COUNCIL ON COURT PROCEDURES
Minutes of Meeting of July 15, 2000
5200 Southwest Meadows Road
Oregon State Bar Center
Lake Oswego, Oregon

Present:	J. Michael Alexander	William A. Gaylord
	Lisa A. Amato	Rodger J. Isaacson
	Benjamin M. Bloom	Mark A. Johnson
	Ted Carp	Virginia L. Linder
	Kathryn S. Chase	Michael H. Marcus
	Kathryn H. Clarke	Connie E. McKelvey
	Allan H. Coon	Ralph C. Spooner
	Don A. Dickey	Nancy S. Tauman
	Robert D. Durham	
Excused:	Richard L. Barron	
	Bruce J. Brothers	
	Lisa C. Brown	
	Daniel L. Harris	
	John H. McMillan	
	Karsten H. Rasmussen	

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

Agenda Item 1: Call to order (Mr. Alexander). Mr. oAlexander called the meeting to order at 9:37 a.m.

Agenda Item 2: Approval of minutes of June 10, 2000 Council meeting. The minutes of the Council's June 10, 2000 were unanimously approved with the following correactions: Justice Durham will be listed as present; on page 2, fourth paragraph, "an" letter will be changed to "a" letter; on page 5, second full paragraph,third line, "... to produce two copies of requested records, one for the subpoenaing party and one for the patient's lawyer. However, ...".

Agenda Item 3: Reports:

3A. ORCP 58--Jury Reform (see Attachment 3A to agenda of this meeting) (Mr. Alexander). Mr. Alexander commented that the only issue respecting these amendments which appeared to be still open was whether proposed ORCP 58 B(9) should specify that jury questions must be in written form, or whether to retain the present proposed language whereby judges would have the option of permitting written or oral questions. The consensus of the

members was that this issue should remain open until the Council's September 9 meeting.

Judge Marcus asked whether there would be any proposal regarding alternate jurors, to which the response was there would be no such proposal at the present time.

3B. ORCP 44 A--IME's (see Attachment 3B to agenda of this meeting) (Justice Durham). Justice Durham stated that the subcommittee had read and carefully considered letters received from Mr. Jonathan Hoffman and Mr. Larry Brisbee (copies of which are filed with the original of these minutes.) He added that the consensus of the subcommittee was that the concerns expressed in those letters were adequately addressed in the currently proposed language of the 44 A amendments, and that no changes were, with one exception, called for. That single exception, he explained, was to add language making clear that if an examination were obstructed, the examination could be continued after the problem had been resolved without the need for a further motion or court order. In other words, if the examining physician believed that the examination is being unreasonably obstructed, he or she could call for a suspension of the examination.

Justice Durham also commented that the subcommittee had made every effort to discourage "lawyering" in connection with these examinations. It was with that thought in mind that the subcommittee decided that any objections, apart from those invoking privilege, should be reserved until trial.

Mr. Spooner asserted that the choice before the Council was to preserve the status quo by doing nothing, which would mean that these problems would continue to be worked out on a case-by-case basis, or try to craft an amendment that would bring greater uniformity and consistency to the area. He added that the only reason an examinee might want to have counsel with him or her during an examination would be so that privileges would not be invaded.

Mr. Bloom said he had some concern that providing that an examinee's counsel may be present might have a chilling effect on the willingness of some doctors to perform IME's. Mr. Gaylord respectfully disagreed with this comment, adding that no one could deny that IME's are, in some respects, adversarial procedures and that the rights of examinees must somehow be protected.

Judge Marcus stated that he thought that greater uniformity was needed in this area, and that something along the lines of the proposed amendments would represent an improvement on the existing situation where no guidance is provided to judges. He expressed concern, however, about whether any worthwhile proposal could

secure the support of at least 15 votes.

Mr. Spooner commented that he was not sure that he could support the proposed amendments in their present form. He added that, if problems respecting protection of privilege arise, it might be preferable if these were resolved in advance of examinations, which would presumably obviate any need to authorize the presence of an examinee's counsel. In response to a question from Judge Dickey, Mr. Spooner responded that he would not object to authorizing the presence of an examinee's representative as long as it is made clear that the representative could not do anything except simply be present for the benefit of the examinee's comfort and peace of mind.

Ms. Tauman reminded members that proposed 44 A(3) provides that the physician or any party is entitled to have a stenographic or audiotape recording of an exam, which she said she thought would deter lawyers from obstructing examinations, especially given the provision for sanctions against anyone found to have engaged in obstruction.

Ms. Clarke stated that the subcommittee had been persuaded of the genuine need for the greater uniformity which the proposed amendments would afford. For example, she said that, at present, in the absence of a rule, some courts order that examinations be recorded, while others do not, and some courts allow the presence of someone accompanying examinees, while others do not.

