

CORRECTED COPY

**COUNCIL ON COURT PROCEDURES**  
**Minutes of Meeting of December 11, 2004**  
**Oregon State Bar Center**  
**5200 SW Meadows Road**  
**Lake Oswego, Oregon**

Lisa A. Amato  
Eric J. Bloch  
Benjamin M. Bloom  
Bruce J. Brothers  
Eugene H. Buckle  
Ted Carp  
Kathryn H. Clarke  
Allan H. Coon  
Don Corson  
Robert D. Durham

Martin E. Hansen  
Nely L. Johnson  
Nicolette D. Johnston  
Alexander D. Libmann  
Connie Elkins McKelvey  
Shelley D. Russell  
David Schuman  
David F. Sugerman  
John L. Svoboda  
Ronald D. Thom

Richard L. Barron, Daniel E. Harris and Russell B. West attended by speaker telephone.

Guests: Attorney David S. Barrows, Portland  
Mr. John F. Borden, Legislative Fiscal Office, Salem  
Ms. Susan Grabe, Director, Public Affairs Department, Oregon State Bar  
Attorney James N. Gardner, Portland  
Attorney Phil Goldsmith, Portland  
Mr. Thomas A. Perrick, President and Chief Executive Officer, Oregon Bankers  
Association  
Attorney Nancie K. Potter, with Foster Pepper Tooze LLP, Portland  
Ms. Danelle Romain, Office of Public Affairs Counsel, Salem

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

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**Agenda Item 1: Call to order.** The meeting was called to order by the Chair, Ms.  
Clarke, at 9:30 a.m.

**Agenda Item 2: Approval of 9-11-04 minutes.** On motion duly made and seconded the minutes of the 9-11-04 meeting were unanimously approved as distributed with the agenda of this meeting.

**Agenda Item 3: New report for consideration (Ms. Clarke):**

**3a. Rule 67--Judgments:** Discussion was had concerning Mr. Lance A. LeFever's 10-18-04 comment letter regarding the proposed amendments to this rule and Judge Barron's 11-9-04 letter in response.<sup>1</sup>

**Agenda Item 4: Proposed amendments to Oregon Rules of Civil Procedure (ORCP) (attached and as published in Issue No. 22 of the Oregon Appellate Courts Advance Sheets pp. A-4--A-17 (10-25-04)) (Ms. Clarke):**

**4b. Rule 32--Class Actions:**<sup>2</sup> Consideration of this item began with discussion about whether the merits of the proposed amendments to section F of this rule should first be addressed, or the procedural issue raised by Mr. Gardner be initially resolved. (That procedural issue was whether the Council's vote at its 9-11-04 meeting tentatively to adopt these amendments for publication and comment was invalid either because that vote represented only the views of a majority of the quorum present at the meeting, but not a twelve or greater number majority of the Council as Mr. Gardner contended is required by ORS 1.730(2), or because no record was made of how each member present voted as Mr. Gardner contended is required by ORS 192.650(1)(c)). Several members commented that before confronting what might be the difficult procedural issue, a straw vote should be taken to determine whether the proposed amendments command the required 15 affirmative votes. However, it was then unanimously voted that the Council go into executive session.

{In executive session the Council considered a letter dated 12-7-04 from Mr. Joseph T. McNaught of the General Counsel Division of the Oregon Department of Justice in response to Ms. Clarke's request for advice.}<sup>3</sup>

<sup>1</sup>here and throughout indicates that a copy of the letter or letters referred to has been filed with the original of these minutes.

<sup>2</sup>This item was taken up out of the order shown on the meeting agenda in order to accommodate guests who wished to speak to this proposal.

<sup>3</sup>"Minutes of executive sessions [of a public body] shall be kept in accordance with subsection (1) of this section." ORS 192.650(2).

**Item 4b, cont.d.**

Following conclusion of the executive session it was voted, with 17 members in favor and 6 opposed, to ratify the vote at the 9-11-04 meeting tentatively to adopt the section 32 F amendments for publication and comment, with Judge Bloch, Mr. Buckle, Judge Johnson, Ms. McKelvey, Mr. Svoboda and Judge West opposed.

