

**AMENDED MINUTES OF MEETING**  
**COUNCIL ON COURT PROCEDURES**

Saturday, May 3, 2008, 10:30 a.m.

Phoenix Inn  
 Phoenix Room  
 300 NW Franklin Ave  
 Bend, OR 97701

**ATTENDANCE**

Members Present:

Eugene H. Buckle  
 Brian S. Campf\*  
 Brooks F. Cooper\*  
 Don Corson  
 Kristen S. David\*  
 Dr. John A. Enbom  
 Martin E. Hansen  
 Hon. Daniel L. Harris\*  
 Hon. Jerry B. Hodson\*  
 Hon. Lauren S. Holland\*  
 Hon. Mary Mertens James  
 Hon. Rives Kistler\*  
 Hon. Eve L. Miller  
 Hon. David Schuman  
 John L. Svoboda\*  
 Mark R. Weaver

Members Absent:

Hon. Robert D. Herndon  
 Hon. Rodger J. Isaacson  
 Alexander D. Libmann  
 Leslie W. O'Leary  
 David F. Rees  
 Shelley D. Russell  
 Hon. Locke A. Williams

Guests:

David Nebel, Oregon State Bar\*

Council Staff:

Mark A. Peterson, Executive Director  
 Shari C. Nilsson, Administrative Assistant

\*Appeared by teleconference

ORCP Discussed this Meeting	ORCP Discussed & Not Acted Upon this Biennium	ORCP Amendments Moved to Publication Docket this Biennium	ORCP to be Reexamined Next Biennium
ORCP 1 ORCP 7D(3)(b) ORCP 18A ORCP 44A ORCP 54A ORCP 54E ORCP 57 ORCP 59B ORCP 68 ORCP 69	ORCP 7 ORCP 7D(4)(a) ORCP 7F(2)(a) ORCP 9 ORCP 9F ORCP 18B ORCP 19B ORCP 21A ORCP 25 ORCP 27 ORCP 38B ORCP 38C ORCP 43B ORCP 44A ORCP 44B ORCP 47C ORCP 51 ORCP 54 ORCP 54A ORCP 55H ORCP 57 ORCP 57D(2)-(4) ORCP 58B(5) ORCP 59H ORCP 61 ORCP 67C ORCP 68 ORCP 69A(1)	ORCP 7D(3)(b) <i>(pending changes)</i> ORCP 54E	ORCP 68 ORCP 69

I. Call to order (Mr. Corson)

Mr. Corson called the meeting to order at 10:35 a.m.

II. Introduction of Guests

There were no guests present that required introduction.

III. Approval of April 12, 2008, Minutes

Mr. Corson called for a motion to approve the April 12, 2008, minutes which had been previously circulated to the members. The motion was made and seconded and the minutes were approved by the membership with no amendments or corrections.

IV. Administrative Matters

A. Performance Measures (Prof. Peterson)

Prof. Peterson stated that there is not a lot of new information to report regarding performance measures. He stated that David Nebel had improved the survey he drafted earlier. Judge Miller and Dr. Enbom volunteered to review the survey and to make suggestions for further improvement. Prof. Peterson, Mr. Buckle, Mr. Corson, and Mr. Nebel will work together on a proposal for key performance measures. Mr. Nebel stated that the Council's aim should be to have a draft of key performance measures completed by the end of June, which is when most performance measures are due.

B. Report: Website/Inquiries (Ms. Nilsson)

Ms. Nilsson briefly reviewed the information contained in the Website/Inquiries Update (attached as Appendix A). She discussed the continuing addition of new materials to the website, and informed the Council that the website is now ranking high in Google searches.

