COUNCIL ON COURT PROCEDURES

Minutes of Meeting of October 11, 2003
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	Lisa A. Amato	Nicolette D. Johnston
	Ted Carp	Connie E. McKelvey
	Kathryn H. Clarke	David Schuman
	Allan H. Coon	David Sugerman
	Don Corson	John L. Svoboda
	Robert D. Durham	Ronald D. Thom
	Nely L. Johnson	Russell B. West

Benjamin M. Bloom and Daniel L. Harris attended by speaker telephone.

Excused:	Richard L. Barron	Martin E. Hansen
	Eric J. Bloch	Alexander D. Libmann
	Bruce J. Brothers	Shelley D. Russell
	Eugene H. Buckle	

Also present were: Susan Evans Grabe, Public Affairs Director, Oregon State Bar; Gary St. Hilaire, Lead Docket Clerk with law firm of Lane, Powell, Spears and Lubersky; Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

(Minutes commence on next page)

Agenda Item 1: Call to order. Ms. Clarke, as Acting Chair, called the meeting to order at 9:40 a.m.

Agenda Item 2: Self-introductions of members and staff. Members and staff briefly introduced themselves.

Agenda Item 3: Approval of 12-14-02 meeting minutes. On motion of Judge Johnson, seconded by Ms. McKelvey, the minutes of the 12-14-02 Council meeting were approved and adopted as distributed with the agenda of this meeting.

Agenda Item 4: Brief summary of 2003 legislative session (Prof. Holland). Prof. Holland reported that the Council was totally defunded by the 2003 legislature because of the state's fiscal difficulties, but pointed out that the Oregon State Bar (OSB) would, as in past biennia, continue to provide funding up to $8,000 to reimburse members for their costs of travel and lodging in attending meetings. He added that all the legislators with whom Ms. Clarke, Mr. Spooner and he had met expressed support and good will towards the Council, and had also expressed the hope that it would be refunded when state finances improve. He further added that particular thanks were owed to Rep. Williams, Chair of the House Judiciary Committee, and Rep. Patridge, Chair of the Public Safety Subcommittee of Ways & Means, for the special efforts they made to enact HB 5512, which authorizes the Council to continue to function as a state agency, in particular to exercise its authority to promulgate ORCP amendments, despite being defunded. Regarding this matter, Prof. Holland commented that, throughout the 2003 session, the continued functioning of the Council was vigorously and skillfully supported by the OSB, Ms. Susan Grabe in particular. At the suggestion of Ms. Clarke, the members then voted their thanks to Ms. Grabe and to the OSB generally for all they had done on the Council's behalf.

Prof. Holland then reported that the Legislative Assembly took no action to prevent any of the ORCP amendments as promulgated by the Council at its 12-14-02 meeting from taking effect as law on Jan. 1, 2004. He added that the legislation, drafted primarily by Justice Durham and adopted by the Council, to revise the "exact language" requirement of ORS 1.735(2) in the interest of greater flexibility and gaining more benefit from the comment period, had been enacted, as well as the statutory amendments providing that knowingly false statements of material fact made in the course of making a declaration would be subject to the same criminal penalties as such statements in affidavits. Judge Carp inquired whether this legislation authorized use of declarations apart from where now authorized throughout the ORCP as an optional alternative to affidavits, to which Prof. Holland replied that it did not.

Agenda Item 5: Discussion of possible action items for Council's 2003-05 agenda (Ms. Clarke). Ms. Clarke stated that she thought it important that some inquiries be made to

determine whether the amendments to ORCP 44 and 55 promulgated last biennium to comply with the federal HIPAA regulations were working as intended. She then invited members to suggest any ORCP amendments which they believed the Council should place on its 2003-05 agenda to be considered for possible action. Responses were as follows:

i. ORCP 46 A(1). Judge Harris mentioned that Judge Lyle Velure had suggested an amendment to this provision that would require parties moving to compel production of requested documents to identify those documents on the first page of their motions. Judge Carp stated that he would get together with Judge Velure to find out whether the latter had a specific amendment to propose, and that he would report back on that matter.

ii. ORCP 68 C(5)(b). Judge Harris stated that he believed some suggestions have been made concerning supplemental judgments pursuant to this provision, but that he was not then able to be more specific as to what these suggestions were. Mr. Bloom noted that he believed that some consideration to supplemental judgments might be warranted.

Judge Carp suggested that he work with Prof. Holland to examine the impact, if any, on the ORCP's judgment provisions of the 2003 legislation, HB 2646, which made several changes regarding procedures relating to judgments, including supplemental judgments, and report back with any possible ORCP amendments that might appear necessary or useful in light of that legislation. This suggestion was agreed to without a formal motion or vote.

iii. ORCP 59 B (see Attachment 6A to agenda of this meeting). Judge Harris urged that the Committee on Jury Innovations be reconstituted and charged with considering whether section 59 B might be usefully amended to clarify how attorneys could have greater involvement in the process of preparing written jury instructions. Without formal motion or vote, general agreement with this suggestion was expressed. Judge Harris was asked to continue as chair of this committee, and Judges Thom and West and Mr. Bloom were appointed members.

