

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of February 14, 2004

University of Oregon School of Law

Knight Law Building

(Fourth Floor, Lewis Lounge)

1515 Agate Street

Eugene, Oregon

Present:

Richard L. Barron	Nely L. Johnson
Benjamin M. Bloom	Nicolette D. Johnston
Eugene H. Buckle	Connie Elkins McKelvey
Ted Carp	David Schuman
Allan H. Coon	John L. Svoboda
Don Corson	Russell B. West
Martin E. Hansen	

The following attended by speaker telephone:

Eric J. Bloch
Robert D. Durham
Daniel L. Harris
Ronald D. Thom

Excused:

Lisa A. Amato
Bruce J. Brothers
Kathryn H. Clarke
Alexander D. Libmann
Shelley D. Russell
David F. Sugerman

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

(MINUTES COMMENCE ON NEXT PAGE)

Agenda Item 1: Call to order. In the absence of the Chair, Ms. McKelvey, as Vice Chair, called the meeting to order at 9:36 a.m.

Agenda Item 2: Approval of 1-10-04 minutes. With the following corrections the minutes of the 1-10-04 meeting were approved as distributed with the agenda of this meeting:

i. Judge Coon stated that the summarization appearing on p. 3 of the concern expressed by Justice Durham regarding ORCP 59 H did not accurately reflect that concern.

ii. On p. 3, in the second from the final sentence in the second paragraph under 3d. "practice more uniform" should be substituted for "practice for uniform."

iii. Judge Carp was incorrectly shown as a member of the committee chaired by Justice Durham to consider possible amendments to ORCP 44 A.

Agenda Item 3: Reports and recommendations (Ms. McKelvey).

3a. ORCP 46 A(1)--Judge Velure's proposed amendment (Judge Carp). Judge Carp referred the members to a very preliminary draft of an amendment suggested by Judge Velure that would require the first page of a motion to produce documents or other tangible things to include a specific identification of all items requested. (See copy attached to these minutes.) He noted that this draft did not approach being in final form for presentation to the Council, and asked whether any members had any thoughts on this matter. Mr. Hansen said that he thought an amendment along the lines of the preliminary draft would be useful both for judges and attorneys. Mr. Bloom stated that he agreed with Mr. Hansen, but questioned what sanction would appropriately be authorized for violation of this rule. A question was raised as to whether this matter might usefully be referred to the Uniform Trial Court Rules committee. Judge Barron commented that he was strongly opposed to such referral.

There followed general agreement, without a formal motion or vote, that this matter be referred to a committee consisting of Judge Carp, Mr. Corson, Mr. Hansen, and Judge Harris.

3b. ORCP 59--Report of the Jury Innovation Committee (Judge Harris for the committee). Judge Harris reported that this committee had recently met and decided that no amendments to this rule would be proposed at this time. He added that several possible changes had been discussed by the committee, such as one dealing with pre-trial admission of exhibits and deposition testimony, but that it was decided to first have a look at the pertinent federal rules and how they work in practice. He further added that the committee discussed whether the

Council might make a formal request to the Committee on Uniform Jury Instructions that the latter make a concerted effort to word uniform instructions in plain English, a monumental task which is being actively pursued in some states.

Ms. Johnston commented that, based on her experience as a juror, she thought a very high priority should be assigned to an effort to make instructions more understandable by jurors, which she thought might well lead to a reduction in the time required for jury deliberations. She added that, in her experience, some jurors experienced great difficulty in understanding the instructions, which led to very prolonged and frustrating deliberations. Judge Harris suggested that, before any decision by the Council to forward a formal request to the Committee on Uniform Jury Instructions, he would get in touch with the chair of the committee to find out what the recent past history of this undertaking has been and whether any comprehensive effort is under consideration. General agreement with this suggestion was expressed.

Judge Johnson stated that in her discussions with jurors following trials she had never heard a complaint about difficulty in comprehending instructions.

Mr. Corson inquired whether this committee was giving any consideration to the use of the individual judge-assignment system as opposed to the generally employed master calendar system of judge assignments. Judge Harris replied that this question had not been discussed by the committee.

Judge Harris concluded his report by saying that the committee had given some thought to various other possible innovations regarding jury practice, such as adding a provision encouraging the use of juror notebooks and prescribing some standard practice concerning answering jurors' questions about instructions. He added, however, that the committee had not reached the point of being persuaded that any state-wide rules regarding these matters were called for at the present time.

