

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of June 12, 2004

Oregon State Bar Center

5200 Southwest Meadows Road

Lake Oswego, Oregon

Present:	Richard L. Barron	Robert D. Durham
	Eric J. Bloch	Martin E. Hansen
	Benjamin M. Bloom	Nicolette D. Johnston
	Bruce J. Brothers	Alexander D. Libmann
	Eugene H. Buckle	David F. Sugerman
	Ted Carp	John L. Svoboda
	Kathryn H. Clarke	Ronald D. Thom
	Don Corson	

Allan H. Coon attended by speaker telephone.

Excused:	Lisa A. Amato
	Daniel L. Harris
	Nely L. Johnson
	Connie Elkins McKelvey
	Shelley D. Russell
	David Schuman
	Russell B. West

The following guests were in attendance: Dr. Larry Friedman, Portland; Attorney Phil Goldsmith, Portland; Mr. Tom Perrick, representative from Oregon Bankers' Association, Portland; Attorney Ken Sherman, Jr., Salem; Attorney Billy Sime, representative for OADC, Salem; Attorney Scott O. Pratt, representative, Procedure & Practice Committee, Portland.

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

Agenda Item 1: Call to order. The meeting was called to order by the Chair, Ms. Clarke, at 9:35 a.m.

Agenda Item 2: Approval of 5-8-04 minutes. With the following corrections the minutes of the May 8, 2004 meeting of the Council were approved as previously distributed: 1. In section 3b, p. 4, "service by tax" should read "service by fax"; 2. The last word in the final paragraph of section 3b, p. 4, should be "correct"; 3. In section 5e, "Steven H. Pratt" is corrected to "Steven O. Pratt;" and 4. Mr. Don Corson should be shown as participating in the meeting by speaker phone.

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

Item 3c: ORCP 32--proposed amendments regarding class actions (see Attachment C to agenda of this meeting) (Mr. Sugerman). Mr. Sugerman explained that the proposed amendments would make the use of claim forms discretionary with the court, rather than mandatory in every class action as now required by subsections 32 F(1) and (2). He further explained that claim forms serve little purpose in cases where defendants already possess full information about the amount of damages, where they constitute nothing more than expensive make-work. He also stated that section 32 F's mandatory claim form provision is nearly unique to Oregon, and is not found in the federal rule or the rules of most other states. He emphasized that, in cases where use of claim forms might be appropriate, nothing in the proposed amendments would prevent the court from ordering that it be done. Prof. Holland mentioned that claim forms serve little or no useful purpose in cases where the measure of recovery is restitution of defendant's unjust enrichment, as is frequently the case with class actions.

Ms. Clarke then recognized guests present to comment on this matter. Attorney Ken Sherman, Jr. of Sherman, Sherman, Johnnie & Hoyt, stated that he had been counsel to the Oregon Bankers Association since 1977 and that, while he was not a class action litigator, he had spoken to several lawyers in Portland who had expressed very serious concerns about a procedural change such as this because of the potentially serious consequences it might have, among which he said was depriving courts of essential information regarding the extent of damages and the likelihood of driving up the amount of recoveries beyond any damages members of plaintiff classes might have actually sustained. Mr. Corson asked Mr. Sherman what the latter thought should happen in a case where, for example, the evidence shows damages in the aggregate amount of \$9,000,000 for the class, but claim forms are submitted totaling a significantly lower amount. Mr. Sherman responded that he was not then in a position to give a response to that hypothetical case. He also stated that he did not think adequate notice of this proposal had been given, with the result that few people were aware of it.

Attorney Phil Goldsmith was then recognized. After noting that he was the principal advocate of somewhat similar amendments to ORCP 32 which the Council

*For the convenience of visitors, and without objection, items were taken up in the order shown in these minutes rather than as shown on the agenda of this meeting.

considered in 1992, Mr. Goldsmith stated that, pursuant to the present rule, any excess in the aggregate class damages established by way of restitution of unjust enrichment or otherwise over the total amounts claimed in claim forms is returned to the defendant. By this he explained that what is generally known in class action practice as "fluid recoveries" are effectively precluded by subsections 32 F(1) and (2). He added that, while there is general agreement that the primary purpose of class actions is to help ensure that the typically large number of class members who have usually been damaged in modest amounts recover compensatory damages, there exists a philosophical difference of opinion as to whether an additional useful purpose is to ensure that defendants whose unlawful conduct has resulted in their being unjustly enriched are made to disgorge such enrichment. He further stated that, when a class action monetary recovery cannot be wholly paid over to class members who have not submitted claim forms, the unpaid amount would probably be treated by the State of Oregon as abandoned property payable to it, usually after some delay for further efforts to notify class members.

Mr. Brothers commented that this proposal seemed to him to involve questions more of substantive policy than of a purely procedural nature, and that, as had happened in the past, the legislature might think the Council exceeded its authority by promulgating these amendments. Mr. Svoboda noted that he was inclined to agree with this comment. Mr. Buckle asked what efforts Mr. Goldsmith had made to confer about this proposal with such obviously interested groups as the Oregon Bankers Association.

