COUNCIL ON COURT PROCEDURES
Minutes of Meeting of September 9, 2000
5200 Southwest Meadows Road
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
	Ted Carp	Michael H. Marcus
	Kathryn S. Chase	Connie E. McKelvey
	Kathryn H. Clarke	John H. McMillan
	Allan H. Coon	Karsten H. Rasmussen
	Don A. Dickey	Ralph C. Spooner
	Robert D. Durham	Nancy S. Tauman
	William A. Gaylord	
Excused:	Richard L. Barron	

The following guests were in attendance: Ms. Susan Grabe, Public Affairs Attorney, Oregon State Bar; Mr. Michael Brian, Attorney, Medford; Mr. Eugene H. Buckle, Attorney, Portland; Mr. Thomas E. Cooney, Jr., Attorney, Portland; Mr. Don Corson, Attorney, Eugene; and Mr.Thomas D'Amore, Attorney, Portland.

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

Agenda Item 1: Call to order (Mr. Alexander). Mr. Alexander called the meeting to order at 9:34 a.m.

Agenda Item 2: Approval of minutes of Aug. 12, 2000 meeting (Mr. Alexander). The minutes of the Aug. 12, 2000 meeting were approved as previously distributed with the following corrections: 1. The minutes are corrected to show tentative adoption of amendments to ORCP 7 D and 21 A as set forth on pp. 1-5 of Packet 1 attached to the agenda of this meeting; 2. The minutes are corrected to revise the second sentence of the second paragraph under "Report 3D" on p. 4 to read: "for the purpose of further clarifying . . . ." vice "for the purpose of further

restricting . . ."

Agenda Item 3: Drafts of the following rules with votes on tentative adoptions (Mr. Alexander):

Rules 44 A/46 B[1] (see replacement pp. 15-18 and original pp. 19-22 of Packet I of attachments to the agenda of this meeting) (Justice Durham). Mr. Alexander then recognized guests Mr. Tom D'Amore, Mr. Mike Brian, and Mr. Don Corson for comments on the currently pending proposed amendments to ORCP 44 A and 46 B on behalf of the Oregon Trial Lawyers Association. Mr. Corson distributed materials (copies of which are filed with the original of these minutes) prepared by companies specializing in assisting defense counsel and examining physicians in cases involving compelled medical examinations (CME's), an excerpt from the transcript of the cross-examination of an examining physician at trial, a copy of Washington State's Rule 35, together with other items. He also showed a videotape of the same cross-examination as recorded in the transcript.

Mr. Corson stated that these materials clearly demonstrated that training and certifying physicians for what has become the specialty of conducting CME's have attained the status of an "industry," the increasing involvement of which in personal injury cases casts doubt on their supposed "independence." Using quotations from some of the distributed materials to illustrate his point, Mr. Corson contended that at least some physicians who conduct these exams are wholly aligned with, and compensated by, defendants or their insurers to the degree that their objectivity and disinterested assessment of medical conditions cannot realistically be assumed as a matter of course.

Mr. Corson suggested that if members were interested in information about doctors whose loss of skills often harms patients, an excellent place to find it is an article in the August 7, 2000 edition of *The New Yorker* magazine.[2]

Mr. Corson concluded his remarks by noting that very few states today still preclude trial courts from accompanying orders for CME's with any conditions protective of examinees, and by urging the Council to adopt what he characterized as the "modest" amendments to ORCP 44 A and 46 B now being considered so that a consistently applicable rule would replace the wide discrepancies in rulings under the current unguided, case-by-case approach. He added that the materials he distributed demonstrated that many CME examiners are so strongly aligned with

[1]These amendments were taken up out of the order shown on the agenda of this meeting in order to accommodate guests who wished to comment on them.

[2]Atul Gawande, *Annals of Medicine; When Good Doctors Go Bad,* THE NEW YORKER, Aug. 7, 2000, at pp. 60-69.

defendants and their insurers that the right of examinees to have counsel present during CME's has become a practical necessity if examinees' privileges and other rights are to be protected.

Mr. Brian told the Council that, in cases in Washington State where he was attorney for the plaintiff-examinee, he has attended many CME's, and that with one exception, there have been no problems. On that single occasion, the examining doctors had no objection to having him record the exam by audiotape, but told him that the company which retained them had a rule prohibiting tape recording. He added that, several years earlier, he was outraged by the length and intrusiveness of the exam to which his client was subjected, after which he began the practice of attending all CLE's with an audiotape recorder.

