

**COUNCIL ON COURT PROCEDURES**

Minutes of Meeting of March 13, 2004

Oregon State Bar Center

5200 Southwest Meadows Road

Lake Oswego, Oregon

Present:	Lisa A. Amato	Daniel L. Harris
	Richard L. Barron	Nicolette D. Johnston
	Benjamin M. Bloom	David Schuman
	Eugene H. Buckle	David F. Sugerman
	Kathryn H. Clarke	John L. Svoboda
	Allan H. Coon	Ronald D. Thom
	Robert D. Durham	

Bruce J. Brothers and Don Corson attended by speaker telephone.

Excused:	Eric J. Bloch	Alexander D. Libmann
	Ted Carp	Connie Elkins McKelvey
	Martin E. Hansen	Shelley D. Russell
	Nely L. Johnson	Russell B. West

Susan Evans Grabe, Public Affairs Director of the Oregon State Bar, was present. Also present were Maury Holland, Executive Director, and Gilma J. Henthorne, Executive Assistant.

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(MINUTES COMMENCE ON NEXT PAGE)

**Agenda Item 1: Call to order.** The Chair, Ms. Clarke, called the meeting to order at 9:35 a.m., and announced that the first order of business would be a discussion with Ms. Susan Grabe, Public Affairs Director of the Oregon State Bar (OSB), regarding the 2005-07 biennium budget process and the possibility of securing refunding of the Council.

Ms. Grabe stated that the OSB would be supportive of refunding of the Council in the 2005 legislature, but that despite recent mildly favorable economic trends in Oregon, refunding was by no means assured and would probably prove to be something of an uphill battle. One reason the effort would be difficult, she added, was that many of the legislators who had been most familiar with the work of the Council and supportive of it would not be members of the 2005-07 Legislative Assembly. Ms. Grabe urged that the word "restore" not be used in connection with refunding, and that references back to former legislators who were Council supporters would best be avoided. She further recommended that each Council member should make contact with his or her legislators, and also that all members be provided with "talking points" about the mission of the Council and its cost-effectiveness. She added that, with more members of the Judiciary Committees being non-lawyers, it would be a serious mistake to assume that they or any other legislators were familiar with the role of the Council, with what preceded it, and with the adverse consequences were it to cease to function. She concluded by stating that, while she and others associated with the OSB would do whatever they could to secure refunding, the principal effort would have to come from Council members themselves, and by stressing the great importance of "educating" as many legislators as possible about what the Council does and why it is important.

Mr. Svoboda asked what the response should be to any legislators who might concede that it would be highly valuable for the Council to continue its work, but then point out that it had shown during the current biennium that it could do so without any level of state funding. There was general agreement that this was a matter that should be confronted candidly, and that no impression should be created that unless the Council were refunded, it would or should cease to exist or become a bar committee. Several members commented that, as helpful as refunding would be, the highest priority must be to ensure that, founded or not, the Council does not cease to exist. Prof. Holland was tasked with preparation of "talking points" for reference by all members, both as to the benefits to the state of the Council's continuing to perform its mission and as to why state funding for this purpose, and in what amount, was appropriate.

Ms. Grabe urged that Ms. Clarke and Prof. Holland keep in touch with her and with the Department of Administrative Services to ensure that a bill to authorize funding was prepared by June of 2004.

Judge Harris suggested that the Legislative Advisory Committee of the Council be reactivated, with which there was general agreement. It was agreed that the LAC would consist of Judge Barron, Ms. Clarke, Judge Harris, Ms. Johnston, and Judge Schuman. Ms. Clarke requested that Ms. Henthorne furnish her with a breakdown of all Council expenses incurred to date during the current biennium prior to the April 10 meeting.

**Agenda Item 2: Approval of minutes.** By motion offered by Justice Durham, duly seconded and unanimously agreed to, the minutes of the 2-14-04 Council meeting were approved as distributed as an attachment to the agenda of the 3-30-04 meeting.

**Agenda Item 3: Reports and recommendations (Ms. Clarke):**

**3a. ORCP 46 A(1)--Judge Velure's proposed amendment.** Mr. Corson reported that this committee, consisting of Judge Carp, Judge Harris, and Mr. Hansen, had not yet had an opportunity to meet, but expected to meet prior to the April Council meeting when it might have something to recommend.

