

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of April 10, 2004

Oregon State Bar Center

5200 Southwest Meadows Road

Lake Oswego, Oregon

Present:	Benjamin M. Bloom	Nicolette D. Johnston
	Bruce J. Brothers	Alexander D. Libmann
	Eugene H. Buckle	Paul F. Sugerman
	Allan H. Coon	John L. Svoboda
	Don Corson	Ronald D. Thom
	Nely L. Johnson	

Kathryn H. Clarke, Russell B. West, and Martin E. Hansen attended by speaker telephone.

Excused:	Lisa Amato	Daniel L. Harris
	Richard L. Barron	Connie Elkins McKelvey
	Eric J. Bloch	Shelly D. Russell
	Ted Carp	David Schuman
	Robert D. Durham	

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

Agenda Item 1: Call to order. In the absence of Ms. Clarke and Ms. McKelvey, Ms. Johnston called the meeting to order at 9:45 a.m. and presided throughout this meeting.

By phone Ms. Clarke said that she had two items about which she wished to inform the Council and get any thoughts members might have. The first item was that, with the first installment of \$4,000 provided by the OSB to reimburse travel and lodging expenses of members who request reimbursement having been nearly expended, it will be necessary to suspend further reimbursements until the second \$4,000 installment of funds becomes available on Jan. 1, 2005. She asked any members who might be affected by this suspension whether, under the circumstances, this would be agreeable to them, to which the response was affirmative. In response to Prof. Holland's request for clarification, Ms. Clarke said that the suspension of

reimbursements would be in effect from this meeting through the December meeting. Judge Coon commented that his experience had been that, while participating in meetings by phone saves travel expenses, it is not a very satisfactory way of doing so.

Ms. Clarke's second item was for information, namely, that she and Prof. Holland would be attending a meeting in Salem with Ms. Janel Page and Ms. Gail Bouldrey of the Judicial Department, together with Ms. Susan Grabe of the Oregon State Bar, to discuss preparation of the Council's requested 2005-07 budget. She explained that this budget preparation, which must be completed by June, was necessary in order for the Council to be included in the Governor's budget, which was essential to the legislature's consideration of it, although it would certainly not guarantee favorable legislative action on the request.

Mr. Buckle raised a question as to whether law firms might be approached about possible contributions for support of the Council. Prof. Holland noted that the Council's statutes, specifically ORS 1.755, authorizes it to accept "gifts, grants, and donations from any source," although none have ever been solicited or received. One or more members commented that, if anything like this were done, any appearance of the Council's being indebted to particular donors would have to be scrupulously avoided, with which there was general agreement. Ms. Clarke asked Ms. Johnston to chair a committee to consider possibilities of securing Council support from sources other than the State of Oregon, to which request Ms. Johnston agreed.

Agenda Item 2: Approval of minutes. On motion of Judge Coon, duly seconded and unanimously agreed to, the minutes of the March 13, 2004 meeting of the Council were approved as distributed with the agenda of this meeting.

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

3a. ORCP 59 H--Report and recommendation of committee regarding requirements for preserving error respecting jury instructions and statements of issues (see Attachment A to agenda of this meeting) (Judge Coon for the committee). In the absence of Justice Durham, Judge Coon referred members to Attachment A of the agenda and stated that it had been drafted primarily by Justice Durham and was agreed to by all members of the committee. He recalled that the effect of this proposed amendment would be to require, as a condition of preservation of error for appellate review, that counsel aggrieved by instructions or statements given or refused must do more than simply object or note an exception on the record, but must identify on the record any asserted error with reasonable particularity. He added that the purpose of this amendment was to avoid appeals, and reversals on appeal, which might be avoided if counsel were encouraged by this more demanding preservation requirement to inform the trial court more fully as to the legal bases of any assertions of error.

Mr. Corson stated that his initial reaction to the draft language was decidedly favorable, adding that he had one question about it, which was whether the draft amendment would require counsel to make their objections or note their exceptions before or after the court gives its instructions. Mr. Brothers commented that the usual practice is for counsel to discuss proposed instructions with the judge informally in chambers, off the record, before they are given, but that the proposed amendment might be read to require that these discussions be verbatim placed on the record. He questioned whether it would be wise to impose any requirement that these often lengthy colloquies be included in the record because that could discourage their characteristic and, in his view, useful informality. Mr. Svoboda remarked that he thought it would make sense if the rule required that any particularized statements of objections or exceptions be made prior to the jury being instructed, rather than afterwards when the judge might be convinced that he or she should amend instructions already given.

Judge Coon stated that the committee had not really focused on the precise point in time when the particularized assertion of error would have to be made. He further stated that his own practice, which he said he believed to be the common one, was to discuss proposed instructions with counsel prior to giving them. Judge Coon then stated that the committee would review the question of timing to see whether some additional language was needed to deal with it.