3c. ORCP 59 H--Additional requirements for preserving error regarding jury instructions (see Attachment A to agenda of this meeting) (Justice Durham for the committee). Justice Durham reported that because of a family illness this committee had been unable to meet as previously scheduled. He further reported that the committee expected to meet, if possible, prior to the March 13 Council meeting, in which event he expected it would have something to discuss on that date.

3d. ORCP 9 F and 10 D--effective date of fax service (Ms. McKelvey for the committee). Ms. McKelvey reported that she expected that this committee would have something to report, and possibly recommend, at the March 13 Council meeting.

3e. ORCP 32--possible amendments regarding class actions (Mr. Sugerman for the committee). Mr. Sugerman reported that he expected that this committee would have something to report, and possibly recommend, at the March 13 Council meeting.

3f. ORCP 44 A--possible amendments regarding court-ordered physical and mental examinations (Justice Durham for the committee). Justice Durham reported that this committee had scheduled a meeting to take place in Judge Johnson's courtroom, and had nothing to report or recommend at this time. Mr. Corson asked Prof. Holland whether he had had an opportunity to survey any developments in other jurisdictions on matters of concern to this committee. Prof. Holland replied that he had not, but would get this effort underway promptly and forward his findings to the committee for any assistance they might afford. Mr. Buckle urged any members having thoughts or suggestions concerning the issues on which the committee was focusing to send them to the committee as soon as possible. He added that it would be helpful to this committee to have the texts of whatever amendments were considered by the Council during the 1999-2001 biennium.

3g. ORCP 44 C--possible amendments regarding requests for written reports and existing chart notations (Mr. Bloom for the committee). Mr. Bloom reported that this committee had not yet had an opportunity to meet formally, but that he had discussed this matter with Mr. Svoboda, who expressed agreement that some work was needed on this provision. He added that Mr. Brothers had stated his opinion by letter that no changes to this section were needed. Mr. Bloom further stated that his firm currently had a case where the question of whether a report of a treating physician who was expected to testify at trial as an expert witness could be obtained pursuant to this provision. Mr. Corson commented that he regarded the current section is sufficiently clear that the reports may be obtained with the expert's name redacted.

Discussion of this item concluded with Judge Carp offering a motion, duly seconded and unanimously agreed to, that this committee continue its work and report back to the Council if and when it reached any conclusions.

Agenda Item 4: Old business. Mr. Buckle asked whether it had at one time been the practice of the Council to hold its meeting alternatively at the Bar Center and at some place elsewhere in the state. Prof. Holland responded that, until it was amended many years ago, one of the statutory provisions pertaining to the Council required that it hold at least one meeting during each biennium in each of Oregon's seven Congressional districts. Judge Barron remarked that he recalled from his membership on the Council when that practice was in force that it did not work well and that meetings away from the Bar Center were generally not well attended.

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

Agenda Item 6: Adjournment. Without objection Ms. McKelvey declared the meeting adjourned at 10:42 a.m.

Respectfully submitted,

Maury Holland
Executive Director

1 "ORCP 59 H. No statement of issues submitted to the
2 jury pursuant to subsection C(2) of this rule and no
3 instruction given to a jury shall be subject to review
4 upon appeal unless its error, if any, was pointed out
5 to the judge who gave it and unless a notation of an
6 exception is made immediately after the court instructs
7 the jury. Any point of exception shall be particularly
8 stated and taken down by the reporter or delivered in
9 writing to the judge. It shall be unnecessary,
10 regarding matters related to trial procedure, to note
11 an exception in court to any other ruling made. For
12 matters related to trial procedure, [a]ll adverse
13 rulings, including failure to give a requested
14 instruction or a requested statement of issues, except
15 those contained in instructions and statements of
16 issues given, shall import an exception in favor of the
17 party against whom the ruling was made. However,
18 adverse rulings, including failure to give a requested
19 instruction or a requested statement of issues, are not
20 subject to review on appeal unless the aggrieved party
21 pointed out to the trial judge the error in the ruling
22 or the refusal to give the requested instruction or
23 statement of issues."