Mr. Alexander then recognized Mr. Gene Buckle to make any comments he wished on behalf of the Oregon Association of Defense Counsel. Mr. Buckle stated that he thought the concerns stated by Mr. Corson can adequately be met by plaintiffs' cross-examination of examining physicians at trial. He also repeated a caution he had mentioned to the Council at an earlier meeting; namely, that the presence of observers at CME's will open the door to their being deposed. In response to a question of Ms. Clarke as to whether depositions of observers or representatives, including plaintiff's counsel, have been allowed in Washington practice, Mr. D'Amore responded that in one instance the defense sought to take his deposition, but the court disallowed it. He also stated his disagreement with Mr. Buckle's point that cross-examination of CME physicians provides a sufficient protection against what amounts to private interviews of examinees by adverse expert witnesses.

Then followed a lengthy discussion of the differences between the 44 A and 46 B amendments proposed by a majority of the CME subcommittee (see replacement pp. 15-18 of Packet I attached to the agenda of this meeting), hereinafter referred to as "Version One," and amendments proposed by Mr. Spooner as a minority report of the subcommittee (see pp. 19-22 of Packet I), hereinafter referred to as "Version Two."

Justice Durham stated, responding to a suggestion by Mr. Spooner, that Version One had been made more explicit about the right of an examining physician to halt an examination if the latter reasonably believed it was being obstructed. Mr. Brothers commented that in line 15, p. 2 of Version One, the word "unreasonably" should be inserted before "obstruct" to make clear that mere conversation between the examinee's attorney or other representative and the examinee, or between the attorney and the examiner, would not constitute sanctionable obstruction. Justice Durham said that there was no thought on the part of the subcommittee that conversation between the examiner and the examinee's attorney would constitute obstruction by the latter. No motion was offered to make the change suggested by Mr. Brothers. Judge Marcus suggested that in line 2, p. 2 of Version One, the phrase "for good cause supported by the record, . . ." be deleted, which suggestion was accepted as a friendly amendment.

Mr. Spooner explained that, in contrast to Version One, Version Two would permit an examinee to have a representative, but not his or her attorney, present during an examination. He further explained that Version Two would protect against violations of examinees privileges by, rather than allowing an attorney to be present and make objections on grounds of privilege, providing instead that no answers to an examiner's questions during an exam would be deemed to have waived any privilege, and further providing that any transcription of stenographic notes or an audio tape recording of an examination would first be provided to the examinee or the examinee's attorney so that any information revealed in asserted violation of a privilege could be ruled on by a judge *in camera* for redaction if the judge so ordered.

Mr. Gaylord stated that he strongly disagreed with Version Two's exclusion of attorneys as examinees' representatives. He also criticized Version Two as inadequately protective of evidentiary privileges because, he stated, the protection privileges are supposed to afford is compromised when privileged information must be disclosed to an agent of the opposing party, even if that information is later redacted by court order.

Justice Durham commented that the fundamental principle informing Version One is to minimize the potential for excessive "lawyering" in connection with CME's. With that in mind, he explained, Version One would permit only "core lawyer behavior" during the course of a CME, meaning objecting to questions, or possibly other conduct by examiners, that would violate examinees' privileges, while preserving all other objections, including those going to the scope of the exam, until trial.

Ms. McKelvey said that she could not support Version One's "default rule" (i.e., a condition that would apply unless, and to the extent, the court orders otherwise or the parties otherwise agree) because, she explained, she wants examinees to approach CME's as they would a regular physical or psychiatric examination rather than as an adversary proceeding. She added that she could support an amendment whereby a representative could be the examinee's attorney, but only by court order for good cause shown. Ms. Chase expressed agreement with this point. Mr. Gaylord queried how such good cause could be anticipated or shown in advance of the examination.

Justice Durham noted that many CME's occur pursuant to agreement of the parties, not court orders, and that Version One expressly authorizes the setting of conditions as part of such agreements. He added that Version One would prohibit violations of agreed conditions, which can lead to sanctions by the court. Judge Marcus questioned the need for the words "good faith" in the phrase "based on a good faith claim that a person has obstructed the examination, . . ." (see lines 2-3, replacement p. 17 of Packet I). Justice Durham responded that the reason "good faith" is included is to underscore to parties that CME's should not be suspended on grounds that the exam is being obstructed unless the difficulty is a serious one which cannot be resolved between the parties themselves. In other words, he continued, the purpose is to discourage parties from

running to a judge at the first hint of disagreement between an examiner and an examinee's attorney.

