

**MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES**

Saturday, September 15, 2007

9:30 a.m.

Oregon State Bar
5200 SW Meadows Road
Lake Oswego, Oregon

Members Present:

Brian S. Campf
Brooks F. Cooper
Don Corson
Kristen S. David
Dr. John A. Enbom
Martin E. Hansen
Hon. Robert D. Herndon

Hon. Jerry B. Hodson*
Hon. Lauren S. Holland*
Hon. Rodger J. Isaacson
Alexander D. Libmann
Leslie W. O'Leary
Shelley D. Russell
John L. Svoboda

*Present by teleconference

Members Absent:

Eugene H. Buckle
Hon. Daniel L. Harris
Hon. Rives Kistler
Hon. David Schuman
Hon. Locke A. Williams

Guests:

Connie McKelvey, Retiring Chair
Susan Grabe, Oregon State Bar
Mark Comstock, Attorney at Law

Also present were Mark A. Peterson, Executive Director, and Shari C. Nilsson, assistant to Mark Peterson.

Item I: Call to Order

Retiring Chair Ms. McKelvey called the meeting to order at approximately 9:30 a.m.

Item II: Introductions

All members and guests briefly introduced themselves at this first meeting of the biennium.

Item IIA: Roster

The current member roster was distributed and Prof. Peterson requested that errors or updates be noted and returned to him for correction.

Item IIB: Review of Matrix of Terms

A matrix of OSB attorney appointments was circulated and Mr. Corson requested that any attorney member of the Council inform Prof. Peterson if they believe that information contained therein is incorrect, especially as to whether a member is in his or her first or second term or the ending date of his or her term.

Item III: Information Item (Minutes from December 9, 2006)

No motions were made due to technical difficulties in preparing the December 9, 2006, minutes. Ms. McKelvey requested that members review the draft minutes, make corrections, and return them to Prof. Peterson for editing. The item will be re-addressed at the next meeting.

Item IV: Information Item (Elections of Officers)

Ms. McKelvey turned the meeting over to Vice Chair Corson. Mr. Corson explained the Council's traditional election procedures. Formal elections were deferred until the next meeting when appointments to fill the remaining two attorney vacancies as well as the circuit court judge vacancies will be made and the Council will be at full strength.

New Item: Honoring Ms. McKelvey

Mr. Corson presented Ms. McKelvey with a plaque honoring her years of service to the Council.

Item V: Report from Last Biennium

Item V A: Promulgated Rules

Prof. Peterson reported that all amendments promulgated at the December meeting all passed without a vote in opposition. Prof. Peterson briefly reviewed the amendments to ORCP 7, 8, 9, 32F and N, 43B, 55F(3), 63D, 64F, and 69B, which had been submitted to the Legislative Assembly. Prof. Peterson reported that the Legislature had not voted to amend, repeal, or supplement any of the Council's promulgated rules; therefore, the Council's amendments will take effect on January 1, 2008.

Item V B: Legislature's ORCP Amendments Outside of CCP Promulgations

Ms. Grabe explained that the Council has primary responsibility for promulgating amendments to the rules of civil procedure but that the Legislature has also reserved the ability to introduce legislation that would affect the ORCPs. Ms. Grabe distributed a matrix of five bills that passed the legislature and amended ORCP 7C; 9A, B, C and E; 17A, C, and D; 34G; 47C, D, and F; 78C; and 79E. She briefly discussed those bills. She expressed the need for the Council to coordinate and communicate with the Legislature and other groups to avoid parallel tracks in amending the ORCPs.

Item V C1: Administrative Matters (Contract with Lewis & Clark Law School)

The Council is receiving in-kind support from the Bar and from Lewis & Clark Law School. The Law School is now the administrative office for the Council and the repository for all documents and records and Prof. Peterson is the Executive Director.

Item V C2: Administrative Matters (Legislative Oversight/Review)

Mr. Cooper explained some of the history of the Council. At one time the Council was fairly autonomous; however, the Council's budget is now a subset of the Legislative Counsel's budget. The Legislature now expects performance measures, including interaction with the public.

Mr. Cooper suggested sending regular e-mails to senators and representatives in Council members' districts after each Council meeting to help develop relationships with those lawmakers. He recommends being proactive with the Legislature.

