditures previously allocated to the Council during the 2003-2005 biennium. Prof. Peterson noted that he has done preliminary work on the budget request that he has reviewed with Ms. Grabe, who did a lot of the work on the Council's budget for the last biennium. Ms. Clarke expressed concern that the Council did not have the documents for the budget request to review in order to vote and requested a consensus of the Council. Ms. McKelvey noted that the Council has never voted on the budget in the past and that the budget proposals have been an administrative function working with the leadership of the Council to submit to the Legislative Fiscal Office. Ms. Clarke suggested that the Council should have a more hands on approach and that the Council should approve by consensus that it is appropriate for the Executive Director to submit the budget request as it has been done in the past. There was a unanimous consensus by the Council for the proposal to submit a budget request to the legislature for a return to the 2003-2005 biennium funding.

Agenda Item 5: Committee Reports (Ms. McKelvey).

Rule 32 Committee Report (Judge Bloch). Judge Bloch reported that the “subcommittee plus” (which includes non Council members and will be referred to as the Rule 32 Work Group) has been working on Rule 32 and includes the Committee constituted by action of the Council consisting of himself, Mr. Libmann, and Ms. O’Leary. Judge Bloch also noted that there has been good participation by Mr. Sugerma, Bruce Hamlin, Ken Sherman, Nancie Potter, and Phil Goldsmith. Judge Bloch added that Ms. Grabe has participated at many meetings. Judge Bloch then reviewed the issue under consideration, that Rule 32F mandates claim forms for determining who takes as part of a judgment as well as how much each class member takes once liability is established. The Work Group has been exploring whether, under certain circumstances, the claim form can be dispensed with and a determination as to who takes and how much can be accomplished in a more efficient manner. Judge Bloch noted that the Work Group has the understanding that it should not be doing anything to affect the *status quo* regarding the legal concepts of fluid class recovery, *cy pres* doctrine, or anything considered to be a substantive policy choice that is within the legislature’s domain.

Judge Bloch reported that the Work Group has had a couple of meetings and that Mr. Hamlin presented a draft that reflects some of the concepts being considered for discussion at a Work Group meeting which was held on June 9, 2006. Judge Bloch reported that part A of the draft is a reflection of the Work Group’s notion that claim forms might be dispensed with as a mandatory means of determining: 1) who takes under the judgment and 2) how much does each party take, if the parties agree that claim forms are not necessary to answer those questions and the court approves (which would address due process considerations). Judge Bloch noted that the Work Group felt that, if it seems appropriate to waive the use of claim forms when a class case is settled, then the same logic should apply when a case is not settled but where the parties’ lawyers agree and the court agrees.

Even when a case is in active litigation in the damages phase, there may be a better way of determining who takes and how much. Judge Bloch then went on to report that part B represents another situation where a claim form may not be needed to determine who takes and how much, namely, where the names and addresses of class members can be reasonably identified from the defendant’s business records and individual monetary calculations can be made without the need for individual hearings. There could be some modification of the language in Rule 32F to replace “hearings” with “determinations”.

Judge Bloch then discussed part C which addresses any special needs created by class members’ disabilities which the court should take into account when determining the format of the claim form. Judge Bloch said that the Work Group discussed whether it is appropriate to address a request for statements to an individual or entity other than the class member. Currently Rule 32F refers to “class members” and, where possibly it is the disability that is the characteristic joining the class together, if the class members by reason of disability cannot file claim forms, then it may be appropriate to give the court more explicit ability to submit claim forms to persons or entities other than the class members.

Judge Bloch reported that the Work Group is addressing the circumstances where claim forms may not be required by the court, by waiver of the parties with court approval, or where

there are business records that can answer the critical questions of who takes and how much. Mr. Sugerman expressed concern that the Work Group may become too focused when discussing Rule 32 and noted that the claim form, which is unique to Oregon, was put into place by the legislature in the 1970's by statute. Mr. Sugerman noted that, under Oregon procedure as it now stands, the defendant's liability is no more than the aggregate total of claim forms received, plus fees and costs. Mr. Sugerman also noted that, when Rule 32 was written, the use of spreadsheets and current technology was not available to total how much was owed to whom with a matter of a few key strokes and that the root of the proposed changes currently occurs in practice, although it is not written within the rule. Mr. Sugerman emphasized that the draft is still in its preliminary stages and needs additional work before submitting it for public comment.