Judge Harris noted that the language which Mr. Stephen L. Brischetto stated in his 6-24-03 letter might be ambiguous had been deleted by the 2002 amendment of this section.

iv. ORCP 44 C. Prof. Holland stated that he thought a flat inconsistency exists between ORCP 44 C, which makes "written reports and existing notations of any examination relating to injuries for which recovery is sought" discoverable upon request, ORCP 36 B(1), which provides that privileged material is not discoverable by any method, and OEC 511, whereunder OEC 504-1's physician-patient privilege belonging to a personal injury claimant is not waived until evidence concerning the injury is offered at trial.

There was a difference of opinion among members as to whether any such inconsistency exists. But the general consensus of members was that, even if an inconsistency exists in theory, it has not caused any serious difficulties in actual practice since lawyers representing personal injury claimants understand that this privilege must be waived by voluntary disclosure of medical records to defendants well prior to trial in the interest of pursuing settlement. It was therefore

decided not to pursue this matter further.

v. ORCP 44 B. Mr. Corson reported that the Oregon Trial Lawyers Association (OTLA) continued to have some concern about possible abuses in connection with examinations ordered pursuant to this section, which its existing language does not address. Some members commented that this issue had been thoroughly considered by the Council in the recent past, but no decision was made to foreclose the possibility of revisiting it this biennium if a sufficient number of members thought it worthwhile doing so.

vi. ORCP 59 H (see Justice Durham's letter of 10-15-03 attached to these minutes). Justice Durham raised the question whether this section might usefully be amended to require that parties assigning error on appeal to jury instructions do something in the trial court beyond simply objecting to, or requesting, jury instructions in order to preserve such error. He said that he would particularly value the view of trial judges as to whether this section's current requirements, of simply making objections or exceptions without elaboration or argumentation on the record, provide an adequate safeguard against possible reversible error that might be avoided if some reasoned basis for any objections or exceptions were required to be placed on the record. Mr. Corson commented that proposed jury instructions are customarily discussed with counsel by judges in chambers, and these discussions can be included in the record.

In response to this matter it was suggested that Justice Durham prepare some proposed amending language to this section, to which suggestion he agreed.

vii. ORCP 9 F and 10 D (see Attachment 6B to agenda of this meeting). Mr. Gary St. Hilaire, docketing coordinator at Lane Powell Spears Lubersky LLP, was recognized by Ms. Clarke to present amendments to these rules proposed by him and Mr. Bruce C. Hamlin, a member of that firm, as shown in the aforementioned attachment.

Mr. St. Hilaire stated that Mr. Hamlin and he agreed that the existing language of these provisions leaves unclear the effective date of service when there is dual service by fax and by mail, more particularly whether fax service should be treated the same as in-hand service, wherein the effective date of service is not postponed by the three days applicable to mail service. He added that both Mr. Hamlin and he believed that, subject to the condition now stated in these provisions that fax service on an attorney is effective only if that attorney has an operating "telephonic facsimile communication device" at the time of service, fax service should be treated as the equivalent of in-hand service without any postponement of its effective date.

Mr. Sugerman stated that he regarded fax service simply as a courtesy, and therefore was inclined to oppose dispensing with the three-day postponement of the effective date when it is used, whether or not in combination with mail service. General agreement was then expressed that this matter be placed on the agenda of the January, 2004 meeting for further consideration.

Prof. Holland raised a question whether consideration of this proposal might provide an apt occasion for the Council to consider more broadly whether any provisions of the ORCP might usefully be amended to take account of e-service and e-filing such as is done in federal

courts. The general sense of the members was to the effect that this broader inquiry would be premature at this point.

viii. ORCP 32. Mr. Sugerman stated that he thought this rule might warrant some attention by the Council. He said he was aware that the Council had spent a great deal of time considering proposed amendments to this rule several biennia ago when Judge Henry Kantor was Chair. He added that he would contact Judge Kantor to discuss with him what specific issues were then considered and why the Council ultimately took no action on any proposed amendments to this rule, and would subsequently report back the results of that discussion.

ix. ORCP 21 A and C. Judge Johnson asked whether the language of these sections is as clear as it might be concerning the authority of trial judges to determine contested facts material to ruling on motions raising the defenses enumerated in section 21 A. As one example of possible lack of clarity Judge Johnson mentioned the omission from ORCP 21 A of a provision similar to its federal counterpart, FRCP 12(b), to the effect that when ruling on motions to dismiss for failure to state a claim which require determination of factual matters "outside the pleading," they will be treated as motions for summary judgment under FRCP 56.