Mr. Goldsmith replied that there had no formal consultations with that or any other group, but that he had been in touch with Mr. Dave Barrows, who in the past had been a leading spokesperson for groups inclined to oppose Rule 32 amendments along the lines presently proposed, to be sure he was fully aware of what the Council had under consideration.

Judge Bloch commented that he had had no experience with claim forms, either as a practitioner or as a judge, but that the questions raised by the current proposal seemed to him to be significantly substantive in their implications, which he believed would need to be thoroughly debated before these amendments were promulgated. Judge Carp remarked that the question then before the Council was not whether to promulgate these amendments, but whether tentatively to adopt them for the limited purpose of publication for comment.

Discussion of this item concluded by Mr. Sugerman, seconded by Ms. Clarke, offering a motion tentatively to adopt the amendments set forth in Attachment C. This motion carried by a vote of fifteen in favor, one opposed, and one abstention.

Item 3b: ORCP 9 F and ORCP 10--effective date of fax service (see Attachment B to agenda of this meeting) (Mr. Bruce C. Hamlin). Mr. Hamlin recalled that this matter had been brought to his attention by his firm's docket clerk, who had concluded that ORCP 9 F and ORCP 10 left unclear whether fax service is subject to the same three-day delay in effective date as mail service or is effective on the date of transmission. He added that use of fax in serving documents was here to stay, was being widely used, and had proved generally reliable. He further stated that, while he preferred the version of the amendments shown on p. B-1 of Attachment B, whereby fax service

would be equated with service by hand delivery, he thought the most important thing was that these provisions be clarified one way or the other.

Several members expressed various reservations about an amendment that would equate fax with personal service for purposes of its effective date. Mr. Syoboda asked whether fax numbers as shown in the Bar Directory would be treated as conclusively correct.

Mr. Brothers offered a motion, duly seconded, to place version B-2 on the agenda of the September 11, 2004 meeting. This motion was agreed to by a vote of fifteen in favor, one opposed, and one abstention. Mr. Bloom, seconded by Judge Carp, then offered a motion to place version B-1 of the amendments on the agenda of the September 11, 2004 meeting. This motion failed of agreement by a vote of three in favor and fifteen opposed.

Item 3d: ORCP 44 A--proposed amendments regarding court-ordered physical or mental examinations (see Attachment D to agenda of this meeting) (Justice Durham for the committee). Justice Durham began by thanking the other members of this committee, Mr. Buckle, Mr. Corson, and Judge Johnson, for the effort they had put forth in helping to formulate these proposed amendments. He briefly recalled the history of similar proposed amendments to section 44 A in 2000, which required parties to comply with any agreed conditions relating to examinations and entitled examinees to have a representative present during examinations. He also recalled that those amendments failed to obtain a supermajority by one vote.

Justice Durham continued by noting that, as was well known, there existed a sharp division of views between the plaintiffs and defense bars as to whether ORCP 44 A stood in need of amendment and, if so, how it should be amended. He observed that some believed the current provision is faulty in failing sufficiently to set rules, and leaving too much latitude to negotiation between parties and the discretion of individual judges, in not requiring that some sort of record be made of examinations, and in not entitling examinees to have a representative present during examinations. He also stated that the present rule does not reflect current practice in all respects.

Justice Durham then distributed copies of the committee's draft amendments for discussion, a copy of which is attached to these minutes. Mr. Buckle stated that he questioned whether there was anything wrong with the current section 44 A. Regarding the committee's draft he expressed concern that it would authorize encroachment on the domain of the medical profession, and questioned whether an examinee's representative, who might be an expert or the examinee's attorney, would be subject to discovery. Justice Durham responded that the present rule was based on the rule in federal courts and fostered excessive divergence in rulings among individual trial court judges. He added that the committee's draft amendments provided some default rules, such as audio recording of examinations, while also leaving room for negotiated changes agreed to by the parties and judicial discretion to deal with unusual situations, and additionally prohibited obstruction of examinations by representatives or any one else.

Mr. Brothers stated that there appeared to be no disagreement about the appropriateness of audio recording of examinations as a routine matter, but that he shared the concerns expressed by others about providing for the presence of a representative as a matter of right. He added that he also thought any reference to obstructing an

examination should be qualified by the word "unreasonably." Mr. Hansen said he was curious about practice in other jurisdictions, in particular whether representatives tended to be relatives or friends of examinees as opposed to adjusters or experts and whether authorizing the presence of representatives has added another layer of complexity to the process. Mr. Sugerman stated that compelled medical examinations is a somewhat unique discovery method where examinees should be afforded some protection against inaccuracies in examiners' reports and questions that might go beyond the proper scope of the examination.