Judge Bloch reported that the participation of the Work Group has been excellent. Judge Bloch noted that Mr. Sherman has been at the table representing the banking interests and indicated, if the lawyers agree to waive the claim forms and the court also agrees, that seems like a safe harbor. There appears to be a general consensus that such a waiver of forms would not be a problem with respect to part B, the first time that class actions have been identified where claim forms would not be required. Judge Bloch reported that the Work Group plans to continue working off of the current draft document and to have one or two more meetings before the end of June to further develop the proposed changes to Rule 32; to address additional questions that the Work Group has; and then, by the end of June or early July, to begin a public/stake holder process with two or more meetings to occur in July or August in order to engage with all the interest groups. Judge Bloch expressed that the Work Group would like to engage more directly with the consumer groups and then hope to have a final presentation by the next Council meeting in September. Judge Bloch asked for informal feedback from the Council and an informal nod from the Council that this proposal is moving in a productive, worthwhile direction and that the Work Group should continue to refine the document and continue obtaining input with a consumer/public process. Judge Bloch requested flexibility from the Council to further refine the proposal and not to be locked in to the current proposal. Judge Bloch noted that the Work Group is willing to continue with the entire process including the public process while recognizing that the Council could decide at any time not to proceed with the Work Group's work. Ms. Clark observed that progress has been made in terms of flexibility. Mr. Corson suggested that the language should be refined in August in order that Prof. Peterson can review the proposed changes to Rule 32 for technical edits.

Judge Bloch affirmed that he would schedule a public process for feedback on the proposed Rule 32 changes before submitting a proposed amendment to the Council prior to the Council's next meeting in September.

Rule 43 Committee Report (Mr. Corson).

Mr. Corson presented to the Council the finalized version of the proposed changes to Rule 43B reflecting what was agreed upon by the Council at the last meeting held in May. Mr. Corson reported that lines 11 through 13 retain the current rule of the 45 day grace period for the defendant unless the court otherwise specifies and that lines 13 through 15 will make a default mode of 30 days unless parties agree otherwise. Mr. Corson noted that the proposal was voted on during the last meeting in May to be placed on the September calendar if there were no further questions. The Council was satisfied with the finalized version.

Rule 63 and Rule 64 Committee Report (Ms. Clarke). Judge Schuman noted that at the May meeting there was a unanimous vote to place the proposed rule changes on the September calendar. There was no further discussion.

Agenda Item 6: Old business (Ms. McKelvey).

The Oregon State Bar's E-filing Task Force Proposal (Mr. Hamlin).

Mr. Hamlin reported that a little over a year ago the Board of Governors created an Electronic Filing Task Force with Mark Comstock as Chair as a way of moving forward the goals of the court's Technology Committee. That Committee had made an electronic case management system for the state courts and some form of electronic filing part of the long term plans of the court system. Mr. Hamlin reported that the Electronic Filing Task Force met for about a year and struggled with a variety of business plans, everything from a system owned by the state that would be composed of computer software and hardware to a proprietary turnkey operation such as the LexisNexis[®] models that are used for electronic filing in some states. Mr. Hamlin noted that Ms. Grabe delivered a rough draft of the Task Force's proposed legislation to the Council prior to the Council's meeting on May 13, 2006. Mr. Hamlin expressed concern that the Council did not receive the full flavor of what is going on and that questions may not have been answered, which is why he asked to attend the Council's meeting today. Mr. Hamlin reported that both the Technology Committee within the State Court Administrator's office and the E-filing Task Force have struggled with trying to determine what an electronic filing system would look like and how it might be funded -- that in one sense it would be easy to turn it over to a third party vendor who would get all of the revenue in return for doing all of the work, but that the third party vendor model may not be the best system for the state. Mr. Hamlin reported that the software the federal courts use is not available to the state. Mr. Hamlin said that the Task Force has also been looking at what the program would look like and what statutes and uniform trial court rules amendments would be necessary in order to implement an electronic filing system. Mr. Hamlin observed that several things have to come together including a system for financing electronic filing, technology that works, statutes that permit electronic filing to occur, and rules that allow it to be implemented.

Mr. Hamlin stated that it is not the intent of the E-filing Task Force to rush the Council but that proposals need to be submitted to the Legislative Counsel's Office well in advance. Mr. Hamlin noted that, in order to make everything come together for the e-filing proposal, it will be necessary to make all of the changes to the statutes, the Oregon Rules of Civil Procedure, and the Uniform Trial Court Rules effective on a particular date, which why the E-filing Task Force would welcome the Council's input at this point.