Prof. Holland commented that a mistake that seems frequently to be made by Oregon courts is to treat any motion requiring the trial court to determine contested facts as a motion for summary judgment, even when the defense asserted by the motion has nothing to do with the merits of the case. As an example he instanced a motion to dismiss for insufficiency of service which requires determination of contested facts, such as whether the defendant had actually been served in the manner stated in the return of service.

The general consensus of the members was that neither Judge Johnson's query nor Prof. Holland's comment suggested that any amendment to sections 21 A or C would be necessary or useful.

Agenda Items 6A and B: Items for information and consideration for possible action (Ms. Clarke). See Items 5 iii and vii above.

Agenda Item 7: Old business (Ms. Clarke). No item of old business was raised.

Agenda Item 8: New business (Ms. Clarke). For the benefit of new members Ms. Clarke summarized the procedure by which the Council has customarily conducted its work. She stated that proposed amendments are typically assigned either to an individual member, or more often to a committee of interested and willing members, who then give focused consideration to the matter and report back to the full Council the results of that consideration, frequently accompanied by some preliminary drafting of possible amendments.

Ms. Clarke continued that when a recommendation or tentative draft amendment is reported to the Council it is then fully considered and debated, following which a vote is usually taken on whether tentatively to adopt it as a proposed amendment. Tentative adoption requires

a vote of a majority of members present. Any amendment tentatively adopted will be included on the agenda of the September meeting, where a vote will be taken on whether to publish it for comment. However, even after an amendment has been tentatively adopted it can be recalled at any time for further consideration at the instance of any member.

Ms. Clarke said that, while the Council must function in an orderly fashsion, its methods are not characterized by any rigid parliamentary formality. She added that the Council ordinarily does not meet in the October or November preceding the December meeting when votes are taken on whether finally to promulgate each of the amendments published in accordance with the vote at the September meeting. Votes to promulgate amendments statutorily require a supermajority of members in favor numbering at least 15. After the December meeting the Council does not meet during the following spring and summer months when the legislature is in session. Amendments as promulgated at the December meeting take effect as law on January 1 of the year following the next legislative session unless disallowed or revised by statute.

Ms. Clarke then announced the dates of forthcoming Council meetings as follows: Beginning at 9:30 a.m. on:

Jan. 10, 2004
Feb. 14, "
Mar. 13, "
Apr. 10, "
May 10, "
June 12, "
Sept. 11, "
Dec.13, "

All meetings will be held at the Bar Center except for that of Feb. 14, which will be held at the University of Oregon School of Law. She added that the Council does not meet in July or August because of conflicting professional meetings and summer vacations. She suggested that any members who find themselves unable to attend a meeting in person and would like to participate in it by speaker phone contact Gilma Henthorne or Maury Holland in advance so that necessary arrangements can be made.

Prof. Holland reminded members that a convenient method of communicating between meetings is to use the Council's list serve address: <cocp@law.uoregon.edu>

Agenda Item 9: Adjournment (Ms. Clarke). Without objection Ms. Clarke declared the meeting adjourned at 10:58 a.m.

Respectfully submitted,
Maury Holland
Maury Holland,
Executive Director

ROBERT D. DURHAM
ASSOCIATE JUSTICE

1163 STATE STREET
SALEM, OREGON 97310-0260
Telephone: (503) 986-5725
FAX: (503) 986-5730
TTY (503) 986-5561

OREGON SUPREME COURT

October 15, 2003

Ms. Kathryn H. Clarke
Chair, Council on Court Procedures
921 SW Washington, Suite 764
Portland, OR 97205

Re: ORCP 59 H (Exceptions to Jury Instructions)

Dear Kathryn:

The rule about which I spoke last Saturday is ORCP 59 H, which provides:

> "No statement of issues submitted to the jury pursuant to subsection C(2) of this rule and no instruction given to a jury shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury. Any point of exception shall be particularly stated and taken down by the reporter or delivered in writing to the judge. It shall be unnecessary to note an exception in court to any other ruling made. All adverse rulings, including failure to give a requested instruction or a requested statement of issues, except those contained in instructions and statements of issues given, shall import an exception in favor of the party against whom the ruling was made."

There may or may not be a problem regarding that rule. At this point, I question only whether the rule operates correctly and whether it is clear. I discuss the potential problem below and realize that others on the Council quickly may explain away my questions.

ORCP 59 H consists of four sentences. In examining those sentences, it is important to bear in mind the distinction between a trial court error in delivering an instruction and an error in refusing to deliver an instruction.

The first sentence concerns an asserted error in delivering an instruction. It bars appellate review of the asserted error unless the party appealing pointed out the error to the judge. The second sentence requires the objecting party to state the point of exception "particularly."

