

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

Members Present:

Hon. Richard L. Barron*
Hon. Eric J. Bloch
Benjamin M. Bloom
Eugene H. Buckle
Kathryn H. Clarke
Brooks F. Cooper
Don Corson
Dr. John A. Enbom
Hon. Daniel L. Harris
Martin E. Hansen
Hon. Robert D. Herndon
Hon. Jerry Hodson
Hon. Lauren S. Holland

Hon. Rodger J. Isaacson - excused absent
Hon. Rives Kistler
Alexander D. Libmann
Connie Elkins McKelvey
Leslie W. O'Leary*
Shelley D. Russell
Hon. David Schuman - excused absent
David F. Sugerman
John L. Svoboda
Hon. Locke A. Williams

* Mr. Bloom and Ms. O'Leary appeared by teleconference.

Guests:

John Borden, Phil Goldsmith, Susan Grabe, Bruce C. Hamlin, Gina Anne Johnnie and Tim Martinez

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. Ms. McKelvey welcomed Judge Harris to the Council. Ms. McKelvey welcomed the guests and asked them to introduce themselves to the Council.

Agenda Item 2: Approval of minutes (Ms. McKelvey). Upon motion duly moved and seconded, the Council unanimously approved the minutes for the meeting held on June 10, 2006.

Agenda Item 3: Report on the progress 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 a tentative final report and that there are some last minute changes regarding whether statutory amendments are needed to formalize the relationship between the Council and the Judicial Department in terms of assistance with financial accounting. It was determined that statutory language was not necessary and the relationship could be formalized by a letter of agreement. Ms. Clarke reported that the rest of the report was final and that it would be presented to the joint interim judiciary committees on September 20, 2006. Ms. Grabe reported that Sen. Floyd Prozanski and Rep. Robert Ackerman will be at the hearing to present the report. Ms. Clarke reported that the bottom line of the report is to restore funding to the Council and to maintain the structure as it is.

Agenda Item 4: Report on the E-filing Task Force (Judge Holland). Judge Holland deferred to Mr. Cooper to present the report. Mr. Cooper reminded the Council that the Oregon State Bar and the Chief Justice have appointed an E-Filing Task Force that has been operating for over a year in parallel with the Council. After the June 10, 2006, Council meeting Judge Holland was appointed to a seat on the Task Force and Mr. Cooper has been an observer. Mr. Cooper reported that the Task Force has a finalized and prepared legislative proposal that would be introduced under the auspices of the Bar which would amend a number of statutes and give the Chief Justice the necessary authority to make the necessary changes to the ORCP's (through Uniform Trial Court Rule amendments) related to filing, service, and other issues which would be affected by e-filing. Mr. Cooper noted that the Task Force is composed primarily of trial court administrators, Department of Justice computer personnel, and lawyers including Mark Comstock and Bruce Hamlin. The legislative proposal is that the Chief Justice will propose a number of Uniform Trial Court Rules which will set out the method of e-filing, whether an e-mail address is used, if a website such as Pacer is used, how the system will interface with OJIN, etc. Mr. Cooper reported that the Task Force is focused on working with vendors and it may be possible to finance the new electronic system as there is value in having court documents available for purchase. Mr. Cooper observed that the Task Force's focus was analogous to a group that is interested in the physical properties of a tire whereas the Council's focus is where does the road go. Mr. Cooper expressed concern that the Task Force's proposals have been finalized so late that the Council will not have adequate time to review them. Mr. Hamlin informed the Council that the Task Force does not have the authority to actually negotiate with potential vendors; rather, the Task Force has received presentations from various vendors. Ms. Clarke expressed her concern regarding the drafting of the Task Force's proposal, that it takes time to appropriately draft rule changes. She pointed to examples of Task Force language that would create significant uncertainties for parties and practitioners. Justice Kistler inquired if the Oregon State Bar intended to move forward with the legislative process, even if the Council chooses not to publish the proposal. Ms. Grabe responded that the Bar had filed its proposals to the Legislature by May 17th as it does each biennium and that the current e-filing proposal was included as a placeholder for later modifications. Mr. Hamlin informed the Council that the E-Filing Task Force values the Council's continuing input and that the Council returning in December to this issue would be timely. Ms. Clarke moved that Ms. McKelvey appoint a committee to report back in December with a tentative report, which means that the proposal as drafted could not be published by the Council for this session. Mr. Cooper seconded the motion. The motion was unanimously approved by the Council. Ms. Russell, Ms. Clarke, Judge Holland, Mr. Cooper, and Mr. Buckle volunteered to work on the E-Filing Committee.