Judge Isaacson commented that he strongly agreed that there is a need for greater uniformity in how these matters are dealt with. He added that he thought it worth keeping in mind that amended 44 A would allow for solutions to unusual circumstances, first through agreement of the parties about particular conditions, and, failing agreement, the court ordering "other or different conditions [than those that would be provided in the rule] for good cause," in default of which the proposed amendments would provide some very helpful ground rules.

Mr. Spooner remarked that he had some concern that these proposals, in particular the provision authorizing the presence of counsel, would constitute a fundamental change in the way IME's have traditionally been handled in Oregon practice. He added that he understood the reasonableness of allowing the presence of a "support person," but remained skeptical about the presence of a lawyer who might affect the ability of the doctor to conduct the examination in a manner consistent with the standards of the medical profession.

Ms. Clarke observed that, at present, some courts take the position that, because the current rule says nothing about it,

examinees have absolutely no right to ask that any conditions be set. She added that the subcommittee had reached the conclusion that this situation was not satisfactory and should be changed. Thus, she did not disagree with Mr. Spooner's point that these amendments would effect an important change, but said she might differ with him in believing this change would be desirable.

Mr. Gaylord stated that he thought the Council should not be unduly influenced by the fact that some doctors might prefer that counsel not be present, because, whether doctors realize it or not, IME's are inevitably adversarial to some extent.

Justice Durham reminded members that issues of privilege can arise in the context of IME's innocently and by surprise, which is the principal reason why providing that all such issues be thrashed out in advance would not be entirely workable. He added that the subcommittee proposals seemed to him to represent a carefully worked out compromise of views within the subcommittee, and was somewhat surprised to learn that the consensus he thought had been achieved appeared to be less than solid. He further added that the subcommittee would be willing to consider an added provision whereby there would be advance notice to defense counsel of the identity of the examinee's representative and that the examination would be audiotaped if it is thought that would be useful.

Judge Carp said that, in 25 years in practice, he had never experienced a problem with IME's. He asked whether the privilege problem might be solved by a provision to the effect that any statements by examinees in the course of an examination would not waive the privilege. Mr. Gaylord responded that such a provision would not adequately safeguard the privilege, the purpose of which is to preserve confidentiality from anyone, including examining physicians. He added that such a provision would also not solve the problem of doctors asking examinees questions about the facts and circumstances of the accident.

After a brief recess, Mr. Alexander called for straw votes in order to get a sense of the directions in which members were inclined. To the question of how many members believed that some rule was needed to address these issues, 15 members responded in the affirmative. To the question of how many members would support adoption of the presently proposed amendments with suggested modifications, 9 members responded in the affirmative. To the question of how many members would support the presently proposed amendments, but with greater restriction on the presence of counsel, 12 responded in the affirmative.

Mr. Alexander concluded discussion of this item by commending the subcommittee for doing a sterling job on a very difficult

subject, and by commenting that he thought it incumbent on the Council to work through this issue to a satisfactory resolution. Mr. Gaylord said that he would like the subcommittee to consider a provision authorizing the presence of counsel, but possibly limiting counsel's role to objecting solely on grounds of privilege, and perhaps also providing that responses of examinees in the course of IME's could not be used in cross-examination at trial.

3C. ORCP 21 A (see Attachment 3C to agenda of this meeting) (Judge Linder/Mr. Johnson). Judge Linder explained that the problem with which this subcommittee had been dealing was when an action is dismissed in an Oregon court because of the prior pendency of essentially the same action elsewhere, there exists the possibility that if the other action were terminated on some ground not resolving the merits of the dismissed proceeding in Oregon, reinstitution of the latter might be futile for such reason as the expiration of a statute of limitations or loss of subject-matter jurisdiction on the part of the Oregon court as occurred in *Weller v. Weller*, 164 Or App 25, 988 P2d 921 (1999). She added that the subcommiittee's preferred solution was set forth as Alternative A in Attachment 3C, which would authorize the Oregon court to defer dismissal of the action pursuant to ORCP 54 B(3), which she said would be the functional equivalent of a stay.

Ms. Clarke commented that, although she agreed that Alternative A would accomplish what the subcommittee intends, she nevertheless thought that Alternative B would make clearer to judges and lawyers that a stay was essentially what was being sought and the reason for it. Judge Linder responded that the subcommittee thought that Alternative B risked creating the impression that some dramatic change from current practice was contemplated, but that nothing dramatically new was actually needed. Judge Marcus expressed agreement with Alternative A, though he also said that he would like to see the amendment call explicitly for a stay of the action.

Discussion of this item concluded by Judge Linder stating that she and Mr. Johnson would give further thought about whether Alternative B's provision for a stay could be somehow combined with the essential features of Alternative A.