Ms. Grabe also suggested the need to be active in substantive matters, including having a web page up and running and available to the public. She stressed the importance of developing performance measures. Mr. Corson asked whether the Council could receive assistance from the Bar to this end. Ms. Grabe indicated that the Bar would provide support and will be preparing a matrix with a list of legislators from each Council member's district.

Mr. Corson inquired as to whether the Council listserv is up and running. Mr. Brooks and Prof. Peterson indicated that technical difficulties are being resolved and the listserv will be available shortly.

Item V D: Council on Court Procedures Website

Mr. Cooper stated that the Legislature requires that the Council have a publicly available website. Mr. Cooper has found a volunteer to build the website and by the next meeting a draft website will be available for Council members' input. The site should go live by October or November of 2007.

Judge Holland suggested that the website should coordinate with each circuit court's website and that those websites should include links to the Council website. Mr. Cooper stated that the Council will e-mail judges and legislators and request that links to the website be made from as many of their websites as possible. Ms. David also suggested links from local bar associations' web pages. Ms. David volunteered to assist with web page issues.

Item VI: Old Business

There was no old business.

Item VII: New Business

Item VII A: Possible Amendments

Item VII A1: Possible Amendments (E-Filing)

Mr. Comstock, a member of the Bar's E-Filing Task Force, reported on the effort to revamp the way that records are maintained in the judicial system through the use of e-documents and electronic filing. HB 2357 allows electronic images as well as paper records to be considered official documents. The Legislature adopted HB 2357 with one restriction, that initial service of the summons and complaint should not be electronic. Changes throughout the ORCPs would need to amend the word "paper" to "document."

The Ways and Means Committee has created a work group to oversee planning and budget. That work group is in the process of making rules for the system. The rules would be similar to those used in federal court rather than an entirely new system. Mr. Comstock distributed copies of an explanation of HB 2357 and the current thinking on the UTCRs. There will be a stepped process of implementation beginning in January of 2008. The system should be implemented in Multnomah and Jackson counties by the end of the first quarter of 2009.

Mr. Corson inquired what the Council can do to assist. Mr. Comstock indicated that the Council and the work group should work together and be aware of any initiatives. He stated that there will be some effects on the ORCPs and that the Council can help point those out. As Mr. Comstock is the only practicing lawyer on the work group, he would welcome the Council's assistance. A committee was formed consisting of Mr. Cooper (chair), Ms. Russell, Judge Holland, Ms. David, and Mr. Libmann.

Item VII A2: Possible Amendments (E-Discovery)

Katherine Heekin raised this issue last year and again this year and offered to assist the Council. The idea is to move toward the model of the FRCPs regarding electronic discovery. Mr. Cooper indicated that there is not much difference between requesting electronic documents and requesting paper documents. He questioned the need for a rule change in this regard. Mr. Campf indicated that there can be substantial additional expense to retrieve electronic information versus paper information. After discussion, it was determined that at this time no formal action will be taken and no committee formed. Mr. Corson will notify Ms. Heekin of the Council's decision.

Item VII A3: Possible Amendments (Limit Number of Cumulative Experts)

Judge Isaacson opined that this is not an ORCP issue. Judge Herndon suggested that this is an issue for judges to resolve and that changing the ORCPs is not necessary. Ms. O'Leary also expressed that rule changes are unnecessary as this can be dealt with by judges on a case by case basis. No action was taken.

Item VII A4: Possible Amendments (Clarify Standard for Rebuttal Evidence)

After discussion, the Council was unsure whether this would be an ORCP issue. Judge Herndon suggested that, in his experience, this is not a large problem, but perhaps merely a matter of attorneys not understanding the difference between rebuttal evidence and restating previous evidence. Mr. Cooper stated that there may be value in looking into the matter even if the Council may not take action. The issue is continued to the next meeting when a full complement of Council members should be present.

Item VII A5: Possible Amendments (Amend ORCP 18 re: Initial Complaint Stating Amount of Damages Sought)

There was discussion about this being a political matter between plaintiff's and defendant's bars rather than a matter of necessary rule change. The rule has been amended as suggested and then changed back to its current form. The Council debated whether the issue is worthy of consideration again. Mr. Corson appointed a committee consisting of Ms. O'Leary (chair), Mr. Libmann, and Judge Isaacson. Ms. McKelvey indicated that former Council chair Kathryn Clarke could provide information and mentioned that Lewis & Clark Law School will be providing a law student to help with research and that this may be a matter with which the student could assist. It was noted that it would also be helpful to look into past Council minutes and legislative history. Judge Herndon suggested that the matter be revisited when a full complement of Council members may be present, at the next meeting.