Agenda Item 5: Council Budget Request for 2007-2009 (Prof. Peterson). Prof. Peterson reported that the Council budget request was timely submitted. The State has a particular format for agencies' budget requests and that a draft had been circulated to Ms. McKelvey, Mr. Corson, and Ms. Grabe. Ms. McKelvey had provided timely suggestions which were incorporated. Prof. Peterson reported that the budget request is for \$117,085, with \$109,085 from the general funds and \$8,000 from the Bar. A copy of the Council budget request was distributed to members and made available to guests.

Agenda Item 6: Action items; Votes on whether to publish (Ms. McKelvey).

A. Amendments previously approved for publication.

Prof. Peterson read to the Council comments received via e-mail from Jonathan Hoffman regarding proposed amendments to Rule 9 and Rule 43. After some brief discussion regarding Mr. Hoffman's comments, there was no motion to amend the drafted proposals to Rule 9 and Rule 43. Ms. McKelvey noted that it was her understanding that the Council had already voted to publish all of the items (Rule 7, Rule 8, Rule 9, Rule 43, Rule 55, Rule 63, Rule 64, and Rule 69) under 6A on the agenda. Ms. McKelvey then addressed Mr. Hamlin's concerns as to whether a super-majority was required to publish. Ms. Clarke informed the Council that a super-majority was not required to publish, only to promulgate rule changes. Prof. Peterson suggested taking a vote on the proposed rule changes to ratify the approval for publication of the proposed amendments listed under 6A. After being moved and seconded, the Council unanimously ratified publication of all of the proposed amendments listed under 6A.

Ms. McKelvey then asked guests who had recently joined the meeting to introduce themselves. Gina Johnnie, an attorney representing the Oregon Banker's Association, and Tim Martinez, a lobbyist for the Oregon Banker's Association introduced themselves to the Council.

B. Rule Amendments on which a vote is necessary..

ORCP 32 exclusion version and inclusion versions (Judge Bloch). Judge Bloch reported that Ms. O'Leary, Mr. Libmann, and he were the three Council members assigned to examine Rule 32 to explore proposed changes to the claim form and that Committee formed a work group with other individuals representing a spectrum of interests. The additional Rule 32 Work Group members consisted of Phil Goldsmith, Bruce Hamlin, Nancie Potter, Ken Sherman, and David Sugerman. Judge Bloch reported that other interested members from the defense bar, the plaintiff's bar, the business community and other interest groups appeared at two public sessions, one to inform the Committee of potential problems with Rule 32 held on April 3, 2006, and one to provide feedback on the Rule 32 Work Group's proposals held on August 29, 2006. The drafting meetings had been well attended by the Work Group members.

Judge Bloch reported that the proposed changes fall into several categories. The first change is at 32 F(2)(ii), which addresses the perceived lack of flexibility in the claim form and would include changes that would allow for the special needs of certain disabled class members and those whose primary language is not English (identical in both the exclusion and inclusion versions). The next change is at F(2)(v) which makes clear that, if the parties and the court approve, the claims form need not be used. The next change, at 32 F(2)(iv) and 32 F(4), was

included to make clear that the status quo, precluding fluid recovery or *cy pres* recovery, would be preserved. The next change, at 32 N(1)(e)(v) was to replace an obsolete reference to the Disciplinary Rules with a current reference to the Oregon Rules of Professional Conduct. Finally, the Work Group had crafted two competing changes, at 32 E(2)(iii) and 32 F(3), that would affect the use of the claim form in a specific variety of class action cases where the identity of class members and the value of each member's claim is apparent from the defendant's records.

Judge Bloch then went on to report that the proposed claim form changes in 32 F(2)(iii) would contain a notice of the monetary amount that has been calculated to be due to each class member and of the member's right to request either inclusion or exclusion. Judge Bloch reported that this was the provision that had been the subject of considerable discussion and debate and that, from the perspective of the plaintiffs' bar and consumer rights organizations, it was his sense that they viewed it to be less than that it should be but that the proposed language represents a move in the right direction such that the plaintiffs' bar and consumer rights organizations would support the changes to be made. Judge Bloch then acknowledged the presence of Tim Martinez from the business community who had attended both of the Work Group's public meetings and had given feedback. Judge Bloch informed the Council that the business community believes the change is more substantive in impact than the Council should be taking on, which Mr. Martinez would be addressing. Ms. Clarke inquired if there were any substantive changes. Mr. Sugerman pointed out that the inclusion and exclusion versions both contain a tweak, mirrored in each, and that a concern had been raised by the plaintiffs' bar that there may be unintended consequences and that the Work Group needed to specify: 1) that the plaintiffs' counsel had a duty to the class and had to give the notice, and 2) that the affirmative relief came in the specific calculated amount. Mr. Sugerman noted that the concern plaintiffs' attorneys had recently raised is mostly with "who" gives the notice; however, the language reflects that the court will direct who shall provide notice. Ms. O'Leary noted that the notice provisions appeared to be a hyper-technical issue and that the need for additional language for notice is not that important as it is something that the trial judge can order based upon his or her discretion.

