

Corrected to change meeting date in Agenda Item 2

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of October 30, 1999
Oregon State Bar Center
Lake Oswego, Oregon

Present: J. Michael Alexander Daniel L. Harris
 Lisa A. Amato Rodger J. Isaacson
 Benjamin M. Bloom Mark A. Johnson
 Bruce J. Brothers Virginia L. Linder
 Kathryn H. Clarke Michael H. Marcus
 Allan H. Coon John H. McMillan
 Don A. Dickey Ralph C. Spooner
 Robert D. Durham Nancy S. Tauman
 William A. Gaylord

Excused: Richard L. Barron
 Lisa C. Brown
 Ted Carp
 Kathryn S. Chase
 Connie Elkins McKelvey
 Karsten Hans Rasmussen

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Mr. Alexander). Mr. Alexander, presiding as Acting Chair, called the meeting to order at 9:36 a.m.

Agenda Item 2: Approval of minutes. On motion of Mr. Gaylord, seconded by Ms. Tauman, the minutes of the Council's December 12, 1998 meeting were unanimously approved as previously distributed.

Agenda Item 3: Introduction of members. Each member briefly introduced himself or herself, and new members were welcomed by Mr. Alexander to the Council.

Mr. McMillan commented that he thought Bruce Hamlin had done an extraordinarily good job as Chair of the Council, with which there was unanimous agreement. Prof. Holland said that a custom had developed whereby the Council presents outgoing Chairs with a suitably inscribed plaque or similar expression of its esteem and gratitude, and requested the Council to authorize him to arrange for such a presentation to Mr. Hamlin. This authorization was then signified by expression of a unanimous sense of the Council.

Agenda Item 4: Review of 1999 legislative session (Prof. Holland) (See Attachment A to agenda of this meeting). Prof. Holland reported that the 1999 Legislative Assembly had appropriated the requested funding for the Council's 1999-2001 biennial budget. He further reported that the Legislative Assembly had not modified or disallowed any of the ORCP amendments promulgated by the Council at its 12/12/98 meeting, which will therefore become effective on Jan. 1, 2000.

Prof. Holland also noted that the Legislative Assembly had enacted a possibly significant amendment to ORCP 47, but had not consulted with the Legislative Advisory Committee. He also stated that he wanted the Council to be aware of the fact that he had been asked by the sponsor of the bill to testify in support of the Rule 47 amendment, and had done so, but had made it clear on the record that he was testifying as a civil procedure teacher and member of the bar, not as the Council's Executive Director, and did not in any manner purport to speak on the Council's behalf. A sense of the meeting was expressed that Prof. Holland had not acted inappropriately.

Agenda Item 5: Discussion of possible items for Council's 1999-2001 agenda (Mr. Alexander) (See Attachment B to agenda of this meeting). A lengthy discussion was conducted to identify, at least preliminarily, the matters which should comprise the Council's 1999-2001 biennial agenda. Several members stated that the Council could not feasibly undertake consideration of all the items suggested in Attachment B, but would have to limit its focus to whichever among those items, together with possibly others not mentioned in Attachment B, deemed most urgently to warrant attention.

Judge Harris stated that he thought the Council might do well to consider several matters relating to jury reform which have originated in Arizona, including neutral voir dire, juror questions following each witness, and post-trial debriefing of jurors. He added that a subcommittee might be appointed to examine these procedures, and also to recommend any ORCP amendments which might be needed to authorize their implementation. Judge Harris concluded by saying that he would try to get some relevant materials distributed to members prior to the next Council meeting.

Discussion then turned to whether the Council should take up the subject of expert discovery. Mr. Alexander commented that, on one or two past occasions, there had been some very tentative discussion of this subject, but that the result of such discussion had been a decision not to consider seriously amending the existing discovery rules. He cautioned that, given how divisive this subject had been whenever it was raised in the past, the

Council would need to give careful thought before deciding to go down that road during this biennium. Mr. Gaylord added his observation that he did not regard the present ORCP discovery rules as being ambiguous on the subject of expert discovery. However, Judge Marcus said that, while the traditional understanding that expert discovery is not authorized under the present rules is widely understood, there might nonetheless be some value in codifying that tradition by means of a suitable amendment.

Mr. Bloom stated that he thought some doubts exist regarding the territorial scope of availability of DMV service, in particular whether it applies to vehicular accidents on private property, such as parking lots or tractors when operating on farm land. Mr. Alexander suggested that Mr. Bloom summarize whatever problems he saw in a memo for distribution prior to the next Council meeting.