Mr. Buckle asked about an inquiry detailed in last month's Website/Inquiries Update. He noted that the inquirer had asked about official comments by the Council for a specific promulgated rule. Prof. Peterson stated that the Council no longer makes official comments when promulgating rules, but does make a report to the legislature that includes a synopsis of all rule promulgations. He wondered whether the Council felt that comments add to or detract from the Council's work. Mr. Corson stated that he believes that the Council's goal should be to write the best, clearest rules possible and that those rules should then stand on their own. Mr. Buckle agreed that the rules should be plain on the face of the verbiage promulgated by the Council. Judge Holland also agreed and stated that, if the Council includes a comment, the implication could be made that the rule is in need of clarification. Researchers can read the minutes if legislative history is

deemed necessary to determine why a particular amendment was made and the amendment's intended effects.

V. Old Business

A. Committee Reports

1. ORCP 18A: Allow Optional Form Pleadings for Personal Injury (and Other) Complaints (Mr. Libmann)

In Mr. Libmann's absence, Judge Holland reported regarding this committee's work. She stated that the committee has met and will have a report available for the Council at the June meeting. She stated that the committee, having spoken with attorneys from both the plaintiff and defense bar, did not find strong support for this idea and even found some opposition. The committee also feels that the Council is not in a position to do such an overhaul of the entire system at this point.

Prof. Peterson wondered whether there was a great deal of support from the legal community regarding form pleadings for personal injury. Judge Holland indicated that there has not been a large outcry to make this change. The committee agreed that it will communicate with the proponent, attorney Danny Lang, and explain that the subject has been thoroughly discussed by the Council and that no action will be taken this biennium.

Judge James mentioned that there will be a new task force on *pro se* litigation to assist the e-court process by looking into potential issues regarding *pro se* litigants. She suggested that the Council may wish to revisit this issue or to offer assistance when that task force is formed.

Prof. Peterson requested that the committee provide a written report for the next meeting to memorialize the committee's work. This item will remain on the agenda until the written report is provided and accepted by the Council.

2. ORCP 68: Probate Court Matters (Mr. Cooper)

Mr. Cooper stated that the Council may not be able to act on ORCP 68 this biennium. The committee is still in the process of gathering opinions from the probate community at this time to determine the best way to make changes. Mr. Cooper wondered whether it is best to remove this item from the agenda at this point. The committee could continue to work on the issue and raise it again next biennium.

Mr. Corson asked which specific parts of ORCP 68 the committee is

considering for change. Mr. Cooper stated that ORCP 68 is used for attorney fee issues routinely in probate/guardianship/conservatorship matters because counsel who represent the petitioner, fiduciary, or protected person have the right to have attorney fees paid out of the probated estate or the protected person's fund. This is encountered by probate litigants more than by adversarial civil litigants. The general consensus in the probate community is that the hodgepodge of changes to the rule throughout the years have created inconsistencies. Mr. Cooper used the example of filing a petition for attorney fees from a protected person's fund and having the other party object. He stated that it is not clear whether evidence can be presented at the hearing on the objection, whether the evidence is limited to what is presented in the pleading and attached affidavit, or whether witness testimony as to reasonableness is necessary or permissible.

Judge Miller stated that, from a judge's perspective, Rule 68 hearings are extremely time-consuming and seem to take on a life of their own, necessitating review of years' worth of litigation. She stated that she would therefore be reluctant to add probate to that process. Mr. Cooper stated that those are among the reasons that the rule needs to be revised completely.

Prof. Peterson asked about costs related to collection of judgments. He stated that, the way the rule reads now, the statement for attorney fees needs to be filed within 14 days of the entry of the judgment. He wondered whether a supplemental statement for attorney fees is allowed and, if so, when. Judge Miller stated that the attorney needs to keep supplementing to include additional costs incurred, but that she does not feel that there is a clear understanding of a time limit for filing supplemental statements. Prof. Peterson pointed out that the UTCR (paragraph 5 of Form 5.080) still allow for an anticipatory award of fees, even though Multnomah County practice is not to allow an award of anticipated fees. Judge Miller stated that she routinely does not allow anticipated fees. Prof. Peterson stated that this is another reason for a rule change.