Ms. Clarke inquired if they could separate the issue that appears to be presented by F(3), the competing inclusion or exclusion language from the other three or four changes or if those changes all had to be amended together. Judge Bloch noted that the Council can separate out the changes, that most of the proposed modifications were minor or noncontroversial and that only significant change is the proposed amendment to Rule 32 F(2)(iii) and F(3) which is subject to debate.

Ms. McKelvey then invited the guests to address the Council and to provide their comments on the proposed amendments to Rule 32, both the inclusion and exclusion versions, and why those issues may be controversial. Phil Goldsmith then introduced himself as a lawyer who represents plaintiffs in class actions upon occasion and that he participated in the Work Group that created the language proposals. Mr. Goldsmith then gave a historical background regarding the claim form requirement, that during the previous 2004 legislative cycle there was a proposal to eliminate the claim form requirement and, instead, to provide the trial judge with discretion as to whether the claim form would be required in a given case, which the Council supported 13-9, with one abstention, short of a super-majority. Mr. Goldsmith pointed out that the proposed change before the Council today is much different than the one in the prior session,

that the current proposal does not remove the claim form requirement and give the trial judge sole discretion. Mr. Goldsmith remarked that, during the Work Group meetings, Mr. Hamlin made an important observation that the claim form requirement was really a procedural device to implement a substantive policy choice of the legislature. Mr. Goldsmith noted his concern with the inequities of the claim form for those who cannot read or who have disabilities. Such individuals may understand that they are entitled to the money, but would not be able to take the steps necessary to get the money. In some cases, it may cost the business community more if the existing claim form procedure is changed. But, as a matter of equity, it would be a good thing and that, due to reduced administrative and attorney time, there may be a net savings by not having the mandatory requirement of a claim form. Mr. Goldsmith went on to note that the exclusion model was developed which identified a set of circumstances where the defendant's records would enable one to determine which people would be entitled to relief and the specific amount of relief to which each class member would be entitled. In such instances, a notice would be sent where an individual can opt out; if there was no response that individual would get paid. Mr. Goldsmith reported that Mr. Sherman suggested that the inclusion model also be promulgated which may be more acceptable to the business community and which Mr. Goldsmith did not feel was significantly different from the current rule. Mr. Goldsmith went on to note that at the public meeting held on August 29, 2006, Bill Linden, who was present representing certain business interests, specifically said that, if the Council passed either version, it would be unacceptable to business. Mr. Goldsmith noted that the ultimate passage of the exclusion modification could lead to an attempt on the part of the business community to get the legislature to take a second look at it, yet noted that there were several reasons why the Council should approve the proposal: efficiency, equity, and increased discretion of management over cases. Mr. Goldsmith addressed the question of whether such a change was procedural or substantive. In 1981 the attorney general's office was asked by a state senator for an opinion on whether, as a general matter, a rule which eliminated the claim form requirement, or at least eliminated a mandatory claim form requirement, was substantive or procedural. The attorney general's opinion was that it was a procedural, not a substantive matter.

Tim Martinez, with the Oregon Banker's Association, then introduced himself to the Council. Tim Martinez informed the Council that Mr. Sherman is the outside counsel for the Oregon Banker's Association and is not a lobbyist. Mr. Martinez then thanked the Council for staying away from the *cy pres* issue. Mr. Martinez also noted that the Council plays such an important role and that he could not find another group that can tell the legislature what the law will be unless the legislature says "no." Mr. Martinez noted what an important role that was; however, the legislature has not demonstrated that it recognizes the importance of the Council's work by providing funding to the Council. Mr. Martinez observed that, even if there is more state revenue, if the Council thinks it is going to jump ahead of education and other interests, it probably was not going to happen and that the funding issue was probably going to continue in the next session. Mr. Martinez noted that having the provisions for agreement as to whether a claim form is needed or not was useful and that the provisions regarding a form in braille or other languages are good changes. He observed that 80% of the changes the Council made were good changes and a good percentage and that if the Council accepts the other four changes, it would be acceptable to the business community, but that the business community does not want either the exclusion or inclusion model. Mr. Martinez argued that the procedural vs. substantive issues was a gray area and that ultimately, despite the AG's position, the legislature would decide whether it was policy or procedure and could take action to undo the inclusion/exclusion

piece of the proposed amendments to Rule 32. Mr. Martinez noted that the claim form requirement brought about in the 1980's was a hard fought compromise which makes it clear that it was a policy piece and urged the Council to adopt the other four amendments which everyone wants to see move forward. Mr. Martinez suggested that the respective interest groups could then argue about the remaining amendment in the legislature.