Prof. Holland asked whether the language of the proposed amendment about identifying error might be satisfied by counsel merely stating something like: "Please note my exception to Instruction No. XX," in which event the amendment could fail of its essential purpose. Judge Coon responded that the committee believed that any possibility of that sort would be excluded by the language of proposed subsection H(2) to the effect that exceptions must be stated "with particularity," which the committee believed would not benefit from any further elaboration. Mr. Buckle commented that any amendment should make absolutely clear precisely what must appear on the record in order to preserve the issue on appeal, though not the point of prescribing any form of "magic words."

Ms. Johnston concluded discussion of this item by noting what seemed to be the two issues that had surfaced during its course, which she said were: i. whether a particularized objection or exception had to be placed on the record before the jury is instructed, and ii. whether counsel who raised a particularized objection or exception for the first time after the jury was instructed could expect the trial court to consider it and thereby preserve error.

Mr. Corson then stated that he favored the proposed amendment in its present form and thought there was no need to refer it back to the committee. Prof. Holland commented that this or any other tentatively adopted amendment could be modified, at the instance of any member, at any of the Council's remaining meetings up to and including the September meeting.

Mr. Sugerman then offered a motion, duly seconded, that the amendments proposed to ORCP 59 H as shown in Attachment A be tentatively adopted. This motion carried by a vote of 13 ayes, 0 noes, and 0 abstentions.

3b. ORCP 46 A(1)--Judge Velure's proposed amendment (Mr. Corson for the committee). Mr. Corson reported that this committee had not yet met, and that it might have something to propose at the May meeting of the Council.

3c. ORCP 9 F and 10 D--Effective date of fax service. In the absence of Ms. McKelvey, this item was deferred to the May Council meeting.

3d. ORCP 32--Proposed amendments regarding class actions (Mr. Sugerman). Mr. Sugerman reported that this committee would have one or more amendments to propose at the May meeting of the Council.

3e. ORCP 44 A--Proposed amendments regarding court-ordered physical or mental examinations (see Attachment B to agenda of this meeting) (Mr. Corson for the committee). Mr. Corson reported that work on these proposed amendments was still ongoing, and that an additional submission was expected soon from Justice Durham.

3f. ORCP 44 B and C--Proposed amendments regarding requests for written reports and existing notations of examinations relating to injuries for which recovery is sought ((Mr. Bloom for the committee). Mr. Bloom reported that this committee had not yet met formally, but that he had had some informal discussions with its other members, Mr. Brothers and Mr. Svoboda. He referred members to a preliminary draft he had prepared (see copy attached to these minutes), which he said had not been agreed to by the other committee members, but which he thought might serve to focus discussion.

Mr. Brothers stated that he had certain reservations about Mr. Bloom's proposed amendment, and asked whether the words "prepared by medical experts" should be added. Judge Thom commented that he and Mr. Hansen, participating in the meeting by phone, had not seen the draft, which had not been circulated prior to the meeting. Mr. Svoboda commented that he thought the sole issue here concerned the identity of experts. Discussion of this item ended inconclusively with general agreement that its further consideration be deferred to a future meeting.

Agenda Item 4. Old business (Ms. Johnston). No item of old business was raised.

Agenda Item 5. New business (Ms. Johnston).

5a. ORCP 67--notice to defendant of judgment in excess of amount claimed in original complaint (see Attachment C to agenda of this meeting). In the absence of Judge Barron it was agreed to defer this item to the May meeting of the Council.

5b. ORCP 83 A(9) and 83 D--proposed deletion of references to "notice of bulk transfers" (see Attachment D to agenda of this meeting) (Prof. Holland). Prof. Holland reported that these deletions had been suggested by Mr. David Heynderickx of the Office of Legislative Counsel because the statutes relating to bulk transfers had been repealed by the 1993 legislature. Mr. Corson suggested that, before these ORCP deletions were tentatively adopted, Prof. Holland should check the case law since the date of the repeal to be sure that questions regarding bulk transfers no longer arise in litigation. Prof. Holland agreed to report back on this matter at the May meeting of the Council.

5c. Proposals by Ms. Kristen David to amend UTCR 5.030 and 5.080 referred to Council by Mr. Bruce C. Miller (see Attachment E to agenda of this meeting) (Prof. Holland). Judge Thom stated that this matter should be discussed at a future meeting because there might be a problem here. It was agreed that this item might warrant discussion at a future meeting.

There followed some discussion about how advocacy for the Council's continued existence and funding should be managed. Mr. Corson stressed the importance of members contacting their legislators in advance of the 2005 session. Mr. Brothers commented that the Council's continued existence and the level, if any, at which it is funded are two separate issues.

Agenda Item 6: Adjournment. Without objection Ms. Johnston declared the meeting adjourned at 10:58 a.m.

Respectfully submitted,

Maury Holland
Executive Director