Mr. Corson raised the issue of process and stated that there is only one more meeting before the Council votes to publish amendments in September. Mr. Cooper agreed that there is not enough time to make thoughtful changes to the rule before that time. Mr. Corson suggested keeping the committee open, even after all the other rules are promulgated, and allow it to work between biennia. Mr. Cooper agreed that this is a good idea. Mr. Buckle reminded committee members that they will need to check to see whether their terms will expire in the interim so that new members may be appointed, if necessary.

3. ORCP 54A: Voluntary Dismissals (Mr. Campf)

Mr. Campf stated that the committee remains open and welcomes input. Mr. Corson suggested that, since there is nothing to vote on this biennium, the issue be carried over to the next biennium. Mr. Campf stated that he sees no reason for the committee to remain open in the interim. The Council agreed that the committee will be closed and that the issue will be taken off the agenda. If there is interest, the issue may be raised again next biennium.

4. ORCP 57, 59: Jury Improvement (Judge Harris)

Judge Harris stated that he did not get the information sent to the judges in time to receive feedback for the meeting. He stated that he will be receiving this feedback in the next few weeks and that the committee will meet again and develop a consensus on a final proposal before the June Council meeting. Mr. Corson asked whether the final proposal would consist of fine-tuning or adding new substantive material. Judge Harris stated that it will most likely be fine-tuning.

Mr. Buckle asked whether Judge Harris believes that the changes will be controversial. Judge Harris stated that it is difficult to predict and that there will always be a few who do not want changes because they do not want judicial discretion taken away. He stated that the goal is to have the changes ready for the June meeting but that, in a worst-case scenario, the committee can review the changes through the summer and have them ready for a final vote in September.

The Council agreed to remove ORCP 57 from the agenda, as no changes will be made this biennium.

5. ORCP 1: E-Filing (Mr. Cooper)

Mr. Cooper discussed his proposed changes to ORCP 1 (attached as Appendix B). He stated that the idea is to make one rule change that indicates that any “piece of paper” that can be filed with the court will also be accepted in digital form. This will avoid the need to amend each rule separately.

Mr. Buckle asked about the intent and scope of the proposed changes. He asked whether the changes only mean that a document which can be filed as paper can also be filed electronically. He wanted to confirm that the changes would not require production of electronic data in response to a

request for production, for example. Mr. Cooper stated that yes, the intent is procedural, not substantive.

Mr. Corson suggested that the language “exchanged between parties” was not necessary, but that language along the lines of “to the extent allowed by court rules” was needed. He also suggested making the new language section 1F and renumbering the other sections accordingly.

Judge James stated that the “or other things” language may be too vague. Judge Schuman suggested that the language after “paper versions” was unnecessary. Mr. Hansen asked whether discovery is included. Mr. Cooper stated that it was not the intention of the committee to change discovery practice. Mr. Hansen requested that it be made clearer that discovery is not included. Judge Miller stated that the language has to be framed so that it does not go beyond documents that the court would usually receive.

Judge Schuman stated that, although it might be cumbersome, it is a good idea to go through the ORCP and reference all types of documents that are included and list them specifically. Mr. Corson agreed.

Judge Miller stated that the language “other documents exchanged” may sound like it includes things that are not intended to be e-filed. Prof. Peterson suggested making the new language section 1E and renumbering the other sections accordingly. He also wondered whether summonses should be specifically excluded. Mr. Cooper agreed that the Council does not want to give the impression that electronic service is acceptable.

Mr. Cooper agreed to take these suggestions into account and to rework the language. He will provide the new changes to the Council in advance of the June meeting.