Mr. Cooper observed that the Oregon State Bar and the legislature have spent the time and the money to constitute the Council to do things that relate to necessary or proposed amendments to the ORCPs and that, as a larger concept, electronic filing is going to happen and is a good idea. Mr. Cooper noted in the proposed document that rulemaking tends to be by the Chief Justice by rule or order and asked Mr. Hamlin if the Task Force considered, as an alternative, that authority should be placed in the Council. Mr. Cooper stated his feeling that this is a procedural, not a substantive matter and that, at this time, the Chief Justice does not have a process or mechanism whereby that office promulgates rules of this large scope or nature, and wondered if perhaps the Council may be a better fit for that rule making designation. Mr.

Hamlin replied that he will take back to the Task Force Mr. Cooper's suggestion regarding the Council's role. Mr. Hamlin noted that he believed that the Chief Justice has a procedure in the Uniform Trial Court Rules for implementing what Mr. Hamlin referred to as sub-ORCP items. Mr. Cooper noted that "filing" is a legally significant act for the case, the court, and the litigants as compared to sub-ORCP items, *i.e.* paper numbering, for example, and that filing issues should be properly addressed through the Council. Mr. Hamlin responded that what the act of filing is in an electronic filing system depends in part upon the business model that is chosen and that, under the federal court electronic filing system, the act of filing occurs when the electrons are transmitted to the federal government's computers whereas, under the LexisNexis[®] model, they keep their own servers in one place, receive the electrons, and then transmit them to the court system. In most states, the act of filing occurs when the electrons are received by LexisNexis[®].

Ms. Clarke shared Mr. Cooper's concern, where the E-filing Task Force is seeing a need to amend the ORCPs, that is something which should be dealt with at the Council level and that: 1) there will need to be somewhere in an already strapped fiscal system the money for the computer system and software for the judicial branch in order for this to be implemented, and 2) there is going to be a lag between the budgetary allocation and actual implementation that would then allow the Council to do any necessary work to adjust the Rules of Civil Procedure. Mr. Hamlin replied that there are other revenue streams involved; documents electronically filed have commercial value. For example, Mr. Hamlin noted that some documents he recently retrieved through the Pacer[®] system cost eight cents per page and reported that Pacer[®] earns approximately 27 million dollars per year. Mr. Hamlin expressed his opinion that there may not be any delay at all regarding financing. Judge Isaacson noted that the Oregon Judicial Information Network (OJIN) is very antiquated and that it will have to be redeveloped which will cost some money. Mr. Hamlin replied that the E-filing Task Force has discussed both the case management (OJIN) side and the electronic filing side of the issue and that there is a strong consensus that OJIN is quite antiquated. Justice Kistler noted that, if just the electronic filing component is addressed, the financing could be achieved rather quickly to which Mr. Hamlin replied that LexisNexis[®] confirmed that they could have a site for electronic filing up and running in 30 days. Mr. Hamlin noted that, regarding case management systems, some business models involve a vendor who wants the electronic filing system to help support the case management side of it. Mr. Hamlin reported that the E-filing Task Force wants the court system to have a case management system that works and the lawyers to have an electronic filing system that works.

Ms. McKelvey expressed her concern since the e-filing proposal would involve changes to the ORCP that, at a minimum, an appointee from the Council should have been on the Task Force. Mr. Hamlin responded that he has just invited a subcommittee of the Council to work with the E-filing Task Force on the electronic filing proposal. Ms. McKelvey replied that it makes more sense to have a Council member on the Task Force who can easily report to the Council as to what is going on and whether it is consistent with the rule changes that the Council is making. Judge Holland inquired as to what the time frame is for submitting the e-filing proposal to the legislature. Mr. Hamlin replied that the e-filing proposal is still being considered by the Oregon State Bar and did not believe that it had yet been submitted to the Legislative Counsel's Office. Ms. Clarke stated that she believed that the time frame for submitting proposed legislation for the next biennium is now. Mr. Nebel responded that proposals were to

be submitted to the Oregon State Bar by April 1, 2006, and the Board of Governors approved a package to go to the Legislative Counsel in May. Mr. Nebel was not sure if a placeholder was made for this proposal. Ms. McKelvey asked Judge Holland if she would serve on the E-filing Task Force, which Judge Holland accepted. Ms. Clarke suggested that the Council also form a committee of two or three people to look at the proposals and to do an initial overview for potential problems. Judge Holland and Mr. Corson offered to work on the committee to review the proposals of the E-filing Task Force.