Dr. Larry Friedman, a neuropsychologist, was then recognized. He stated that he recognized that the issue of permitting representatives to be present was a complex one having many facets. He added that, from what he has observed and from the literature he had read, he had concluded that physicians conducting physical examinations usually have no serious problem with the presence of a representative, but that psychologists and psychiatrists often do have an objection to it because the presence of a representative can interfere with establishing rapport between the examiner and the examinee. He further added that psychologists and psychiatrists tend not to see an examination as a legal, but as a medical, procedure. Dr. Friedman stated that he would be strongly opposed to both having a recording of an examination apart from the examiner's notes and report, and to having a representative present at examinations that are psychological or psychiatric, as opposed to purely physical, in nature.

Judge Barron commented that, throughout his twenty-four years on the bench, he had never encountered a situation where the attorneys were unable to reach agreement about fair and reasonable conditions under which the examination would be conducted. He stated that he was therefore opposed to amending this provision because of his sense that it would create more problems than it would solve.

Ms. Clarke observed that general agreement appeared to exist with respect to the following three aspects of this problem: i. All examinations except psychological ones should be routinely audio recorded; ii. the use of simple notice; and iii. the autonomy of practice under rules.

Attorney Billy Sime was then recognized. He said that he saw some problems with the draft amendments, namely, what about examinees who come to their examination and insist upon recording it without having given prior notice, and what about discovery of a representative's observations.

Justice Durham at this point suggested that the time had come to find out how much common ground existed among Council members. With that in mind, Judge Thom, seconded by Judge Coon, moved that no changes be made to the present ORCP 44 A. The motion failed of agreement by a vote of seven in favor and eight opposed.

Ms. Clarke then asked for a straw vote on the distinct question of whether to amend section 44 A to permit audio recording of examinations. Twelve members indicated support for such an amendment and three members indicated opposition to it. Another straw vote was taken concerning the question of amending section 44 A to prohibit obstruction of examinations where a representative is present. Eight members indicated support for such an amendment and six members indicated opposition to it. These straw votes concluded discussion of this item.

Item 3a. ORCP 46 A(1)--Judge Velure's proposed amendment (see Attachment A to agenda of this meeting) (Judge Carp). Judge Carp offered a motion, duly seconded, that this amendment be tentatively adopted. This motion was agreed to by a vote of fourteen in favor, none opposed and one abstention.

Item 3e. 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 (see Attachment E to agenda of this meeting) (Mr. Bloom). Mr. Brothers stated that he thought that no case had been made for any changes to sections 44 B and C. Judge Barron offered a motion, duly seconded, that no amendments to these sections be promulgated. This motion was agreed to by a vote of fourteen in favor, none opposed and no abstentions.

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

Agenda Item 5. New business (Ms. Clarke):

Item 5a. Proposals by Ms. Kristen David to amend UTCR 5.030 and 5.080 referred to the Council by Mr. Bruce D. Miller (see Attachment F to agenda of this meeting). A motion was duly offered, seconded, and unanimously agreed to that this item be referred back to the UTCR Committee.

Items 5b and 5c. These items were not discussed and no action was taken regarding them.

Ms. Clarke announced that the Justice Department had agreed to advance \$4,000 toward members' travel and lodging expenses, an amount that will be forthcoming from the Oregon State Bar on January 1, 2005.

Agenda Item 6: Adjournment. On motion duly offered, seconded, and unanimously agreed to, the meeting was adjourned at 1:25 p.m.

Respectfully submitted,

Maury Holland
Executive Director

RULE 32
CLASS ACTIONS

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5 **F. Notice and exclusion.**

6 F(1) When ordering that an action be maintained as a class
7 action under this rule, the court shall direct that notice be
8 given to some or all members of the class under subsection E(2) of
9 this rule, shall determine when and how this notice should be
10 given and shall determine whether, when, how, and under what
11 conditions putative members may elect to be excluded from the
12 class. The matters pertinent to these determinations ordinarily
13 include: (a) the nature of the controversy and the relief sought;
14 (b) the extent and nature of any member's injury or liability; (c)
15 the interest of the party opposing the class in securing a final
16 resolution of the matters in controversy; (d) the inefficiency or
17 impracticality of separately maintained actions to resolve the
18 controversy; (e) the cost of notifying the members of the class;
19 and (f) the possible prejudice to members to whom notice is not
20 directed. When appropriate, exclusion may be conditioned on a
21 prohibition against institution or maintenance of a separate
22 action on some or all of the matters in controversy in the class
23 action or a prohibition against use in a separately maintained
24 action of any judgment rendered in favor of the class from which
25 exclusion is sought.

26 F(2) Prior to the entry of a final judgment against a
27 defendant the court [*shall request*] **may require** members of the
28 class who may be entitled to individual monetary recovery to
29 submit a [*statement in a form*] **claim form** prescribed by the court
30 requesting affirmative relief which may also, where appropriate,
31 require information regarding the nature of the loss, injury,
32 claim, transactional relationship, or damage. **When required,**
33 **[T]the [statement] claim form** shall be designed to meet the ends
34 of justice. In determining [*the form of the statement*] **whether to**
35 **require a claim form and what form it shall take**, the court shall