6. ORCP 44: Prohibit *Ex Parte* Conversation with Treating Physicians (Ms. O’Leary)

In the absence of Ms. O’Leary, Judge Holland discussed the committee’s written report (attached as Appendix C). She stated that the committee has met many times and had discussions regarding whether the issue is substantive or procedural. She stated that, given the polarized points of view in both the committee and the Bar, there is no clear consensus, and it may be best left for another venue to resolve this issue. Judge Schuman wondered why the issue has never reached the Supreme Court. Mr. Corson stated that there are probably two reasons: 1) that it needs to get

there by mandamus, which does not happen often; and 2) that when the trial is over the issue has already been resolved and is not worth bringing up on appeal.

Mr. Buckle wondered whether there is consensus on the premise that physician/patient privilege has been waived when the defendant doctor is deposed in a medical malpractice case. He stated that, in a non-malpractice civil case, it is the consensus that privilege is waived after the plaintiff has testified at trial, and he will often schedule a meeting with the treating physician for a time after the plaintiff has testified. Judge Holland stated that the committee did not discuss that particular issue because they were focusing on pre-trial discovery rather than discovery during trial. Judge James raised the issue of whether privilege is waived simply by pleading the injury. Mr. Buckle stated that, in a regular personal injury case, it is agreed that privilege is not waived until the physician has been deposed or the plaintiff has testified.

There was no objection to the Council accepting the committee's report recommending making no amendment to ORCP 44. This item will be removed from the agenda.

## B. Non-Committee Matters

### 1. ORCP 54A: Confidentiality Agreement at Settlement (Ms. O'Leary)

In the absence of Ms. O'Leary, Mr. Campf reported on this issue. He stated that he reviewed a 2007 American Association for Justice survey of how some states address secrecy in settlements. Using it as a guide, he did further preliminary research and found that some states have statutes or rules specifically addressing the confidentiality of settlement agreements that involve the government (e.g. Oregon). California carves out a niche for elder abuse cases. Florida, Texas, and New Jersey add broader limitations on confidentiality.

Judge Schuman stated that he believes that the confidentiality of a settlement agreement is a substantive issue. He stated that it is frequently one factor that is looked at in determining, for example, whether a mandatory arbitration clause is unconscionable. He stated that it did not strike him as procedural, or what the Council is supposed to be doing.

Mr. Corson wondered whether the Council is interested in proceeding further with this issue. Judge Miller stated that the threshold issue of whether the issue is substantive or procedural needs to be addressed first.

Prof. Peterson stated that he believes that a measure in California regarding this issue had been raised recently. Mr. Campf stated that the California measure concerns the prohibition of confidentiality provisions in settlement agreements when a violation under an elder abuse statute is involved. Judge Holland stated that confidentiality of settlement agreements has become a big issue where it concerns protected persons under a guardianship or conservatorship. Judge James stated that, if something has a public policy impact that large, she feels it must be substantive. Mr. Corson stated that, in his opinion, something being outcome-determinative does not necessarily make it substantive. He asked that Ms. O’Leary and Mr. Campf provide a written report addressing the research they have done. Mr. Campf stated that he will do so and bring the report to the next meeting. Judge Schuman stated that everything the Council does will have some policy implication but that our primary focus is how efficiently litigation moves through the system, and rule changes to that end are procedural. He thought that the confidentiality agreements were unrelated to cases moving efficiently through the system.

2. ORCP 7D(3)(b): Limited Liability Corporations (Prof. Peterson)

Prof. Peterson reported on his research regarding adding limited liability corporations (LLCs) to ORCP 7D(3). He observed that corporations and limited partnerships may be inconveniently joined in ORCP 7D(3)(b) as the persons listed for service are a combination of persons that might exist in a corporation or in a partnership. In addition to containing no provision for service on LLCs, Rule 7 likewise contains no provision for service on limited liability partnerships (LLPs). Prof. Peterson thought that moving limited partnerships and LLPs to a new subsection might be more clear and that LLCs might require their own subsection.