Rule 69B(4) (Mr. Svoboda). Mr. Svoboda reported that at the last meeting he submitted a draft and added a reference to the new federal Serviceman's Relief Act and Mr. Corson had questioned whether the citation was correct or needed to be changed. Mr. Svoboda noted that the federal Serviceman's Relief Act has been cited two or three different ways, one reflecting 50 App. U.S.C. and another as 50 U.S.C. App. Mr. Svoboda asked to defer to someone with more knowledge regarding U.S.C. citations. Justice Kistler inquired if the citation is to an appendix to the U.S.C. and offered to review the correct citation to the U.S.C. Mr. Svoboda also reported that he reviewed the Multnomah County approved form of affidavit or declaration and did not feel that it meets the requirements in order to comply with federal law. Mr. Svoboda was unsure how to speed up the effectiveness of the adoption of the new rule, if it gets adopted. Ms. Clarke noted that the Council could ask the legislature to speed it up. Mr. Svoboda also suggested that the Council could do an educational process to the members of the Oregon State Bar. Mr. Svoboda also noted that there could be an affidavit that meets the federal requirements and also meets the existing ORCP 69B(4) requirements. Prof. Peterson inquired about the definition of terms on line 3 referring to "affidavit, statement, declaration, verification or certificate" being added to the existing "an affidavit or a declaration" and inquired whether the terms "affidavit" and "declaration" sufficiently covered the requirement without adding "statement, verification, or certificate". Ms. Clarke suggested amending the proposed rule to require the filing of an affidavit or declaration and that, if Oregon is more restrictive than the federal government, then it would not be a problem and Oregon would be staying with those documents which are familiar in its system. Ms. Clarke suggested an amendment to retain affidavit or declaration and to remove the language referring to statement, verification, and certificate. There was some discussion regarding certain cases in some courts that use orders instead of judgments as the final ruling of the court and the concern that, after the enactment of ORS 18.005, *et seq.*, that there is no finality with orders but there is with judgments. Judge Herndon noted that orders are still used instead of judgments in probate matters in Clackamas County. After being moved and seconded, the Council voted unanimously to place the amended Rule 69B(4) on the September calendar.

Rules 7H and 8D Telegraphic Service (Prof. Peterson). Prof. Peterson began the discussion by noting that Rule 7 has been amended over time and that he cleaned up many inconsistent terms throughout the rule regarding true copies and making other terms plural where needed. Prof. Peterson reported that he learned that telegraphic service is no longer used in other countries and, therefore, there was no harm in removing section H from Rule 7. Prof. Peterson also reported that he did some research and learned that a person can get a return receipt with express mail and that he made changes in the rule in order to make the language consistent with the rule's language regarding service by certified or registered mail. Mr. Corson expressed concern over the appearance in pages 6, 12, and 13 that express mail will always have return receipt requested, where the normal use of express mail is more like first class mail in all other

respects. Ms. Clarke pointed out that this section refers to service of a summons and complaint by mail and that there should always be a return receipt requested for initial service of a summons and complaint, that follow-up mail does not need a return receipt requested. After some further discussion it was suggested that, if the Council amended the rule to say “or express mail, with return receipt requested” on line 9 then that modifies all three and solves the problem addressed by Mr. Corson. Justice Kistler noted that, if service of the summons and complaint must be done by both first class mail and by certified mail, both methods should be stated in the rule because it is possible to read Rule 7D(2)(d)(i) to mean that service can be by first class mail or by certified or registered mail. Ms. Clarke suggested it should read “by first class mail and any of the following.” Ms. Clarke suggested the language “for purposes of this section first class mail does not include certified, registered, or express mail, return receipt requested, or any other form.” Mr. Corson noted that this change only needs to be made on page 6, that page 12 and 13 are fine. Ms. Clarke also suggested taking out the word “by” both first class mail and any of the following on page 12 and 13 to make it more clear. Prof. Peterson reported that he would make the modifications and the Council voted unanimously to place the proposed rule change as amended on the September calendar.

Agenda Item 6: New business

ORCP 55 (Ms. McKelvey). Ms. McKelvey noted for those who are working on ORCP 55 that there has been some recent information regarding attorneys who have not received certain documents, such as medical records, and that Ms. McKelvey would like to save discussion on that issue for the next Council meeting in September.

Agenda Item 7: (Ms. McKelvey). Adjournment. The meeting was adjourned at 11:20 a.m. The next meeting will be held at 9:30 a.m. on Saturday, September 9, 2006, at the Oregon State Bar.