Judge Isaacson suggested that the words "good cause shown" be deleted in Version One because they set too high a standard. Although no motion was made or vote taken to make this change, there appeared to be general agreement with it. Mr. Buckle asked whether either Version would authorize attendance at a CME by defendant's attorney. Justice Durham replied that defendants' attorneys very seldom have any wish to attend, but if particular circumstances warranted, the court could order that they be permitted to attend or, of course, they could always attend when that is agreed upon. Mr. Spooner commented that allowing the presence of both attorneys, plus a court reporter, would be an extremely bad idea from the perspective of proper and efficient conducting of CME's, and said he thought the concerns that some members have expressed could be perfectly well be satisfied by cross-examination of examining physicians at trial without having attorneys for either side present at the exam.

After a short break Mr. Alexander summarized the principal differences between Versions One and Two, and noted that the difference as to which there appeared to be the sharpest divergence of opinion was whether the default rule would be that an examinee's representative could be his or her attorney. Mr. Gaylord stated that practice under the Washington rule, whereby examinees' attorneys may be present, has demonstrated that that approach works and has not proved disruptive of CME's. He added that he did not think there is any other effective way to protect examinees' privileges.

Mr. Alexander then stated that the point in the meeting had arrived for straw votes on which, if any, of the alternative versions of proposed amendments members leaned toward supporting. He summarized the alternative versions as follows, as to each of which he said the assumed default rule would be that a CME could be recorded by audiotape by any party or the examiner:

A. An amendment whereby the default rule would be that the examinee's representative could, but need not, be the examinee's attorney, who could be present at the CME unless the court in its discretion ordered that no representative be present or that the representative not be the examinee's attorney; or

B. An amendment whereby no representative of the examinee, including the examinee's attorney, could be present at the CME, and the court would have no discretion to order that a representative could be present; or

C. An amendment whereby the default rule would be that no representative of the examine, including the examinee's attorney, could be present at the CME, but the court would have discretion to order that a representative of the examinee could be present at the CME, and

would also have discretion as to whether that representative could be the examinee's attorney.

Mr. McMillan asked whether, whatever else might be done, the Council should now adopt an amendment about audiotape or stenographic recording. Judge Marcus commented that he had little or no concern about the method of recording, but did think it highly important that there be an amendment making some method of recording a default rule.

There followed discussion of which version or versions of the proposed amendments should be tentatively adopted for publication and comment. Judge Harris said he favored publishing all versions or alternatives, and Mr. Gaylord stated that he agreed that all versions should be published. A motion of Judge Marcus, duly seconded, that all versions be tentatively adopted and published for comment, was agreed to by a vote of 15 in favor, 4 opposed, with 1 abstention.

Then followed prolonged discussion about how the three versions under consideration differed among themselves, accompanied by various suggested amendments of their respective wording, though without any motions being offered to amend such wording. At the conclusion of this discussion, a motion was offered that three alternative versions of these amendments be tentatively adopted and published as follows: Alternative One, under which an examinee's counsel or other representative could attend the examination unless the court orders or the parties agree otherwise; Alternative Two, under which neither counsel nor any other representative of an examinee could attend the examination except by agreement of the parties; Alternative Three, an examinee's counsel or other representative could attend the examination only if the court so ordered or the parties so agreed. This motion, having been duly seconded, was agreed to by a vote of 11 in favor, 7 opposed, with no abstentions.

Rule 7 D (see pp. 1-3 of Packet I of attachments to the agenda of this meeting) (Judge Rasmussen). It was agreed that these amendments, having been tentatively adopted for publication at the Council's August 12, 2000, need not be further discussed or voted on at this meeting.

Rule 21 A (see pp. 4-5 of Packet I of attachments to the agenda of this meeting) (Judge Linder). It was agreed that this amendment, having been tentatively adopted for publication at the Council's August 12, 2000, need not be further discussed or voted on at this meeting.

Rule 22 C (see pp. 6-9 of Packet I of attachments to the agenda of this meeting) (Judge Barron). Several members expressed the opinion that this amendment was either not needed, or that it would modify substantive law and thus be outside the scope of the Council's authority. A motion was offered, and duly seconded, to table this proposal. This motion was unanimously agreed to.

