COUNCIL ON COURT PROCEDURES
Minutes of Meeting of September 14, 2002
5200 Southwest Meadows Road
Oregon State Bar
Lake Oswego, Oregon

Present:

Richard L. Barron
Benjamin M. Bloom
Bruce J. Brothers
Ted Carp
Kathryn H. Clarke
Allan H. Coon
Don A. Dickey
Robert D. Durham
Daniel L. Harris
Rodger J. Isaacson
Nicolette D. Johnson
Alexander D. Libmann
Connie Elkins McKelvey
Jeffrey S. Merrick
Karsten H. Rasmussen
Shelley D. Russell
Ralph C. Spooner
David F. Sugerman
John L. Svoboda

NOTE: Nely L. Johnson appeared by speaker telephone.

Excused:

Lisa Amato
Gene Buckle
David Schuman

Susan Evans Grabe was a guest in attendance at the meeting. A guest, Attorney Bruce Hamlin, appeared by speaker telephone. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. The Chair, Mr. Spooner, called the meeting to order at 9:35 a.m.

Agenda Item 2: Approval of minutes (attached). The minutes of the June 8, 2002 meeting were, without objection or correction, approved as distributed with the agenda of this meeting.

Agenda Item 3: Progress reports, discussion, and recommendations regarding current ORCP amendment projects (Mr. Spooner)

On motion made and seconded, the amendments previously approved to ORCP 47 C, 62 F, and 68 C(4)(c)(i) were unanimously tentatively adopted for publication and comment.

Agenda Sub-item 5a: Proposed amendment to ORCP 21 A (see Attachment 5a to agenda of this meeting)* Mr. Spooner asked Mr. Hamlin to explain the purpose of this proposed amendment. Mr. Hamlin responded that this amendment was proposed in response to the prevailing opinion in *Black v. Arizala,* 182 Or App 16, 48 P3d 843 (2002), which held that the only permissible procedural method by which a defendant could seek dismissal of an action on the basis of a forum-selection clause was by motion for summary judgment. He stated that his contention was not that *Black* was wrongly decided under existing law, but that resorting to summary judgment in order to obtain enforcement of valid forum-selection clauses is unsound as a matter of policy.

Mr. Hamlin further stated that, by requiring a defendant to resort to summary judgment in order to get the benefit of a forum selection clause, the very purpose of such clauses--avoidance of litigation in other than the forum-selected by the parties--would be largely defeated. This would be particularly true, he added, in any case where the validity and enforceability of a forum-selection clause depends upon contested issues of fact, as it sometimes does when a plaintiff contends that it should not be enforced for such reasons as unconscionability or fraud. He pointed out that if forum-selection clauses can be invoked only by means of summary judgment, that would mean that, whenever their enforceability might turn upon contested facts, a defendant could not get the benefit of it except following discovery and trial, which would defeat their purpose.

Mr. Hamlin concluded by recommending that this problem be resolved by amending ORCP 21 A to add a new defense or objection that could be raised by pre-answer motion worded as follows: "(10) that retaining jurisdiction would contravene an enforceable forum-selection clause." He added that this amendment, in addition to facilitating the raising of a forum-selection clause defense at the earliest possible point in the litigation, would also make clear that, when contested issues of fact must be decided, they will be decided by the judge pursuant to the fifth sentence of section 21 A.

*Without objection, this item was taken up out of order to accommodate Judge Johnson and Mr. Hamlin, both of whom participated in the meeting by speaker telephone.

Mr. Spooner noted that this proposal came very late in the current biennium and asked for a discussion as to whether the Council should tentatively adopt it on the understanding that it would be subject to a final vote on promulgation at the December meeting. Judge Johnson noted that, prior to *Black*, forum-selection clauses had been raised by motions to dismiss, with supporting and sometimes opposing affidavits, similarly to the way in which arbitration clauses are dealt. Justice Durham stated that he had not had an opportunity to consider this proposal carefully, but noted that it lacked any definition of a forum-selection clause. Mr. Hamlin responded to the latter point that his intention was that the proposed amendment deal with contractual forum-selection clauses, which he said are increasingly found in commercial agreements. Justice Durham remarked that he was not fully convinced that advancing the stage at which forum-selection clauses are ruled on from summary judgment to a motion to dismiss was in any way advantageous.

Mr. Brothers asked whether, if contested facts relating to unconscionability had to be resolved, that would be done by the judge or by the jury. Mr. Hamlin responded that he thought such facts would be decided by the judge, but that would not be so respecting facts relevant to other issues possibly bearing on enforceability of a forum-selection clause, such as fraudulent inducement. Prof. Holland commented that Judge Armstrong's concurring opinion in *Black* pointed out that no other American jurisdiction requires forum-selection clauses to be raised by a motion for summary judgment, but allow them to be raised by some form of motion to dismiss. He added that the most appropriate dismissal motion would be a motion to dismiss for improper venue, but no such addition is possible in connection with ORCP 21 A because it would upset too much well-settled law.