Discussion then turned to ORCP 44 and 55, amendments to which were being worked on by Judge Anna Brown's subcommittee during the 1997-99 biennium. Mr. Gaylord mentioned that the full subcommittee had not met since the fall of 1998, but that he had recently met with Judge Brown to review where matters stood. He added that this subcommittee had identified quite a few problems relating to hospital and medical records subpoenas, perhaps foremost among which is the inconsistent responses they often elicit.

Mr. Gaylord urged that this subcommittee be reappointed, possibly with one or more additional members who might be willing to join this effort. Ms. Amato and Mr. Spooner expressed willingness to serve on this subcommittee, and were thereupon so appointed by Mr. Alexander to serve with continuing members Ms. Brown, Ms. Chase, Mr. Gaylord, and Ms. Tauman.

Justice Durham invited attention to the "exact language" requirement imposed by ORS 1.735(2) as referenced on page 8 of the 12/12/98 minutes as an item of new business. He said that he was aware that there had been some previous, inconclusive discussion about whether to seek a relaxation of this requirement, but expressed the view that this question should now be preliminarily considered by more than one member, perhaps by the Executive Committee.

Prof. Holland reminded members that Ms. Henthorne and he are available to provide logistical and other kinds of support to subcommittees between Council meetings, when their meetings and other work must be done. In particular, he said he would be glad to do any legal research desired by a subcommittee, and that Ms. Henthorne is available to arrange telephone conference calls if

given a few days advance notice. Mr. Spooner commented that he thought face-to-face meetings would be preferable to conference calls, and asked whether there are any funds in the Council's budget to defray expenses of such meetings, to which the reply was that there are no such funds in the budget.

Ms. Clarke invited attention to a letter from Michael Brian (copy filed with original of these minutes) calling attention to some problems he believes exist in connection with IME's pursuant to ORCP 44 A. This letter also suggests that the Council consider appropriately amending Rule 44, such as possibly providing, along the lines of the State of Washington's counterpart rule, such protections as a plaintiff having a representative present at an IME, or that there be audio recordings of everything said in the course of the examination. Mr. Bloom commented that he knew of a case where the examining physician refused to conduct the examination with a plaintiff's representative present. Judge Harris noted that, as Rule 44 now stands, different judges take different approaches to dealing with these issues.

Mr. McMillan emphasized the great importance of the Council's finishing the work begun by Judge Brown's subcommittee, with which thought there was unanimous agreement. Mr. Alexander stated that, with what the subcommittee had already accomplished, he was confident that a good final product could be debated and drafted no later than the September, 2000 meeting. Justice Durham commented that he thought that some of the items included in Attachment B could be preliminarily studied by an individual member with greater efficiency and without the need to appoint a subcommittee. Mr. Alexander expressed agreement with this thought.

Mr. Alexander concluded this discussion by asking all members to think carefully about the items suggested in Attachment B, though not to the exclusion of other items, including those mentioned in the course of this meeting, so that at the next meeting, priorities might be agreed upon and assignments accordingly made to subcommittees or individual members on the usual, volunteer basis.

Agenda Item 6: Discussion of Council's meeting schedule (Mr. Alexander). Some members suggested that the Council's 1999-2001 biennial priorities might be agreed upon and settled by means of e-mail and other communications prior to the next meeting. Judge Marcus, however, stated that he believed those priorities should be debated and, if possible, decided upon at that meeting. There appeared to be general agreement to that effect.

The consensus of the members was that it would not be useful for the Council to meet in December. Mr. Alexander therefore

announced that the next meeting would be on January 8, 2000, and that unless subsequently modified by agreement, the Council would plan to meet thereafter on the second Saturday of the month, which is the customary meeting date.

Agenda Item 7: Old business. No item of old business was raised.

Agenda Item 8: New business: Mr. Brothers suggested appointment of a subcommittee, possibly composed of new members, to eliminate any things in the ORCP which do not belong there. There was also a reminder that, at the Jan. 8, 2000 meeting, Council officers, who would also constitute the Executive Committee, will be elected.

Agenda Item 9: Adjournment. On motion duly seconded, Mr. Alexander declared the meeting adjourned at 11:15 a.m.

Respectfully submitted,

Maury Holland
Executive Director