**3b. ORCP 59--Jury Innovation Committee (Judge Harris).** Judge Harris reported that this committee would not have anything to report or recommend until the April or May meeting of the Council.

**3c. ORCP 59 H--additional requirements for preservation of error regarding jury instructions (see Attachment A to agenda of this meeting) (Justice Durham).** Justice Durham reported that the committee had made substantial progress, that there remained no matters of substantive disagreement among committee members, that it was very close to having a final draft amendment to recommend, and stated that the draft might be finalized during the break. Mr. Corson asked whether the proposed amendment could be understood as relating to anything other than instructions and statements of issues, to which Justice Durham replied that his understanding was that it would not apply to errors apart from those and would not require immediate objection in the hearing of the jury.

Mr. Brothers stated that he was in complete agreement with the fundamental purpose of this amendment as currently drafted, but had some concern that its language might leave the scope of its application unclear. In particular Mr. Brothers asked whether the draft amendment might be contradictory with the final sentence of the present section, especially the term "All adverse ruling, ..." Judge Coon commented that he thought the draft language adequately took care of any possible lack of clarity. Ms. Clarke concluded discussion of this item by stating that an effort would be made to finalize the draft language during the break.

Following the break Justice Durham circulated a slightly revised version of the draft amendment that would divide Section 59 H into two discrete subsections.

**3d. ORCP 9 F and 10 D--effective date of fax service.** Ms. Clarke stated that this item would be carried over to the April 10 Council meeting.

**3e. ORCP 32--proposed amendments regarding class actions (Mr. Sugerman for the committee).** Mr. Sugerman reported that this committee had met to discuss possible amendments to Rule 32, and hoped to have one or more specific recommendations to present at the April 10 Council meeting. In particular, he stated, serious consideration was being given to making the present mandatory claim form requirement discretionary with the trial court.

**3f. ORCP 44 A--proposed amendments regarding court-ordered physical or mental examinations (see Attachment B to agenda of this meeting) (Justice Durham for the committee).** Justice Durham reported that the committee had met in Judge Johnson's chambers and expected to meet again in another week, and that the work was still in an early stage. He also mentioned that Mr. Buckle had contacted the OADC Board with a view of possibly having one or more physicians appear before the Council to discuss the problems doctors would face were this section amended to give examinees the right to have counsel or another representative present during examinations. Judge Coon commented that if an amendment were to provide for recording of examinations, it would be important to ensure that recordings were of good quality.

**3g. ORCP 44 C--proposed amendments regarding requests for written reports and existing notations of examinations relating to injuries for which recovery is sought.** Mr. Bloom reported that there seemed to be agreement within the committee that this section was in need of clarification, but that agreement had not been reached as to the resulting rule that should be clarified, in particular whether reports or notations by treating physicians who testify as witnesses is or should be discovery by request pursuant to this section. Mr. Svoboda stated that the meaning of Section 44 C was not clear as it stood. Mr. Sugerman said that he agreed there was some ambiguity in the existing section, and that different plaintiffs' lawyers treat it differently, with some providing the reports and notations with the physician's identity redacted.

Judge Coon recalled that the last time the Council had confronted these issues, the process had been a long drawn out one. He therefore suggested that, if anything were to be ready to vote on by the September meeting, the committee would need to make some progress promptly.

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

**Agenda Item 5: New business.** Mr. Buckle stated that he received an e-mail to the effect that in some counties there was a limitation to reports and notations that can be discovered

pursuant to ORCP 44 C and that such reports must pertain to the same body part for which injury is claimed. Mr. Buckle asked that the 44 C committee consider that issue as well.

Judge Barron referred to a recent opinion of the Court of Appeals, Montoya v. Housing Authority of Portland, \_\_Or App\_\_ (March 10, 2004), concerning default judgments which suggested to him that ORCP 67 C(1) might usefully be amended. He stated that he would try to have something prepared for the Council to consider at its April 10 meeting.

Ms. Clarke stated that the OSB Practice & Procedure Committee had some issue concerning ORCP 54 E which it wanted the Council to consider and would probably appear on the agenda of the April 10 meeting.

**Agenda Item 6: Adjournment.** Without objection Ms. Clarke adjourned the meeting at 11:26 a.m.

Respectfully submitted,

Maury Holland  
Executive Director