Judge Miller asked whether it would be best to have separate rules for each type of business entity or whether regrouping and adding a new subsection would work. Prof. Peterson stated that the order could be changed because it is odd already. He asked to have a business-oriented attorney assist him with drafting the changes. Mr. Corson stated that he is in favor of making the rule as clear as possible, and Judge Miller stated that the rule as is can be a trap for the unwary. Mr. Corson suggested a committee, which was duly formed consisting of Mr. Weaver (chair), Mr. Rees, and Prof. Peterson. The committee will draft changes and provide them for the June Council meeting.

3. Update: Timely Notification of ORCP Changes (Prof. Peterson)

Prof. Peterson reported that he received an e-mail response from Thomson West that was not especially responsive to his questions. He stated that Thomson West had written that it does not want to change the format of *Oregon Rules of Court - State*. Prof. Peterson responded to the e-mail and stated that the Council is not asking for the format of the book to be changed, but merely for a pocket part with the new ORCP amendments to be made available prior to January 1 of even-numbered years. He also volunteered to provide Thomson West with the changes in whatever format they prefer. He is waiting for a response.

4. Question re: ORCP 54E (Mr. Hansen)

Mr. Hansen asked whether, when changes to ORCP 54E were drafted, the word “arbitrator” was intentionally left out. Prof. Peterson stated that arbitration is covered in the UTCR (Rule 13.130) and that the reasoning behind the Council’s not including “arbitrator” is that the ORCP should not set out rules about extra-court processes.

VI. New Business

A. ORCP 69 - Notice Required on Intent to Take Default

Ms. David stated that some Oregon Association of Defense Counsel members had raised the issue of whether the notice of intent to take default was required to be in a specific format (pleading vs. letter) and whether it was required to be served on the other party. She stated that she looked at various cases and that there does not seem to be a consensus. A 1985 case stated that a letter is not sufficient, but a 2003 case stated that a letter is sufficient. She stated that it would be a fairly simple rule change to clarify, but she does not think we can get it done this biennium.

Mr. Corson stated that he feels that the better practice is to use a pleading format, but that people do send letters. He agreed that formalizing this in the rule is a good idea. Prof. Peterson stated that the *Civil Pleading and Procedure* manual from the Bar recommends using a pleading format, and that he himself also files the document with the court. Mr. Hansen raised the concern that some courts are not accustomed to receiving such documents and that a judge may sign a proposed order or judgment before the 10 day deadline has passed. Judge James stated that court staff does not usually put letters into Oregon Judicial Information Network and that using a pleading-type document would be better. Judge Miller stated that the change would not make a difference to her office.

Ms. David stated that she will raise the issue again next biennium and requested that anyone who is interested in being on a committee in the interim let her know.

VII. Adjournment

Mr. Corson adjourned the meeting at 11:55 a.m.

Respectfully submitted,

Mark A. Peterson  
Executive Director

**Council on Court Procedures  
Website/Inquiries Update  
Reporting Period: 3/25/08 - 4/24/08**

I. New Additions

I am continuing to work on posting the history of Council amendments for each rule from 1982 to present. The histories that have been posted to date are:

ORCP 1	Scope; Construction; Application; Rule; Citation	ORCP 21	Defenses and Objections; How Presented; By Pleading or Motion;
ORCP 4	Jurisdiction (Personal)		Motion for Judgment on the Pleadings
ORCP 7	Summons	ORCP 22	Counterclaims, Cross-Claims, and Third Party Claims
ORCP 8	Process		
ORCP 9	Service and Filing of Pleadings and Other Papers	ORCP 27	Minor or Incapacitated Persons
		ORCP 32	Class Actions
ORCP 10	Time	ORCP 34	Substitution of Parties
ORCP 15	Time for Filing Pleadings or Motions	ORCP 38	Persons Who May Administer Oaths for Depositions; Foreign Depositions
ORCP 16	Form of Pleadings	ORCP 39	Depositions Upon Oral Examination
ORCP 17	Signing of Pleadings, Motions, and Other Papers; Sanctions	ORCP 40	Depositions Upon Written Questions
		ORCP 43	Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes
ORCP 18	Claims for Relief		

These histories are located at <http://www.lclark.edu/~ccp/LegislativeHistoryofRules.htm>.