Item VII A6: Possible Amendments (Duty to Save Costs of Service Protocol)

Mr. Cooper explained that under FRCP 4D, a Waiver of Service form is required and defendants are required to acknowledge service or be faced with promptly paying opposing counsel's service costs, if service is required. Prof. Peterson inquired whether the request for an acknowledgment of service would constitute giving legal advice to an unrepresented party opponent in violation of ORPC 4.2. Mr. Cooper replied that the form contained approved language, like a summons, and the plaintiff's attorney does not give advice as to whether or not to sign the acknowledgment; rather, the attorney merely serves the form. After some discussion about whether this would be an appropriate addition to the ORCPs, a committee was formed consisting of Mr. Cooper (chair), Mr. Hansen, and Judge Herndon.

Item VII A7: Possible Amendments (No Duty to Respond to ORCP 43 Request for Production until Answer is Filed)

Mr. Hansen observed that motion practice that precedes the filing of an answer can consume considerable time and the proposal would halt discovery unnecessarily. After discussion, no interest was expressed in pursuing this issue. No action was taken.

Item VII A8: Possible Amendments (Limits on Length of Depositions)

There was discussion of federal rules limiting the length of a deposition to 7 hours per day and whether this would be an appropriate change to the ORCPs. Judge Holland indicated that this

can sometimes be a problem with pro se plaintiffs in common law courts but she has only heard of a few occasions where it has happened. She believes it is something to be handled on a case-by-case basis. Mr. Corson, Mr. Hansen, and Ms. Russell agreed. Judge Hodson said he has never had the issue arise. No interest was expressed at this time; however, the issue will be raised again at the next meeting when a full complement of Council members is present.

Item VII A9: Possible Amendments (Clarify Peremptory Challenges for Third Parties)

Mr. Corson reported on a request he had received to review ORCP 57D(2), which does not mention third party peremptory challenges. Judge Herndon indicated that this sometimes arises in criminal cases with multiple defendants and in those cases the judge decides on the number of challenges. He believes that this would work in civil cases as well. Mr. Hansen suggested that the civil situation may not be quite analogous to the criminal cases. A committee was formed consisting of Mr. Hansen (chair), Judge Herndon, and Mr. Svoboda.

Item VII A10: Possible Amendments (Revise and Update Affirmative Defenses Listed in ORCP 19)

Prof. Peterson indicated that the list of Affirmative Defenses in ORCP 19 appears incomplete. It does not mention exhaustion of remedies. An older case holds that the doctrine of unclean hands is not an affirmative defense while a newer case states that it is. The rule uses the term *res judicata* which would now break down as claim preclusion or issue preclusion. Defendants must plead their affirmative defenses before or at the time they file an answer or risk waiver of those defenses so the list should be updated and made complete. Judge Herndon wondered whether this was a matter of substantive law rather than procedure. After some discussion a committee was formed consisting of Ms. David (chair), Mr. Campf, and Judge Hodson.

Item VII A11: Possible Amendments (Probate Court Matters)

Various probate court rules were discussed:

- Amend Rule 21 to make it explicit that it is not available as a basis for motions challenging the sufficiency of objections to annual or final accountings in probate and trust proceedings.
- Amend ORCP 55 to make it explicit that the court visitor appointed in guardianship and conservatorship actions may access the respondent's otherwise private health information.
- Overhaul ORCP 27 to make it clear that guardians ad litem either can or cannot settle the case in which they were appointed.
- Consider whether ORCP 27 should establish different procedures for appointment of guardians ad litem for adults as opposed to minors.
- Consider whether ORCP 27 should require notice of the motion to appoint guardian ad litem in a similar fashion to the notice required for a petition seeking appointment of a guardian or conservator.
- Consider revising ORCP 44 to clarify whether it can be used as a tool for a

compelled medical examination in a guardianship or conservatorship proceeding.

After some discussion, a committee was formed consisting of Mr. Cooper (chair) and Judge Holland. An additional committee appointment will be made in October, preferably from the defense bar. Ms. David indicated that she would volunteer if no other member steps forward in October.

Item VII A12: Possible Amendments (Amend ORCP 54E re: Offer and Acceptance)

Prof. Peterson indicated that this issue has been proposed in the past. Item continued until next meeting when a full complement of Council members is present.