Judge Rasmussen observed that Rule 21 motions often require resolution of contested facts, and that this is routinely done by judges in accordance with that rule. He added that it seemed to him this matter is better handled under Rule 21 rather than Rule 47. Judge Rasmussen then moved, seconded by Judge Harris, that this proposed amendment be amended by adding the word "contractual" before "forum-selection clause," which motion was unanimously agreed to. Judge Dickey's motion, duly seconded, to tentatively adopt the proposed amendment as thus amended was then agreed to by a vote of 13 in favor, 7 opposed, and no abstentions.

Agenda Item 3 (resumed):

Sub-item 3a: Amendments to ORCP 44 and 55 recommended by the Medical Records Committee (see Attachment 3a to agenda of this meeting) (Ms. Clarke and Mr. Merrick). Mr. Merrick reported that two small changes had been agreed on by the committee

since the last Council meeting. These changes, he said, were in line 8, p. 3a-4, to substitute "object" for "raise an objection to the court; ..." and in lines 7-9, p. 3a-8, to revise the language following "H(6) *Scope of Discovery*" as follows: "Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44, including the limitation expressed in Rule 44 C." Ms. McKelvey stated that she was opposed to adding the specific reference to section 44 C. Mr. Sugerman expressed the view that there might be some ambiguity as to whether chart notations within the meaning of section 44 C are included in the definition of "individually identifiable health information," and urged that any such ambiguity should be removed from the language of the amendment rather than being dealt with in a comment.

Mr. Brothers suggested that, in line 26, p. 3a-6, the word "the" was needed before "entity's or person's business, ..." with which suggestion there was general agreement. Justice Durham stated that he was opposed to the addition, in line 9, p. 3a-8, of the words "including the limitation expressed in Rule 44 C" following "beyond that provided in Rule 36 or Rule 44, ... [.]"

Mr. Merrick, seconded by Ms. Clarke, then offered a motion that the text of subsection H(6) read as follows: "Notwithstanding any other provision, this rule is not intended to expand the scope of discovery beyond that provided in Rule 36 or Rule 44," and that, with that change, these amendments be tentatively adopted for publication and comment. This motion was unanimously agreed to.

Sub-item 3b: Amendment to ORCP 59 B recommended by the Jury Innovation Committee (see Attachment 3b to agenda of this meeting and the document entitled "Proposals to replace the third sentence of ORCP 59 B," copies of which were distributed at this meeting and a copy attached to the original of these minutes) (Judge Harris). Judge Harris explained that the four alternatives set forth in Attachment 3b would replace what is now the third sentence of section 59 B. He further explained that all of the alternatives would accomplish essentially the same thing, but in somewhat different forms of words. He added that the committee preferred either Alternative A or B over Alternatives C and D. Judge Coon asked what the difference was between Alternatives A and B. Judge Harris responded that the only difference was that Alternative A would give the court the option of requiring a party requesting written instructions to prepare such instructions. He added that both Alternatives A and B would move back the time by which written instructions must be requested from the commencement of trial to anytime before the jury is charged. Ms. Russell noted that in federal court attorneys are required to submit requested instructions on disks. Judge Harris said he would bring up this possibility at the Judicial Conference in October, but that he had some concerns about the adequacy of staff and technology in this connection.

The discussion then shifted focus from Alternatives A through D as shown in Attachment 3b to the First, Second, Third, and Fourth Alternatives as shown in the document entitled "Proposals to replace the third sentence of ORCP 59 B." Judge Johnson stated that she thought it important that written instructions be provided at the beginning of trial rather than as late as immediately before the jury is charged. She added that she did not know of any situation where the instructions are not recorded either electronically or stenographically.

Mr. Merrick asked whether the committee had any specific recommendation, to which Judge Harris replied that the First Alternative had the most support within the committee. Judge Rasmussen commented that all four alternatives eliminated the right of a party to require written instructions, adding that, if this is done, it should be made clear. Ms. Clarke pointed out that none of the alternatives explicitly provided that the court will read written instructions to the jury. Mr. Brothers commented that he did not understand how any of the alternatives would really change practice under the existing rule. Judge Dickey conceded this point, but stated that the alternatives were intended to move courts in the direction of written instructions.

Mr. Spooner then suggested taking a short break during which a single version might be prepared on which further discussion might focus. One or more members asked about having parallel transcripts, meaning that each juror would have a copy of the written instructions to follow as the judge reads them. After further discussion, on motion offered by Ms. Clarke and duly seconded, the Council voted unanimously to tentatively adopt for publication and comment the following language to be substituted for the present third sentence of section 59 B:

> **The court shall reduce, or require a party to reduce, the charge to writing. However, if the preparation of written instructions is not feasible, the court may record the instructions electronically during the charging of the jury.**

Judge Dickey stated that, in light of the above amendment, UTCR 6.070 would need to be changed. Judge Harris said that he had already contacted the UTCR Advisory Committee in this regard.