II. Updates

A. Links from State Web Pages

I am pleased to report that the Oregon Blue Book entry for the Council now includes a direct link to the Council's web page and that the Oregon Judicial Department's page now redirects automatically to the Council's page.

B. Google Search Results

I have been working to improve the site's ranking in Google searches. As you can see from the Google search result pages 3-8, the Council's website is now scoring high. Here is a summary of search terms and the resulting ranking of the Council's page on Google:

Search term	Council page's ranking
Oregon council on court procedures	#1
Council on Court Procedures	#1
Oregon Rules of Civil Procedure	#4
ORCP	#7
Oregon court rule changes	#3
Oregon civil rule changes	#1

C. Site Search Engine

The site's search engine continues to return incomplete results. Google does not seem to be "seeing" the agenda and minutes from past biennia. I recently submitted a site map to Google which should help the site's engine be able to find all pages on the site. Unfortunately, Google does not update frequently and it could take a while longer before the engine is working properly. The good news is that the past promulgations and rule histories are being searched.

III. Website Statistics

A. Visitors

From March 25 to April 24, the site received a total of 124 visits from 88 unique visitors. 57% of the total visits were from new visitors. 41% of the visits were direct, 37% came from referring sites, and 22% came from search engines.

B. Geographical Information

Most visitors to the website came from various cities in Oregon, including:

- |               |            |
|---------------|------------|
| ▶ Albany      | ▶ Medford  |
| ▶ Beaverton   | ▶ Murphy   |
| ▶ Bend        | ▶ Phoenix  |
| ▶ Eugene      | ▶ Portland |
| ▶ Grants Pass | ▶ Sherwood |
| ▶ Keizer      | ▶ Tualatin |

The site also had visitors from California, Florida, Arizona, Nevada, Guam, Jamaica, and Egypt (although I suspect the latter three were inadvertent).

C. Referring Sites

Visitors arrived at the web page by clicking links from the following websites, among others:

- |                                    |                    |
|------------------------------------|--------------------|
| ▶ Clackamas County Bar Association | ▶ Oregon State Bar |
| ▶ Jackson County Bar Association   |                    |

D. Keywords from Search Engines

Some of the keywords that visitors entered in search engines that found the Council's website included:

- |                                      |  |
|--------------------------------------|--|
| ▶ council on court procedures        | ▶ rules of court procedure               |
| ▶ Oregon council on court procedures | ▶ proper court procedures                |
| ▶ civil procedures                   | ▶ Oregon rules of procedure and practice |

Respectfully submitted,

Shari Nilsson  
Council Administrative Assistant

1 ORCP 1

2 \* \* \* \* \*

3 G Any reference in these rules to pleadings, orders, motions, requests for  
4 production, responses to requests for production, requests for admissions, or other  
5 documents exchanged between parties or between parties and the Court during the course  
6 of civil litigation shall be construed to include electronic images or other digital  
7 information in addition to paper versions of such pleadings, documents, or other things  
8 exchanged between parties or parties and the Court.

9 \* \* \* \* \*

**COUNCIL ON COURT PROCEDURES  
REPORT OF *EX-PARTE* CONTACT COMMITTEE  
APRIL 29, 2008**

At the last meeting, the Council directed the *ex-parte* contact committee to submit a detailed report outlining the process by which it arrived at its recommendation against amending the Oregon Rules of Civil Procedure to allow or prohibit *ex-parte* contact with treating physicians.