Mr. Corson noted that he was not aware of any statutory or rule based prohibition precluding the Council from engaging in policy and that every rule the Council promulgates is a change of policy. Mr. Corson then inquired if there would be a change of substantive rights if the exclusion or inclusion amendments were adopted and, if there is not an issue of substantive rights, whether Mr. Martinez could articulate, other than the economic interests of his clients, why it would be a bad rule. Mr. Martinez responded that, if the court can identify the members of the class in a given case, those class members would be treated differently than class members where the court can not identify members of the class. Mr. Martinez noted that there would be small, uncashed checks that could affect *cy pres* recovery, where currently the unclaimed money stays with the defendant.

Judge Bloch then noted that, as chair of the Work Group that he was going to appraise the Council concerning some of the sense that he personally has from Mr. Martinez and others about concerns Mr. Martinez shared with the Work Group as to what the implications might be for the Council and its budget should the Council move forward and approve the proposed amendments to Rule 32. Judge Bloch felt that the Council ought to hear those implications. Mr. Martinez noted that those statements were made by Mr. Linden, but that he would speak concerning that issue. Mr. Martinez noted that he referenced early on that the Council has budget issues and that there are times where groups and business lobbyists will ask "does this group serve a purpose any more" and that if it does, "why do we not help fund it" or, if it does not, why do they not say "why is the legislature allowing that group to limp along with \$10,000 funding?" Mr. Martinez noted that the Council is not asking for a lot of money. Yet it has not been very successful at getting funded and that is not due to any efforts on Mr. Linden's or his part, and that the budget issue is rising and falling on its own merits within the legislature. Mr. Martinez noted that he spoke to Senator Ginny Burdick and that one of the reasons the Rule 32 Summit was called was because of the letter that Joseph O'Leary wrote to the Council on behalf of Senator Burdick and that, when Mr. Martinez spoke to Senator Burdick, he laid out both sides of the matter. During that discussion Senator Burdick made it clear to Mr. Martinez that she did not want the business community to go after the Council's funding and Mr. Martinez noted that the Council has an ally with Senator Burdick, but that she was only 1 of 90 and is not on the Ways and Means Committee. Mr. Martinez also said he has spoken with people on the Republican side of the aisle and that a lot of them are uncomfortable with any outside group, not just the Council, being able to go to the Legislature and say "this is what we are going to do unless you tell us otherwise." Mr. Martinez noted that the Council faces that challenge.

Mr. Sugarman summarized to Mr. Martinez what he understood to be the concerns of the business community in that the proposed changes to the claim form requirement is not so much a policy issue but that it may have a substantive effect because it will change who is exposed and that, in certain circumstances, it will affect the distribution of costs to the business community, that it may be more, or that it may be less, and that there is an uncertainty as to those cost distributions. Mr. Sugarman noted that the proposed change is policy driven, that this change

will help create a better fit putting the money where it should go -- more toward the plaintiffs and less to administrative costs and the attorneys. Mr. Sugarman noted that, ultimately, we still have the claim form and that all the Work Group has done is to reverse the direction of the claim form in one class of cases, that it is a conservative proposal, that we have not touched *cy pres*, and that this proposal is the classic fair settlement. Mr. Sugarman expressed his surprise that the business community said no to both proposals. Mr. Sugarman added that he had interpreted Mr. Linden's comments as basically a direct dare; if the Council passed either of the amendments, there would be adverse consequences. Mr. Sugarman noted that he was profoundly offended by Mr. Linden's comments, and that is why he supports the exclusion proposal.

Mr. Martinez then apologized for the confusion regarding the use of the term policy, and that he was referring to public policy which is within the realm of the Legislature to decide what is good public policy. Mr. Martinez noted that if Mr. Sherman signed off on the proposed amendments, he did so in his individual capacity and never signed off for the Oregon Banker's Association. Mr. Sugarman said that Mr. Sherman did make it clear that he was there to work along side the Work Group and that he did not purport to indicate whether any of his clients would endorse any proposal of the Work Group.

