

Oregon State Bar

Senate Bill 799 Task Force

Motions for Change of Attorney

June 27, 2014

Report of the SB 799 Task Force

June 2014

Origin of the task force

During the 2013 legislative session, the legislature considered SB 799. The bill would have modified ORS 9.380, which addresses changes in representation during judicial proceedings. The Senate Judiciary Committee held a hearing on this bill on April 8, 2013, but, after hearing from advocates on both sides, decided not to move the bill. Instead the chair of the committee asked the Oregon State Bar to convene a task force to look into this issue in more detail and report back with a recommendation.

The task force included judges, both criminal and civil litigators, family law practitioners, and representatives of the Oregon Judicial Department, the Professional Liability Fund, and the Oregon State Bar.

Purpose of Senate Bill 799

By its terms, ORS 9.380(1) appears to allow two different procedures for changing the attorney in an action or proceedings:

9.380. (1) The attorney in an action or proceeding may be changed, or the relationship of attorney and client terminated, as follows:

- (a) Before judgment or final determination, upon the consent of the attorney filed with the clerk or entered in the appropriate record of the court; or
- (b) at any time, upon the order of the court, based on the application of the client or the attorney, for good and sufficient cause.

SB 799 would have modified ORS 9.380 to eliminate section (1)(a) regarding attorneys withdrawing “upon consent of the attorney.” Some proponents asserted that the phrase “the attorney” that is used in subsection (1)(a) is intended to refer to a new attorney being substituted into a case and not to the attorney seeking to withdraw. Some task force members disagreed with this analysis, and believed that the existing statute allows the withdrawing attorney to essentially “consent to” their own withdrawal. It does not appear that this wording has ever been analyzed at the appellate level, so the task force was not able to come to a conclusion as to the intent of this language.

Different courts around Oregon appear to have interpreted these provisions differently; some allow attorneys to withdraw by notice and some require a motion approved by the court.

According to proponents of this concept, the main purpose was to better enable judges to manage their docket by minimizing the number of cases where an attorney withdraws on the eve of a trial or other important hearing, thus requiring the case to be rescheduled. This can be especially problematic for the courts when done at the last minute because it may be too late to insert another matter into the schedule which slows the overall court docket. Given that most courts are understaffed, and that many matters wait months to get before a judge, anything that further slows down the process places an additional burden on all court users.

Concerns and Discussion Points

There were a number of concerns raised by SB 799 in its original form. The Oregon State Bar, expressed its concerns in comments provided to the Senate Judiciary Committee, specifically:

A significant amount of judicial resources will need to be expended if judges are to review and approve every attorney withdrawal from an open case. While making these motions may be only moderately time consuming for lawyers, judges will need to dedicate time to each motion if the process is to have any real effect. This bill appears to slow the process down and increase the court's already considerable workload.

These concerns were also echoed by task force members, who noted that while each individual motion might take a very minimal amount of time to resolve, the large number of withdrawals processed each year could cumulatively become significant.

The task force also discussed whether requiring judicial approval for all withdrawals and substitutions was necessary to achieve the proponents' objectives. Many task force members agreed that the court's interest in managing its docket increased the closer a case got to trial or an important evidentiary hearing, and that it would be reasonable to provide the court greater authority closer to those important dates.

Statute vs. Court Rule

Another important discussion point within the task force was the extent to which it made sense for these rules to be contained in statute.

In general, attorneys are trained to look for procedural rules in the Uniform Trial Court Rules, the Oregon Rules of Civil Procedure, and other similar locations. Procedural requirements regarding an attorney's representation of a client are generally not found in statutes.

Furthermore, statutes are more cumbersome to change when problems arise or circumstances change so generally procedural rules are best kept outside of the ORS.

This understanding led most work group members to conclude that the substance of any new rule should not be placed into the statute, but should be contained in a new section of the Uniform Trial Court Rules. Work group members disagreed however as to whether ORS 9.380 and 9.390 should be repealed in their entirety.

Some members believed that it would be best to eliminate much of the content of those statutes, but leave in language that would direct readers to the UTCR. For example, amending ORS 9.380 to simply read: "The attorney in an action or proceeding may be changed, or the relationship of attorney and client terminated, **only in accordance with the Uniform Trial Court Rules.**" (*New language in bold.*)

Other task force members disagreed and suggested that lawyers were already accustomed to looking for procedural rules in the UTCR and directing them was not necessary. Furthermore, the court already has constitutional authority to manage the lawyer-client relationship and does not need additional statutory authority to do so.

This question was not resolved by the task force, and should be explored further with Legislative Counsel as possible legislation is developed.

Recommended Solutions

Substitution

Task force members agreed that in cases where a new attorney is substituting into a case, and where that substitution will not impact trial schedules or otherwise require rescheduling important events, the lawyers should be permitted to simply notify the court of the change in representation. It was agreed that the best way to achieve this result is to identify a specific number of days before which the substitution can be achieved simply by notice. However, there will not be a requirement for filing a motion after the deadline, or an acknowledgement by a new attorney, that no changes will be required.

There was some disagreement as to the exact number of days that should serve as the dividing line. In general, judges preferred the number to be as high as practical and attorneys preferred that the number of days be smaller. For the purpose of advancing the discussion and moving the proposal forward, the task force members recommended 56 days (8 weeks).