3D. ORCP 54 E (see Attachment 3D to agenda of this meeting) (Justice Durham). Justice Durham referred to a letter from Judge Paul J. Lipscomb (a copy of which is filed with the original of these minutes) questioning the need for this proposed amendment. He stated that he acknowledged, as Judge Lipscomb asserted, that the current proposal did not purport to address all aspects of potential conflicts of interest between clients and their lawyers, but nonetheless believes it did usefully address an

aspect of it that is probably the most glaring one. He added that the potential which exists, under the present 54 E, for putting counsel in a clear conflict of interest with his or her client as to whether to accept a "global offer," is fraught, not only with legal problems, but can be a matter of some embarrassment to the Bar.

Ms. Amato said that she had carefully considered Judge Lipscomb's letter, but that it had not persuaded her to change her support for the proposed amendment. Judge Dickey stated that he was generally in agreement with Judge Lipscomb's letter, and was strongly opposed to this proposal because he thought it would only worsen whatever conflicts might arise and would also make settlements more difficult to obtain. Judge Marcus stated that he favored the proposal because it would remove the coercive effect of the current 54 E on attorney fees.

Consideration of this item concluded with consensus that it merited further discussion at the August and September meetings of the Council.

3E. ORCP 44/55 (see Attachment 3E to agenda of this meeting) (Mr. Gaylord). Mr. Gaylord referred to his 7-10-00 letter to Mr. Alexander reporting on the outcome of a meeting at his office on 7-5-00 with representatives of groups having an interest in this matter (Mr. Mark Clarke representing OADC and participating by phone, Mr. Tom Cooney representing the Oregon Medical Association, and Ms. Gwen Dayton representing the Oregon Hospital Association). He invited members' attention in particular to the five "Resolutions" on pp. 6-7 of the aforementioned letter. He added that each Resolution represented an effort to achieve a balanced solution to one of the principal difficulties or points of contention which have arisen in the course of the subcommittee's efforts. He further added that he would like to use this opportunity to obtain some reactions of Council members to these Resolutions, to guide the subcommittee as it tries to bring this endeavor to a successful conclusion. Mr. Gaylord then summarized each Resolution in turn.

Mr. Alexander asked the members if anyone favored simply dropping this project entirely, to which no one responded. He then asked that all members take the time between now and the August 12 Council meeting to study all the materials relating to ORCP 44/55 carefully, and come to that meeting with the best thoughts and suggestions they possibly can. He added that, with all the laborious efforts already expended by the subcommittee, the time had come when all Council members should engage themselves closely in the final efforts to achieve the best possible solution to these vexing issues.

Agenda Item 4: Old business Justice Durham referred members to his letter to Mr. Alexander dated 6-30-00 enclosing a draft amendment to ORS 1.757(2) prepared by him and Judge Harris and intended to deal with the difficulty the Council has experienced because of the "exact language" requirement of that subsection. He recalled for members the nature of that difficulty, namely, that it effectively deprives the Council of much of the benefit of the comment period which proceeds December meetings at which votes are taken on whether to finally promulgate ORCP amendments.

He explained that the proposed statutory amendment would give the Council some flexibility by allowing it to make useful revisions in light of any comments received in response to the publication of tentatively adopted ORCP amendments in the October judicial advance sheets, but would require that any modifications the Council wished to make in ORCP amendments must be promptly published to the Bar and specific notification given to the Legislative Assembly in the letter by which it formally reports finally promulgated ORCP amendments to that body.

Mr. Gaylord stated that he would be more inclined to support this proposal if its language were changed to clarify that only technical or stylistic modifications could be made to ORCP amendments as published in the October judicial advance sheets. Justice Durham responded that Judge Harris and he had not been able to devise language that would distinguish between technical or stylistic changes with sufficient clarity to avoid confronting the Council with problems at December meetings. He added that he thought the requirement of at least 15 votes to promulgate amendments provided a sufficient safeguard against any effort, which he said he regarded as highly unlikely, to misuse the greater flexibility this amendment would afford.

Judge Carp said he thought the deadline had passed for getting legislative proposals to the OSB for its sponsorship in the 2001 session, but urged that the assistance of Bob Oleson and Susan Evans Grabe be requested.

Discussion of this item concluded with consensus that this proposal would be voted on at the Council's September 9, 2000 meeting. Mr. Alexander said that, in the meantime, he would contact Mr. Oleson and Ms. Grabe to ask for their assistance.

Agenda Item 5: New business. No item of new business was raised.

Agenda Item 6: Adjournment. On motion duly made, seconded and unanimously agreed to, Mr. Alexander declared the meeting adjourned at 12:30 p.m.

Respectfully submitted,

Maury Holland
Executive Director