Sub-item 3c: Recommended amendment to ORCP 34 B(2) (see Attachment 3c to agenda of this meeting) (Mr. Brothers). Mr. Brothers briefly recapitulated the purpose of this amendment, which he explained was to avoid any possibility that a motion to continue an action against a deceased's personal representative or successor in interest could be time-barred by the expiration of one year from the date of death even if the personal representative or successor in interest failed to give the claimant or claimant's attorney the notice required by ORS 115.003(3). By general agreement rather than formal motion it was agreed that this amendment

be revised by deleting the comma between "claimant's attorney" and "if the claimant" in line 10, p. 3c, and that "successors" be substituted for "successor" in line 12 of the same page. A motion was then offered, and duly seconded, that this amendment as thus revised be tentatively adopted for publication and comment. This motion was unanimously agreed to.

Sub-item 3d: Recommended amendment to ORCP 43 B (see Attachment 3d to agenda of this meeting) (Mr. Sugerman). Justice Durham stated that he found section 43 B to be generally poorly drafted and proposed that the section be redrafted to read as follows:

> **B. Procedure.** A party may serve the request on the plaintiff after commencement of the action and on any other party with or after service of the summons on that party. The request shall set out the items that the requesting party desires to inspect either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner for making the inspection and performing the related acts. A request shall not require a defendant to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. The party that receives service of a request shall comply with the request unless that party objects to the request, with a statement of reasons for each objection, before the time specified in the request for allowing the inspection and performing the related acts. An objection to part of an item or category of a requested item shall specify the objectionable part. The duty to comply with the request is a continuing duty during the pendency of the action. Notwithstanding any other response or objection, a party that subsequently discovers any document or thing that the request identifies shall produce or allow inspection of the item, or object in the manner described in this paragraph, within a reasonable time after discovering the item. The party submitting the request may move for an order under Rule 46 A with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested.

In response to a question by Mr. Brothers Justice Durham explained that a continuing duty to either produce subsequently discovered items identified in an original request or object to such production was needed so that the requesting party would become aware of their existence and could serve a motion to compel their production if the ground for objecting were deemed to be without merit. Mr. Merrick offered a motion, duly seconded, to delete the entire sentence of the above proposed amendment beginning: "Notwithstanding any other response or objection, .

. ." This motion was defeated by a vote of 8 in favor, 10 opposed, and no abstentions.

A motion, duly seconded, to tentatively adopt for publication and comment the amendment as set forth above was then unanimously agreed to.

Agenda Item 4: Old business (Mr. Spooner). Prof. Holland explained the background and reasons for this proposed amendment to ORS 1.735(2) that would dispense with, or at least mitigate, its provision that no ORCP amendment may validly be promulgated unless its "exact language" is published for comment at least 30 days before the date of the Council's vote on final promulgation. He further explained that the practical effect of this exact language requirement is to make the solicitation of comments on tentatively adopted amendments from the bench, bar, and public nearly useless. He added that, during the 1999-2001 biennium, Justice Durham prepared a statutory amendment that would eliminate the exact language requirement while providing safeguards against the Council's publishing a given amendment and then promulgating one having a substantially different meaning. He concluded by saying that this proposed amendment was unanimously approved by the Council, was approved by the House following a committee hearing at which no opposition was expressed, but failed to get a hearing before a Senate committee and therefore failed of enactment.

Justice Durham stated that, for him, getting this or a similar amendment through the legislative process remained an item of urgent business because he regards the present exact language requirement as having some potential for adversely affecting the quality of the Council's work product. Mr. Merrick suggested that the Oregon State Bar be asked to include this amendment in its package of legislative proposals for the 2003 session. In response to this suggestion Ms. Grabe stated that the deadline for inclusion of items in the OSB's legislative package had unfortunately passed, but that she would do her best to see whether it might nonetheless be pre-session filed.**

Judge Harris said that he has had some experience with the legislative process, and would be willing to serve on a committee to shepherd the bill through the 2003 session. He added that he would solicit other members to join this committee and would call upon Judge Rasmussen, as a former senator, for advice. Prof. Holland said that a copy of this proposed amendment would be included with the agenda of the 12-14-02 Council meeting.

**Subsequent to this meeting Ms. Grabe informed Prof. Holland that this amendment would be pre-session filed, which will facilitate its being called for hearing before committees of both chambers.

Agenda Item 5: New business. See Sub-item 5a at pp. 1-2 above.

Agenda Item 6: Adjournment. Without objection Mr. Spooner declared this meeting adjourned at 12:10 p.m.

Respectfully submitted,

Maury Holland
Executive Director