Withdrawal

Further, the task force recommended that attorneys be allowed to withdraw by notice in civil cases 56 days in advance of trial or evidentiary hearings, but that a motion be required closer than 56 days. In the case of withdrawal, the attorney should also be required to notify the client

of all scheduled court dates. There was some discussion of using different numbers of days for substitutions v. withdrawals, but it was felt that this could cause confusion.

The task force recommends the same rule for withdrawal in criminal cases, with the exception of court appointed attorneys who may only withdrawal by an order of the court. The rationale in this case is that the lawyer-client relationship was essentially created by the court and therefore the court should oversee its termination.

Draft proposal

The task force recommends that the Oregon State Bar work with the Judiciary Committee to engage in two parallel processes to address the concerns raised by SB 799.

First, draft legislation should be drafted to either repeal ORS 9.380 and 9.390 in their entirety, or to replace them with a very brief statute that simply refers the reader to the UTCR. For discussion purposes the current proposal envisions a complete repeal.

Second, the bar is happy to work with the UTCR Committee to draft new language to be added to the Uniform Trial Court Rules. The task force's recommended language is attached to this report. That language should address the issues described above, as well as the content of the existing ORS 9.390.

Draft UTCR Changes

UTCR 3.140 should be amended, and a new UCTR 3.145 be created as follows:

3.140 ATTORNEY-OF-RECORD

- (1) The attorney who files the initial appearance for a party, or who personally appears for a party at arraignment on an offense, is deemed to be that party's attorney-of-record for the action or proceeding, unless at that time the attorney files a notice stating that the attorney is making a limited or special appearance only.

- (2) When an attorney is employed for the purpose of appearing as attorney-of-record for a party in an already pending action or proceeding in which there is not attorney-of-record for the attorney's client, the attorney must promptly notify the court of the representation, either in open court or by filing a notice or other pleading, which shall serve as the party's intent to appear in the action or proceeding. The attorney shall be deemed to be that party's attorney-of-record for the action or proceeding unless at that time the attorney advises the court that the attorney is making a limited or special appearance only.

- (3) When an attorney-of-record is changed, or the attorney-of-record's relationship with the client is terminated for the proceeding, written notice of the change or termination shall be given to the adverse party.

3.145 SUBSTITUTION AND WITHDRAWAL OF THE ATTORNEY-ON-RECORD

- (1) Before judgment or other final determination in an action or proceeding -

- (A) Substitution of attorney-on-record:

- (1) When there are more than 56 days before the date of any trial or evidentiary hearing requiring oral testimony, an attorney may substitute as the attorney-on-record for a party by filing a notice.
- (2) When there are 56 or fewer days before the date of any trial or evidentiary hearing requiring oral testimony, an attorney may substitute as the attorney-on-record for a party by filing a notice, which notice shall acknowledge that as of the date of the notice the substitution will not require a change to any existing trial or evidentiary hearing date.
- (3) When there are 56 or fewer days before the date of any trial or evidentiary hearing, an attorney who seeks to substitute as the attorney-on-record for a party and the substitution is contingent upon the resetting of any existing trial or evidentiary hearing date, the substitution requires an order of the court.

- (B) Withdrawal of the attorney-on-record:

- (1) In a civil case -
 - (a) When there are more than 56 days before the date of any then scheduled trial or evidentiary hearing requiring oral testimony, an attorney-of-record may withdraw from the action or proceeding by filing a notice, which notice shall acknowledge that the withdrawing attorney-of-record has notified the party of all then scheduled court dates and has complied with all other requirements of the ORCP, the UTCR and the SLR.
 - (b) When there are 56 or fewer days before the date of any trial or evidentiary hearing, an attorney-of-record may withdraw from a case only by an order by the court.

- (2) In a criminal case -
- (a) If the attorney-of-record is court appointed, the attorney-of-record may withdraw only by an order of the court.
 - (b) If the attorney-of-record is not court appointed and there are more than 56 days before any trial or evidentiary hearing, the attorney-of-record may withdraw by filing a notice, which notice shall acknowledge that the withdrawing attorney-of-record has notified the party of all then scheduled court dates and has complied with all other requirements of the ORCP, the UTCR and the SLR.
 - (c) If the attorney-of-record is not court appointed and there are 56 or fewer days before the date of any trial or evidentiary hearing, an attorney-of-record may withdraw from a case only by an order by the court.
- (2) After judgment or other final determination in an action or proceeding, an attorney-of-record not previously discharged by the court may withdraw as the attorney-of-record in the action or proceeding by filing a notice of termination, which notice shall acknowledge that all services required of the attorney by the agreement between the attorney and the client have been provided. The attorney-of-record filing the notice under this subsection shall list all co-counsel who have appeared in the case and who are also withdrawn by the notice.
- (3) An attorney appearing in an action or proceeding other than as the attorney-of-record may withdraw at any time by filing a notice.
- (4) Other than a notice filed pursuant to Subsection (3) of this Rule, a notice or motion under this Rule must contain, if known, the name, mailing address, email address, and voice and fax telephone numbers of the new attorney-of-record, if a substitution is being made, or of the party, if not substitution is being made, as well as the date of any scheduled trial or evidentiary hearing. Protected confidential information need not be disclosed, in accord with the applicable standard of confidentiality. Every notice or motion under this rule must be served on every party to the action or proceeding and the party represented by the attorney filing the notice or motion. A motion under this Rule shall be decided by the Presiding Judge or the Presiding Judges designee.