

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of May 20, 2000
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present: J. Michael Alexander Rodger J. Isaacson
 Lisa A. Amato Mark A. Johnson
 Benjamin H. Bloom Michael H. Marcus
 Ted Carp Connie E. McKelvey
 Kathryn H. Clarke John H. McMillan
 Don A. Dickey Ralph C. Spooner
 Robert D. Durham Nancy S. Tauman
 William A. Gaylord

(Note: Mr. Gaylord attended the meeting via speakerphone through the discussion regarding ORCP 44/55.)

Excused: Richard L. Barron
 Bruce J. Brothers
 Lisa C. Brown
 Kathryn S. Chase
 Allan H. Coon
 Daniel L. Harris
 Virginia L. Linder
 Karsten H. Rasmussen

The following guests were in attendance: Bob Oleson, Public Affairs Director, Oregon State Bar; Attorney James C. Tait, representing the OADC. Also present were Maurice J. Holland, Executive Director, and Gilma J. Henthorne, Executive Assistant.

Agenda Item 1: Call to order. Mr. Alexander called the meeting to order at 9:40 a.m.

Agenda Item 2: Approval of minutes. On motion of Judge Marcus, seconded by Judge Carp, the minutes of the April 8, 2000 meeting were approved as distributed to members with the agenda of this meeting.

Agenda Item 3: Report of ORCP 44/55 Subcommittee (Mr. Gaylord) (see "FINAL WORKING DRAFT - 4/3/00," attached to Prof. Holland's 5-10-00 memo re "Proposed ORCP Amendments for Consideration at the May 20 Meeting"). Before hearing from Mr. Gaylord, Mr. Alexander recognized Mr. James C Tait, representing the Oregon Association of Defense Counsel (OADC), and asked him if he wished to offer any comments on behalf of that organization regarding the proposed amendments to Rules 44 and 55 in their present form. Mr. Tait responded that OADC did have some

concerns about those amendments as set forth in Mr. Jonathan Hoffman's May 18 letter to Prof. Holland (copies of which were distributed to members at the beginning of this meeting, and a copy filed with the original of these minutes). He asked that OADC be kept informed of any modifications of these proposed amendments, and especially that it be timely provided with such amendments in the final form considered by the Council for tentative adoption. Mr. Alexander, on behalf of the Council, and Mr. Gaylord on behalf of the Subcommittee, assured Mr. Tait that OADC would be kept fully informed and given ample opportunity to provide input, which would be valued and appreciated.

There followed some discussion of how the Council goes about keeping everyone having a possible interest fully and currently informed about proposals to amend the ORCP. In particular Mr. Spooner queried whether either the full Council or its subcommittees arrange with interested groups and organizations specific times for them to make comments and present their comments and any objections they might have. Prof. Holland responded that the Council has long maintained a standard mailing list of groups and organizations to which copies of all minutes and agendas, including attachments, are routinely mailed. He explained that, in addition to the OSB, OTLA, and OADC, the mailing list includes such organizations as the Oregon Hospital Association, the Oregon Medical Association, the Oregon Association of Process Servers, plus anyone else who requests to be included. He further explained that the Council does not normally take the initiative to schedule times for interested groups to appear and present their views regarding amendments under consideration, but leaves it to such groups to appear at a Council meeting if and when they choose to do so.

Judge Marcus commented that, in his view, comments and possible objections of interested groups should be solicited and considered at the subcommittee level, where most of the actual drafting takes place, which, he said, had often been done in the past, but perhaps not consistently in every instance. Ms. Tauman stated that it would have been helpful to the ORCP 44/55 Subcommittee if it had known earlier how controversial the proposed amendments now appear to be.

Mr. Gaylord began his report by noting that there is no rule or precedent which determines whether input from interested groups and organizations is obtained by a particular subcommittee as opposed to the full Council, but that, in his view, the more that can be done at the subcommittee level, the better. He also commented that the Council has never drawn the distinction, familiar to those wishing to present views to the Legislative Assembly, between hearings and work sessions.

Mr. Gaylord then responded to an objection to some aspects of the amendments currently under consideration expressed in Mr. Tom Cooney's letter of 5-10-00 (copies of which were previously distributed to all members, and a copy filed with the original of these minutes). Mr. Cooney's specific concern was that the proposed amendments would place undue burdens on physicians' offices and other health care record custodians. Mr. Alexander interjected that he had phoned Mr. Cooney to invite him to this meeting.

Justice Durham observed that the several points raised in Mr. Hoffman's May 18 letter on behalf of OADC had not yet been considered by the ORCP 44/55 Subcommittee, and raised the question whether further discussion of those points by the full Council might better take place after such consideration had occurred. Several members expressed agreement with this observation.

Mr. Alexander commented that one of the principal objections raised in Mr. Hoffman's letter, which was also raised by Ms. McKelvey at the April 8 Council meeting, is that the proposed amendments would significantly add to the time defense lawyers might have to wait before obtaining health care records. He added that, although he did not see that any delay which might be added by these amendments could amount to more than 14 days, perhaps the Subcommittee should consider possibly eliminating the first opportunity for objections to requests of, or subpoenas of, health records, namely, the opportunity for objecting provided by proposed paragraph 55 H(3)(b). Mr. Gaylord responded that the Subcommittee would consider this suggested possibility, and would discuss it with OADC, if possible before the Council's June 10 meeting. He also stated that he disagreed with the suggestion in Mr. Hoffman's May 18 letter that these amendments are intended to shift power to plaintiffs' lawyers. Rather, he said, the intention was to ensure that patients are afforded adequate opportunity to assert their physician-patient privilege if they wish to do so.

