

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of September 11, 2004

Oregon State Bar Center

5200 Southwest Meadows Road

Lake Oswego, Oregon

Present:	Lisa A. Amato	Robert D. Durham
	Eric J. Bloch	Daniel L. Harris
	Benjamin M. Bloom	Nicolette D. Johnston
	Eugene H. Buckle	Connie Elkins McKelvey
	Ted Carp	Shelley D. Russell
	Kathryn H. Clarke	David Schuman
	Allan H. Coon	David F. Sugerman
	Don Corson	John L. Svoboda

Richard L. Barron and Russell B. West attended by speaker telephone.

Excused:

- Bruce J. Brothers
- Martin E. Hansen
- Nely L. Johnson
- Alexander D. Libmann
- Ronald D. Thom

Guests:

- Attorney James N. Gardner, Portland
- Attorney Phil Goldsmith, Portland
- Susan Grabe, Director, Public Affairs Department, Oregon State Bar
- Mr. Tim Martinez of Martinez & Sons, lobbyist for Oregon Bankers Association
- Mr. Thomas A. Perrick, President and Chief Executive Officer, Oregon Bankers Association
- Attorney Nancie K. Potter, of Foster Pepper Tooze, Portland (Ms. Potter participated in the meeting by speaker telephone)

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

CORRECTION IN AGENDA ITEM 2 -- REFLECTING CORRECT MEETING DATE

Agenda Item 1: Call to order. The meeting was called to order by the Chair, Ms. Clarke, at 9:05 a.m.

Agenda Item 2: Approval of 6-12-04 minutes. The minutes of the 6-12-04 meeting were unanimously approved without correction.

3. Reports and recommendations (Ms. Clarke)

3a. ORCP 32 - proposed amendments regarding class actions (see Attachment A to agenda of this meeting) (Mr. Sugerman). Mr. Sugerman reported that, following the Council's June meeting, this committee met with representatives of the banking industry and Associated Oregon Industries invited by Mr. Thomas A. Perrick to discuss the currently proposed amendment to ORCP 32 F(2) that would make use of claim forms discretionary with the court rather than mandatory in all class actions. He stated that, among others attending the meeting, were Mr. James N. Gardner, Mr. Bruce C. Hamlin, and Ms. Nancie K. Potter.

Mr. Sugerman referred members to a 9-9-04 letter to the Council from Ms. Potter (copy attached to original of these minutes). He said that, as that letter indicates, the representatives of bankers and other business groups who have been consulted are not wholly opposed to making the current requirement of claim forms in every class action less rigid, but strongly favor making any decision to dispense with them in a given case solely dependent on a stipulation to that effect by the parties rather than a matter of the court's discretion. Mr. Sugerman added that the Rule 32 committee continues to favor the version of the amendments shown in Attachment A to the agenda of this meeting primarily because the latter leaves it to the court to decide, on a case-by-case basis, whether claim forms should be used rather allowing any party to preempt that decision by refusing to stipulate that they not be used. He further added that the committee does not believe that rules of construction should be included in the ORCP, as the amendment to subsection 32 F proposed in Ms. Potter's letter would do.

In response to a question by Judge Barron Mr. Sugerman stated that the federal class action rule, and those of the majority of states which have the model act, do not include an inflexible claim form procedure comparable to subsection 32 F(2). He also explained, in response to a question by Judge Carp, the meaning of "fluid recovery" or "cy pres" as those terms are used in class action practice.

The Council then heard remarks by Mr. Perrick, Chief Executive Officer of the Oregon Bankers Association, who said that he was in general agreement with Mr. Sugerman's summary and urged further careful consideration of the amendment proposed in Ms. Potter's letter.

The Council next heard remarks by Mr. Gardner, who identified himself as a partner in a law firm and a lobbyist for various business groups before the Legislative Assembly. Mr. Gardner described the amendment proposed by the committee as a major break with past practice in Oregon courts, and therefore was in marked contrast to the slow incrementalism he said usually characterizes ORCP amendments promulgated by the Council. He concluded his statement by noting that a less drastic way of tempering the inflexibility of the present claim form requirement would be by providing, as proposed in Ms. Potter's letter, that the requirement would be dispensed with if all parties so agree.

Judge Carp asked whether this question concerning claim forms had any legislative history about which the Council should be aware. Prof. Holland responded that, in the sole instance of an ORCP amendment promulgated by the Council being disallowed by the legislature, that body in 1981 requested an Attorney General's opinion as to whether dispensing with claim forms was within the Council's statutory authority. Despite the opinion's affirmative response, the legislature overrode an amendment to Rule 32, simply on policy grounds, that would dispense with claim forms and thus leave open the possibility of fluid recoveries in appropriate circumstances. At this point Mr. Gardner remarked that the Attorney General's opinion referred to concluded that, while the amendment in question was sufficiently procedural as to be within the Council's statutory authority, it also concluded that the question was a very close one.