Those sentences, when read together, seem to require both a specific objection (or exception) and a particular statement of the exception when the trial judge delivers an arguably erroneous instruction. Recently, in Jett v. Ford Motor Co., 335 Or 493, 502 (2003), the court held that the defendant complied with those sentences in ORCP 59 H and, thus, preserved its claim of error on appeal when it objected to the court's comparative fault instruction and explained its objection to the trial court. In the court's view, that conduct gave the trial court the opportunity to change the instruction and, thus, the subsequent claim of error on appeal did not take the court and the opponent by surprise. See also Davis v. O'Brien, 320 Or 729, 737, 891 P2d 1307 (1995) (discussing rationale for rules regarding preservation of error in trial court).

The potential problem that gives rise to my concern arises from the third and fourth sentences of ORCP 59 H. The third sentence eliminates the need to note an exception to any other ruling that the court makes. The context confines that rule to the subject of requested jury instructions. To make the point even more clearly, the fourth sentence declares that all adverse rulings (regarding, presumably, requested jury instructions), including failure to give a requested instruction, "shall import an exception in favor of the party against whom the ruling was made."

As I mentioned on Saturday, ORCP 59 H seems to do away with the need to explain to the court the justification for a requested instruction that the court refuses to give. (The rule retains the requirement of an explanation only for objections to instructions that the court chooses to deliver.) Under that reading of the rule, the possibility exists that a trial court may refuse to give one or more requested instructions, believing them to be cumulative, legally erroneous or otherwise improper, but the proponent has no burden to explain to the court why the requested instructions are proper. Instead, the proponent apparently may say nothing, and then assign error on appeal to the court's refusal to give the requested instructions.

Such a rule, if indeed that is the rule, deprives the trial court and the opposing party of the opportunity to address the asserted error at the appropriate time: in the trial court. I can see no good reason for relieving a proponent of a jury instruction of the obligation to explain in a timely manner to the trial court the justification for the instruction.

I also acknowledge that that reading of the rule may not be the only possible reading. For example, it may be that the last two sentences of ORCP 59 H are designed simply to relieve the proponent of the rejected instruction of the necessity of separately requesting an "exception" to a trial court's ruling that refuses to give the instruction. Under that reading, the concept of an automatically implied exception pertains only to the conduct of the parties in the trial court, and does not alter the obligation of a party on appeal to demonstrate proper preservation, including a suitable explanation of the asserted error to the trial court, of a ruling assigned as error on appeal.

The problem with the latter construction is that, despite its facial appeal (because it would require no rule amendment), it does not account for the reference to the bar to appellate review that appears in the first sentence of ORCP 59 H. In that respect, the contrast between the first and fourth sentences implies that the bare, unexplained submission of a jury instruction is all that a party needs to do to preserve for appeal a claim that the trial court erred in refusing to deliver the instruction.

I raise this potential problem because it seems that ORCP 59 H needlessly exposes judgments (and trial judges' decisions) to reversal on appeal for reasons that the appealing party should have explained, and possibly eliminated, in the trial court. I am interested in learning whether other Council members feel that this is a problem that merits the Council's attention.

I look forward to discussing this with the Council at a later date, and would be happy to respond to any questions that you might have.

Yours truly,

Robert D. Durham

ROBERT D. DURHAM
Associate Justice

RDD:lk
cc: Professor Maury Holland

(considered in 2000)

PROPOSAL NO. 1: PROPOSED AMENDMENTS TO RULES 44 A/46 B

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS RULE 44

A Order for examination. When the mental or physical condition or the blood relationship of a party, or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or a mental examination by a psychologist or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. (The Council is considering whether or not to promulgate one of the following three alternatives which would be inserted here.)

Alternative One

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

A(1) *Compliance with agreed conditions.* The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.

A(2) *Representation; reservation of objections; assertion of privileges.* The examinee may have counsel or

another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.

A(3) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Alternative One includes the following proposed amendment to paragraph B(2)(e) of Rule 46: Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has

failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

Alternative Two

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

A(1) *Compliance with agreed conditions.* The parties and the examinee shall comply with any conditions for the examination to which they agree in writing.

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

A(3) *Record of examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(4) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and

copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Alternative Two includes the following proposed amendment to paragraph B(2)(e) of Rule 46: Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

Alternative Three

The examinee's counsel or other representative may attend the examination by agreement of the parties or on order of the court. Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

A(1) *Compliance with agreed conditions.* The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination

without an order by the court.

A(3) *Record of examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(4) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Alternative Three includes the following proposed amendment to paragraph B(2)(e) of Rule 46: Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

* * * * *

FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

* * * * *

B Failure to comply with order.

* * * * *

B(2) **Sanctions by court in which action is pending.**

* * * * *

B(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination**, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.**

* * * * *