Judge Marcus stated that, while these amendments would most frequently apply to plaintiffs claiming personal injuries, that is not invariably the case, and raised the question whether they adequately deal with situations, rare as they might be, when the health records sought are those of a defendant or a non-party. He added that no amendments to Rules 44 and 55 would obtain the required supermajority of 15 affirmative votes unless all groups having significant interests at stake, certainly including OADC, are persuaded to be supportive.

Several members expressed concern that, in light of the fact that these proposed amendments are being returned to the Subcommittee for further substantive, not merely stylistic, work,

time might run out this biennium before the Council could take final action on them. Mr. Alexander noted that he fully shared this concern, and thought that the Council and the Subcommittee should move forward as expeditiously as possible, so that the enormous amount of work already done would not be wasted. Mr. Gaylord said the Subcommittee would plan to meet prior to the June 10 Council meeting.

At this point the speakerphone connection with Mr. Gaylord was terminated, and the Council took a short break.

Agenda Item 4: Report of ORCP 54 E Subcommittee (Justice Durham) (see proposed amendments attached to Prof. Holland's covering memo dated 5-10-00, a copy of which is filed with the original of these minutes). Justice Durham briefly recalled the history of rules providing for offers of judgment which, he noted, dated from long before statutes authorizing awards of attorney fees to prevailing plaintiffs became common. He noted that the Oregon Supreme Court, in *For Counsel, Inc. v. Northwest Web Co, Inc.*,¹ was asked to construe the present section 54 E in such a way as to obviate the perceived conflict-of-interest between a plaintiff and his or her counsel which the current language of this section engenders, but concluded that such language is clear in failing to take any account of it. He added that, after a great deal of research and thought, the Subcommittee concluded that section 54 E should be amended to preserve its coercive effect in pressuring the parties to be reasonable with respect to damages, while leaving the parties free to agree about attorney fees if they can, but free of that coercive effect. If the parties cannot agree on fees, he added, naturally there would have to be a ruling on a fee petition and any objections under Rule 68.

Justice Durham explained that when, as permitted under the present 54 E, defendants are permitted to make offers explicitly including fees, costs, and disbursements, that can have the effect of placing plaintiff's counsel in a situation where he or she would have a conflict-of-interest to the extent that he or she might be limited to advising the plaintiff to retain separate counsel to advise the plaintiff on whether to accept the offer.

Judge Marcus said he thought the proposed amendments reflected good policy, although he added that he had some doubt as to whether the particular conflict-of-interest on which they focus is much different from the conflict which can arise respecting an attorney's advice as to whether the plaintiff should accept a given offer of damages. Judge Dickey said that he agreed with the latter observation, and therefore opposed these amendments. Judge

Dickey expressed further objections to these amendments, namely, that they would have the effect of burdening settlements and would create additional work for trial courts, and are illogical in isolating out attorney fees from the overall offer. He further noted that there is an inherent conflict in every case involving contingent fees where an offer of settlement or of judgment is made. Mr. Spooner also stated that he was opposed to these amendments.

Discussion of this item concluded with Justice Durham thanking the members of this Subcommittee, Ms. Amato, Mr. Johnson, and Ms. Tauman, for their hard work, and by saying that further suggestions and comments would be welcome from any Council member. He added that he did not wish to see the effort to address this problem abandoned.

Mr. Alexander then called for a straw vote to determine how many members were inclined to support the proposed amendments in principle, and how many inclined to oppose them. Eight members indicated support, and four members opposition.

Agenda Item 5: Report of Jury Reform (ORCP 57-59) Subcommittee (Judge Dickey) (see "Two Proposals by Jury Reform Subcommittee: May 20 Council Meeting," copies of which were distributed at the beginning of this meeting, and a copy filed with the original of these minutes).

Judge Dickey reported that Judge Harris, chair of this Subcommittee, had been in contact with other groups currently involved with various aspects of jury reform, including the OSB Procedure & Practice Committee and the Civil Law Advisory Commission. He added that the Subcommittee had decided to limit its present recommendations to three quite modest amendments to Sections 58 A and B: allowing, with the court's consent, a brief neutral statement by the attorneys prior to voir dire, requiring instructions on certain specified matters after the jury is sworn, and giving the court discretionary authority to permit jury questions of witnesses. Judge Dickey stressed that the changes that would be made by the proposed amendments were less significant than might appear because of the need to renumber the subsections in section 58 B. He added that the Subcommittee's purpose was not to change existing law or practice, but to bring Rule 58 into line with what is already being done by many judges as matters of their own discretion. He added further that the Subcommittee had considered other possible components under the heading of jury reform, such as allowing jurors to deliberate prior to the close of evidence and also respecting alternate jurors, but had decided that the time was not ripe for those changes.

Mr. McMillan asked why the Subcommittee appeared to have

dropped the idea of making mandatory the use of written jury instructions. Judge Hickey responded that it was decided not to mandate written jury instructions, in large part because the present ORCP 59 B provides that instructions shall be in writing if any party so requests or if the judge so decides. Mr. Spooner added that, in his observation, trial attorneys routinely prepare written jury instructions for the judge's approval and use, and that no new language is needed respecting this matter. Judge Marcus commented that he thought that section 59 B is ambiguous as to whether providing a jury with a tape recording of instructions is an adequate substitute for providing them in written form.

Discussion of this item concluded by Judge Dickey saying he would report to Judge Harris on the comments made during this meeting, in light of which the Subcommittee would decide whether any additional consideration should be given to possibly adding to, or revising, these amendments as presently proposed.

Agenda Item 6: Old business. No item of old business was raised.

Agenda Item 7: New business. No item of new business was raised.

Agenda Item 8: Adjournment. Without objection Mr. Alexander declared the meeting adjourned at 12:20 p.m.

Respectfully submitted,

Maury Holland
Executive Director