Our committee was formed at the January 12, 2008 Council meeting after a member of OTLA asked the Council to consider an amendment to ORCP prohibiting *ex-parte* contact, based on a trial court opinion issued by Judge Kantor. In *Poppino v. Columbia Neurosurgical Associates, L.L.C.*, Case No. 0504-04093 (Mult. Co. Or. Aug. 5, 2006), Judge Kantor held that *ex parte* contact with treating physicians violated HIPAA and implicated concerns of attorney-client privilege. However, he also urged the importance of a final resolution of the matter, whether it is crafted by the Council on Court Procedures, the Oregon legislature, or a decision on mandamus by the Oregon Supreme Court. In a footnote, Judge Kantor commented, “As much of what has gone on over the past 20 years claims the *Ashmanskas* decision as its fount, it seems likely that the Council and the Legislative Assembly would either defer to the Supreme Court or respond in a way which would still require Supreme Court review sooner than later.” *Id.* at 3-4 n.4.

At the outset, the committee identified two issues: 1) whether *ex-parte* contact was a substantive versus a procedural issue; and 2) if it is a substantive issue, whether such a rule change was appropriate for the Council to consider. We invited Susan Grabe and David Nebel from the Oregon State Bar to join a committee meeting to provide their input on both issues. Ms. Grabe and Mr. Nebel believed that it was within the Council’s jurisdiction to recommend and promulgate an amendment (or not) regarding *ex-parte* contact, they also cautioned that the issue was so politically charged that it would invite a tremendous amount of scrutiny from the various stakeholders. We were reminded of the explosive Rule 32 class action *cy pres* issue during the previous term, that it took two Council cycles, and several meetings with various business groups and class action lawyers, and it resulted in a very narrow amendment. Accordingly, the committee agreed to ask the Council as a whole for guidance as to whether *ex-parte* contact was an issue the Council should take up versus letting constituents pursue their interests through other means.

At the February Council meeting, our committee was instructed to solicit formal positions from OTLA, OADC and the OMA. All three groups provided position statements.

The OMA responded as follows: “The OMA advises its members who are or who have been treating physicians not to participate in *ex parte* contacts with defense attorneys but to have both the plaintiff attorney and defense attorney present either at an interview or deposition. This is to protect the physician from claims of breach of

fiduciary duty relationship (notwithstanding any waiver of privilege or court order to which the doctor was not a party) or a HIPAA violation.”

In its letter, OADC asserted that the question of *ex-parte* contact is procedural. OADC advocated specific amendments to ORCP 44E and 36A to allow *ex-parte* contact without having to obtain an order from the court. OADC stated that informal interviews are helpful because they allow lawyers to conduct discovery without the interference of opposing counsel, thus reducing the cost of formal discovery and yielding a more candid assessment of the plaintiff’s medical condition and other legal issues. It was OADC’s view that nothing in HIPAA prohibits disclosure of protected health information pursuant to a court’s order. OADC also cited legal decisions interpreting HIPAA as permitting *ex-parte* interviews.

In contrast, OTLA argued that any rule that would authorize *ex-parte* interviews would affect the patient’s substantive rights, in violation of HIPAA and the physician-patient privilege. OTLA stressed that *ex-parte* interviews by defense counsel puts the physician in an awkward position, often in conflict with the patient’s interests, which results in an unfair advantage for the defendant. OTLA also pointed to instances of abusive tactics by insurance claims managers to pressure physicians to testify for the defense. OTLA stated there were decisions in other jurisdictions prohibiting *ex-parte* contact. In Washington, for example, the parties arrange joint meetings; this process has worked effectively without complaint.

The committee met and discussed the position letters from OMA, OTLA and OADC. The majority of the committee felt that the letters highlighted the ambiguities in the law on *ex-parte* contact and the divisiveness of the issue. It was evident that the plaintiff and defense bars have strong and diametrically opposing views on the validity of *ex-parte* contact and its impact on the parties. Consequently, although a rule change is technically within the Council’s authority to consider, a definitive resolution to allow or prohibit *ex-parte* contact is more appropriate for the Supreme Court or the legislature. Accordingly, the committee recommends against taking further action on any amendment to allow or prohibit *ex-parte* contact.