Judge Bloch informed the Council that it needs to understand that, if it moves forward with the proposed amendments, the business community will see it as a financial detriment, that they will not like it, and that they will possibly do what people do when a body such as the Council does something they do not like and try to perhaps have the Council suffer a consequence as a deterrent to future action.

Ms. McKelvey then addressed the Council noting that she is not a politician; that none of the Council members are politicians; that probably many are also not politically savvy; that the Council exists to develop the best possible rules for the public, for the judges, and for the people who practice in the courts; and that mission should be the entire focus of the Council, not on funding or not funding. Ms. McKelvey noted that the Council hopes to continue to have funding, but that it wants that funding because it is doing a good job for the public, the attorneys, and the judges. Judge Harris inquired if the Council could vote separately to publish the exclusion as well as the inclusion versions to Rule 32. There was some discussion regarding whether to take votes and possibly publish both versions and it was determined that the Council should only publish one version. Mr. Bloom noted that there was not much support for the inclusion version. Judge Bloch moved and it was seconded and passed by acclamation to amend the reference to the Rules of Professional Responsibility to the Rules of Professional Conduct at ORCP 32 N. Ms. Clarke then moved that the Council adopt the exclusion draft as written but with an amendment to subsection 32 F(2)(iii) on page 2, line 13, to add "in the calculated amount" at the end of the section. Mr. Goldsmith noted that the exclusion version would allow those plaintiffs who believe that their damages are more than the amount stated in the notice to exclude themselves from the class and preserve the opportunity to file their own lawsuit.

Ms. McKelvey acknowledged the motion and second to approve for publication of the amended exclusion draft and asked for any further discussion. Judge Bloch expressed that he felt it was appropriate for the proposed amendment to go out as a packet and that he would like to receive public input, that some of the changes are individual items that have good value. Ms. Clarke noted that in December the Council could elect not to promulgate the proposed

amendments. Mr. Corson expressed his support of the motion; that he wants to hear the public response; that if promulgation of the amendment will result in dismantling of the Council, he will listen; but that he believes what has been developed is good policy and that he is going to vote for it. Upon Ms. McKelvey calling the vote, the motion was unanimously passed.

Agenda Item 6: New business

Board of Governor's packet – proposed changes to Rules of Civil Procedure. (Ms. Kelvey). Ms. McKelvey reported that the Douglas County Bar Association proposed rule changes to Rule 7 and Rule 18 which appear identical to those proposed last year by then chair of that organization, Danny Lang. Ms. McKelvey reported that Mr. Hamlin is on the Board of Governors and will lobby against any rule changes being supported by the Board of Governors and support any rule changes going through the Council. The Council incorporated Mr. Lang's proposal regarding Rule 7 and rejected his proposal regarding Rule 18.

E-filing. (Ms. McKelvey). Ms. McKelvey reported that she received an e-mail from a group that is looking at e-discovery and wants to bring a proposal to the Council. Ms. McKelvey extended an invitation for that group to bring a proposal forward in the next biennium.

Ex Parte Interviews of Treating Physicians. (Ms. McKelvey). Ms. McKelvey reported that she has been recently involved in the issue of *ex parte* interviews of treating physicians following waiver of the physician/patient privilege. Following the decision in *Grimm vs. Ashmanskas* it was commonly thought by the defense bar that they could do *ex parte* interviews and there was a motion panel consensus to that effect in Multnomah County. Following HIPPA, in order to proceed with *ex parte* interviews the defense bar had to have either the consent of the plaintiff's attorney or an order of the court. Ms. McKelvey reported that she recently lost a motion regarding an *ex parte* interview before Judge Henry Kantor who in his decision, recommended that perhaps a solution could be crafted by the Oregon Council on Court Procedures. Ms. McKelvey requested that the Council consider this issue when it resumes after the legislative session if it remains unresolved – a writ of mandamus has been filed in the Supreme Court. (Justice Kistler promptly left the room during discussion of this matter.)

Council Members. Prof. Peterson informed the Council that it needs to appoint a legislative advisory committee composed of two judges; two members; and the public member, Dr. Enbom. Prof. Peterson also noted that, according to statute, the officers are elected annually. Ms. Clarke noted that in practice the current Chair continues through the legislative session and then the new chair comes in. Prof. Peterson requested of those Council members whose terms are ending in August of 2007 and who are eligible for reappointment to express whether they are interested in reappointment.

Agenda Item 7: (Ms. McKelvey). Adjournment. The meeting was adjourned at 11:35 a.m. The next meeting will be held at 9:30 a.m., Saturday, December 9, 2006, at the Oregon State Bar.