Rule 32 (see p. 10 of Packet I of attachments to the agenda of this meeting) (Prof. Holland). A motion was offered, duly seconded, and unanimously agreed to tentatively to adopt and publish this amendment.

Rule 34 (see p. 11 of Packet I of attachments to the agenda of this meeting) (Mr. Brothers). Mr. Brothers stated that since the Council had not had an opportunity to consider this proposal prior to this meeting, he suggested that this amendment be tabled and put over for consideration in the 2001-03 biennium. There was general agreement with this suggestion.

Rules 44 and 55 (see Revised Packet II of attachments to the agenda of this meeting) (Mr. Gaylord). Mr. Gaylord briefly summarized the four versions of these amendments, particularly emphasizing the ways in which they differ from one another. He pointed out that the only respects in which these versions actually differ are the number of copies of records which health care providers can be required to produce and whether there should be one or two opportunities to object to heath care records requests or subpoenas.

There followed discussion about whether there exists any strong opposition to some or all these versions. Mr. Gaylord noted that copies of these materials had been furnished to all groups, or their representatives, who have expressed reservations about these proposals in the past, but that there had been nothing received in response. He added that he knew of some plaintiffs' lawyers who oppose all four versions under consideration.

A motion was then offered to tentatively adopt and publish all four versions of these amendments, but the motion was not voted upon. Mr. Bloom stated that he thought the better course would be for the Council to decide, if it could, which one among the four versions it thinks is best. A motion was then offered, duly seconded, and unanimously agreed to tentatively to adopt and publish only Version Three of these amendments.

Rule 54 (see pp. 23-24 of Packet I of attachments to the agenda of this meeting) (Justice Durham). Justice Durham stated that he thought the Council should go forward with this proposal only if there is a strong consensus in support of it. Judge Dickey said that he favored withdrawing this proposal. After a straw vote showed that only eight members present were prepared to vote in favor of this amendment, it was tabled by general agreement.

Rule 58 (see pp. 25-26 of Packet I of attachments to the agenda of this meeting) (Judge Harris). Judge Harris commented that there is nothing in these amendments that would mandate change in current judicial practice. Rather, he said, they would simply provide clear authority in ORCP 58 for what many trial court judges have done, and are doing, as

a matter of discretion. Judge Harris added that he had presented these proposed amendments at the annual meetings of both the Oregon Trial Lawyers Association and the Oregon Association of Defense Counsel, and that on both occasions the response seemed to have been favorable.

Judge Harris continued by noting that the only aspect of these proposed amendments as to which some reservations have been expressed is the failure of new subsection 58 B(9) to specify that, if the court permits juror questions, they must be in writing. Several members pointed out that, under section 58 B as amended, the court could, "for good cause stated in the record," direct that oral juror questions are permitted even if the amendment specified that such questions must be written. Mr. Brothers offered a motion, duly seconded, that the word "written" be inserted in proposed new subsection 58 B(9) between "submit to the court" and "questions directed to . . ." This motion was agreed to by a vote of 16 in favor, 4 opposed, with no abstentions.

ORS 1.735 (see pp. 27-28 of Packet I of attachments to the agenda of this meeting) (Justice Durham). Mr. Alexander stated that one or more members have suggested somewhat more restrictive language than that now proposed. Justice Durham reiterated his view that no more restrictive language had been suggested that would not cause the Council greater difficulty than it might avoid, and that the supermajority vote requirement for promulgating amendments provides a sufficient safeguard against the Council ever abusing the greater flexibility this statutory amendment would afford.

The question then arose as to whether it is appropriate for the Council to publish a proposed statutory amendment in the judicial advance sheets. On motion offered, duly seconded, and unanimously agreed to, it was decided to publish this proposed statutory amendment, together with explanatory commentary, in conjunction with publication of the current tentatively adopted ORCP amendments.

Agenda Item 4: Old business. No item of old business was raised.

Agenda Item 5: New business. No item of new business was raised except that Mr. Alexander reminded members of the importance of full attendance at the Dec. 9, 2000 Council meeting.

Agenda Item 6: Adjournment. Without objection Mr. Alexander declared the meeting adjourned at 3:03 p.m.

Respectfully submitted,

Maury Holland
Executive Director