Compelled Medical Examinations

(ORCP 44 A)

1 Add highlighted material to existing text of ORCP 44A:

2 A. Order for Examination. When the mental or physical
3 condition or the blood relationship of a party, or of an agent,
4 employee, or person in the custody or under the legal control of
5 a party (including the spouse of a party in an action to recover
6 for injury to the spouse), is in controversy, the court may order
7 the party to submit to a physical or mental examination by a
8 physician or a mental examination by a psychologist or to produce
9 for examination the person in such party's custody or legal
10 control. The order may be made only on motion for good cause
11 shown and upon notice to the person to be examined and to all
12 parties and shall specify the time, place, manner, conditions,
13 and scope of the examination and the person or persons by whom it

1 is to be made. Unless the trial court requires other or
2 different conditions for good cause supported by the record, the
3 following conditions shall apply to a compelled medical
4 examination under this rule:

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

8 A(2) *Representation; Reservation of Objections; Assertion of*
9 *Privileges.* The examinee may have counsel or another
10 representative present during the examination. All objections to
11 questions asked and the procedures followed during the
12 examination are reserved for trial or other disposition by the
13 court. The examinee may assert, either personally or through
14 counsel, a right protected by the law of privileges.

15 A(3) *Obstruction.* No person may obstruct the examination.

16 If the examinee, counsel, or the examining physician or

1 psychologist suspends the examination based on a good faith claim
2 that a person has obstructed the examination, the court may order
3 a resumption of the examination under any conditions that the
4 court deems necessary to prevent obstruction. The parties may
5 agree to resume an incomplete examination without an order by the
6 court.

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

13 A(5) *Transcription of Record.* Upon request, and upon
14 payment of the reasonable charges for transcription and copying,
15 the stenographic reporter shall make a transcription of the
16 examination and furnish a copy of the transcript, or in the case

1 of an audiotape record, the person who records the examination
2 shall make and furnish a copy of the original recording, to any
3 party and the examinee.

1 Add highlighted material to ORCP 46B(2)(e):

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

To: Council
From: Ted Carp

I propose that a committee study the following proposed amendment to ORCP 46.

46B Form of Motion

Any written motion made pursuant to ORCP 46A shall specifically identify those items the moving party seeks to compel

Present section 46B, C & D would be renumbered to be 46C, D & E



Oregon

Theodore R. Kulongoski, Governor

Department of Administrative Services

State Controller's Division

155 Cottage Street NE, U50

Salem, OR 97301-3969

(503) 378-3156

FAX (503) 378-3518

CAFR ★ Gold Star 2003

Date: February 9, 2004

To: Maurice Holland
Council on Court Procedures
1163 State St.
Salem, OR 97301-2563

From:

John J. Radford, Administrator
State Controller's Division

Jean L. Gabriel, Manager
Statewide Accounting and Reporting Services

Lorna Christopherson, Accounting Analyst
Statewide Accounting and Reporting Services

Subject: **FY 2003 GOLD STAR CERTIFICATE**

It is a great pleasure to inform you that your agency has earned the State Controller's Gold Star Certificate for fiscal year 2003. Congratulations to you and your fiscal staff for this outstanding work.

The State Controller's Gold Star Certificate is awarded to state agencies that provide accurate and complete fiscal year end information in a timely manner. Clearly, the Gold Star is a challenge to earn, and its achievement is due primarily to your agency's diligent efforts to maintain accurate and complete accounting records throughout the year.

We particularly want to commend your agency's lead CAFR accountant, Janel Page, who worked directly with us to ensure accurate and timely year end reporting. The Gold Star Certificate was presented to your agency's CAFR accountant in late January.

Your agency's participation in the Gold Star Certificate program is important to Oregon in meeting statewide fiscal performance goals and key to the timely preparation of Oregon's Comprehensive Annual Financial Report and the statewide Schedule of Expenditures of Federal Awards. Your agency's success in accounting and financial reporting is also critical to Oregon's success in receiving a favorable audit opinion on both statewide documents.

The State Controller's Gold Star Certificate is Oregon's equivalent to the internationally recognized GFOA Certificate of Achievement for Excellence in Financial Reporting. Through the collaborative team effort of state agencies and the State Controller's Division, Oregon has earned the GFOA Certificate every year since 1992. *Gold Star agencies* are key to making this possible! We appreciate your agency's commitment to teamwork and excellence in financial reporting.

We are very happy to recognize your agency with this award. The diligent efforts of your fiscal staff truly make a difference in maintaining the State's accountability and credibility in financial reporting.

cc: Karen Krill
Janel Page