Ms. Potter commented that a major purpose of the proposed amendments as shown in her aforementioned letter was to avoid exchanging the costs of litigating about claim forms for the costs of employing them. She briefly elaborated on this point by stating that, under the committee's proposals, the question of whether to use claim forms would likely be vigorously contested and expensively litigated in nearly every class action.

Prof. Holland added that, in response to a set of Rule 32 amendments drafted by Mr. Phil Goldsmith among others, some of which were ultimately approved and promulgated, the Council in 1992 again considered the question of whether to dispense with the claim form requirement or make it discretionary, but finally voted not to promulgate the amendment that would have had that effect. The principal reason stated by some members for not promulgating this amendment was that they regarded it as primarily relating to a matter verging close to the domain of substantive public policy, and was thus more appropriate for the legislature, rather than the Council, to decide.

Judge Barron asked if anyone knew roughly what the cost of distributing and processing claim forms tends to be. Mr. Goldsmith responded that he had recently had a class action in Multnomah County where the class consisted of about 40,000 persons and the cost of soliciting and processing claim forms was on the order of \$250,000.

Justice Durham asked Mr. Sugerman what changes, beyond making claim forms discretionary with the court, the committee's proposed amendment would accomplish. Mr. Sugerman responded that the amendment would add the factors courts would use in ruling on whether claim forms would be employed, and would also make clear that when claim forms are used the existing restriction on fluid recoveries would continue in force.

On motion of Mr. Sugerman, seconded by Mr. Svoboda, the Council voted to publish for comment the Rule 32 amendments proposed by the committee. The vote was 11 in favor, 7 opposed, and no abstentions.

At this point Ms. Potter signed off the phone conference with thanks to the Council for considering the alternative proposals set forth in her letter.

3b. ORCP 44 A - proposed amendments regarding court-ordered physical or mental examinations (see committee proposal copies of which were distributed at this meeting and a copy attached as Attachment B to agenda of this meeting) (Justice Durham for the committee). Justice Durham stated that the current proposal was intended to take into account members' comments made at the Council's June meeting, and also noted that it did not reflect the views of all committee members. He further commented that the current, revised proposal deleted the previously proposed amendment that would have permitted examinees to have a representative present during examinations as a matter of right because the committee judged that it did not have sufficiently broad support. But it contained, he stated, two important changes to Rule 44 which the committee sensed had wide support among the members, namely, the provision that examinations be recorded by audiotape unless either of the two exceptional circumstances pertains the parties otherwise agree in writing, or the court otherwise orders, and the provision that examinations may be compelled on notice rather than by motion and court order. Justice Durham also noted that the former change responded to the frequently expressed criticism of the current rule that it authorizes the only form of discovery for which no record is created.

Before signing off the phone conference Judge West stated that he supported these amendments in their revised form as the best compromise that can be achieved. Judge Carp asked who, under these amendments, could be present at examinations apart from the examiner and the examinee, to which Justice Durham responded that no other person could be present unless the parties so agreed in writing.

Mr. Corson then offered the following friendly amendments agreed to by the committee:

1. To restore the words "manner and conditions" in section 44 A following "shall state the time, place, ..." and to delete "Acting pursuant to ORCP 17 D, ..." at the beginning of subsection 44 A(2). Other friendly amendments also agreed to by the committee were: 1. To substitute

"However, the court shall limit or prohibit ..." for "However, the court may limit or prohibit ..." in subsection 44 A(3); 2. To substitute "an ethical rule that applies to the physician or psychologist" for "an ethical rule that applies to the medical professional" in subsection 44 A(3), and 3. To add ", and for good cause, ..." following "The court by order ..." in subsection 44 A(5).

On motion offered by Judge Carp, seconded by Judge Schuman, the Council voted to publish these amendments with the aforesated friendly amendments. The vote was 17 in favor, 1 opposed and no abstentions.

3c. ORCP 67 - notice to defendant of judgment in excess of amount claimed in original complaint (see Attachment C to agenda of this meeting) (Judge Barron). Ms. Clarke explained that the amendment proposed by Judge Barron would delete existing subsections 67 C(1) and (2), and add the underlined language shown on Attachment p. C-3. On motion offered by Mr. Corson, seconded by Judge Coon, the Council voted to publish this amendment for comment.

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

Agenda Item 5: New business.

5a. ORCP 54 E - proposal to amend submitted by the Procedure and Practice Committee of the Oregon State Bar (see Attachment D to agenda of this meeting) (Mr. Scott Pratt). Mr. Pratt explained the reason the committee recommended dividing section 54 E into three subsections as shown in Attachment D. Justice Durham suggested a friendly amendment whereby the underlined language in subsection 54 E(2) be changed to read as follows: "If the offer does not state that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursement or attorney fees to the court as provided in Rule 68." Mr. Pratt agreed to this suggested change. On motion offered by Mr. Sugerman, seconded by Judge Carp, the Council voted unanimously to publish this amendment for comment as thus amended.

Agenda Item 6: Adjournment. Without objection Ms. Clarke declared the meeting adjourned at 11:33 a.m.

Respectfully submitted,

Maury Holland, Executive Director