Item VII A13: Possible Amendments (Jury Instructions, ORCP 59H(1))

There was some discussion about whether an attorney would intentionally fail to mention a jury instruction that should have been given in order to preserve grounds for appeal. Judge Herndon could not recall ever having seen it happen in a civil case. It was noted that appellate counsel could notice the error which trial counsel had missed. Prof. Peterson indicated that ORCP 59H(1) does apply by statute to criminal cases. The item will be continued until next meeting when a full complement of Council members is present. Mr. Corson requested that members read the relevant case, *State v. Toth*, 213 Or App 505 (2007), before the October meeting.

Item VII A14: Possible Amendments (Amend ORCP 16 to Allow Optional Form Pleadings for Personal Injury Complaints)

Prof. Peterson indicated that this item was suggested by Danny Lang of Douglas County and had also been proposed in the last biennium. There was discussion about the fact that Oregon is a fact pleading state but that form pleadings do exist in some areas of law. After discussion, no interest was expressed and no action was taken.

Item VII A15: Possible Amendments (Adopt Federal Style Notice Pleading)

There was discussion of the federal vs. the state system. Ms. Russell indicated that in state court a lot of time is spent arguing what a complaint says instead of getting to discovery. Mr. Hansen stated that in federal court you may avoid 12B(6) motions but that the cases go away on summary judgment. Judge Isaacson mentioned a new provision that will go into effect in January regarding fees for filing motions. Mr. Hansen opined that this may not be an inhibitor of filing motions but that, as with any "sin tax," it may just make it more expensive to do so. Ms. O'Leary expressed that it would be good to have a dialogue about the issue. Ms. O'Leary, Ms. Russell, and Ms. David expressed interest in volunteering. Ms. David would also be interested in a dialogue about getting lawyers to engage in proper fact pleading in Oregon. The item will be continued until next meeting when a full complement of Council members is present, and a full committee will likely be formed at that time.

New Item: Judge Harris' suggestion for a Jury Improvement Committee

Mr. Corson explained Judge Harris' suggestion to form a Jury Improvement Committee. Ms. Russell volunteered for the committee. Judge Harris will be a member and will chair. Mr. Corson will ask Mr. Buckle to be a committee member as well.

New Item: ORCP 44 (Independent Medical Examinations)

Judge Isaacson commented that a lot of good work had been done in the past by a Council committee regarding Rule 44 and IMEs and wondered if the issue is still active. It was noted that the Council did not get a super majority and that the issue did not pass. This item will be placed on the agenda for the next meeting.

Item VII B: Appointment of Committees

<p><u>Committee on E-Filing</u></p> <p>Mr. Cooper (chair) Ms. David Judge Holland Mr. Libmann Ms. Russell</p>	<p><u>Committee on Revising and Updating Affirmative Defenses Listed in ORCP 19</u></p> <p>Mr. Campf Ms. David (chair) Judge Hodson</p>
<p><u>Committee on Possible Amendments to ORCP 18 (prayer for damages)</u></p> <p>Judge Isaacson Mr. Libmann Ms. O'Leary (chair)</p>	<p><u>Committee on Duty to Save Costs of Service Protocol</u></p> <p>Mr. Cooper (chair) Mr. Hansen Judge Herndon</p>
<p><u>Committee on Peremptory Challenges for Third Parties</u></p> <p>Mr. Hansen (chair) Judge Herndon Mr. Svoboda</p>	<p><u>Committee on Probate Court Matters</u></p> <p>Mr. Cooper (chair) Judge Holland Additional Member to be Appointed in October</p>
<p><u>Committee on Jury Improvement</u></p> <p>Mr. Buckle Judge Harris (chair) Ms. Russell</p>	

Item VIII: Future Meeting Dates and Locations

Prof. Peterson handed out the proposed meeting schedule. It was noted that December 3, 2007, should have read December 8, 2007. All other dates were correct. The July and August, 2008 meeting dates were eliminated. It was noted that the Council is required to strive to hold meetings in every congressional district. Bend and Medford were suggested as possible meeting locations. Meeting locations will be discussed at the October meeting when a full complement of members is present.

Item IX: Adjournment

Mr. Cooper moved to adjourn. Mr. Hansen seconded that motion. The meeting was adjourned at approximately 11:25 a.m.