Justice Durham, seconded by Judge Coon, then moved to ratify the vote at the 9-11-04 meeting tentatively to adopt for publication and comment the proposed amendments to ORCP 44. This motion carried by a vote of 22 in favor, one opposed, Mr. Buckle being opposed. A motion then carried, by vote of 22 in favor, Judge Bloch abstaining, to ratify the votes at the 9-11-04 meeting tentatively to adopt for publication and comment the currently proposed amendments to ORCP 9, 46, 54, 67 and 83.

Turning to the merits of the amendments proposed to section 32 F, Mr. Sugerman reported that the committee charged with preparing them had made extensive efforts to contact groups and organizations thought to have an interest in them, but had received relatively little response. However, he recalled that there had occurred a useful meeting with representatives of the banking industry, which he stated remained generally opposed, and also referred members to a letter dated 12-1-04 from Judge, and former Council Chair, Henry Kantor in which the latter expressed strong support for the proposed amendments, whereby the court could exercise discretion to require submission of claim forms only in those cases where they would serve a useful purpose.<sup>1</sup>

Mr. Sugerman pointed out particularly the statement in Judge Kantor's letter, based on his experience as judge in *Brown v. Taco Bell Corp.*, wherein he said he believed the parties had to spend upwards of a million dollars on claim form-related procedures which finally proved unhelpful. Mr. Sugerman concluded that everyone agreed with Judge Kantor's point that there do occur class actions where claim forms are essential, but not so in many instances. In response to Judge Barron's question about class action practice in federal courts, Mr. Sugerman replied that Fed. R. Civ. P. 23, the counterpart of ORCP 32, contained no provision concerning class forms in particular, but had long been interpreted to authorize case-by-case discretion.

Mr. James N. Gardner was then recognized to speak in opposition to the proposed amendments. He stated that he would not address the procedural issue concerning the vote tentatively to adopt the amendments since he had not seen the Department of Justice letter. He added that he and the Oregon Bankers Association shared a belief that ORCP 32 might well be in need of some modest reforms, and stated that perhaps the best way to proceed would be to adopt the compromise proposal, as set forth in the attachment to the letter dated 9-9-04 from Ms. Nancie K. Potter, whereby the claim form procedure could be dispensed with if all parties waived it by so stipulating.<sup>1</sup>

Mr. Gardner concluded his remarks by urging the Council not to promulgate the currently proposed amendments, which he stated would make too drastic a change in the law, and instead work with him and other concerned individuals and consider further the alternative suggested in Ms. Potter's letter or other possible amendments by which Oregon class action practice might be improved to the benefit of all. He added that the

**Item 4b, cont.d.**

amendments then pending would not be conducive to a good business climate in this state.

Mr. Corson asked whether, if all parties waived it, it would be permissible to dispense with the claim form procedure. Mr. Sugerman responded that, while he knew of no case on point, he had very little doubt but that a waiver by all parties would be accepted by the court and therefore effective. He added that he had no personal knowledge about what actual impact, if any, the existing claim form requirement has had on class action settlements.

The aforementioned Ms. Potter was then recognized, and remarked that the amendments under consideration might well drive up the costs of class actions by fostering intense litigation, at trial and on appeal, of the question whether claim forms must be, or should have been, submitted in a given case.

Having been recognized, Mr. Phil Goldsmith spoke in support of the proposed amendments, referring members to his letter to Ms. Clarke dated 12-1-04.<sup>1</sup> He pointed out that in the case mentioned in the first paragraph of his letter, *Franklin Federal Savings & Loan Ass'n. v. Dooley*, the Supreme Court disallowed the use of checks payable to prevailing class members in lieu of the claim forms mandated by the present rule, even though the defendant could calculate the amount of each member's recovery from its own records.

In response to Judge Barron's question at the 9-11-04 meeting, Mr. Goldsmith stated that the cost of soliciting and processing claim forms in a class action wherein he was attorney for the class representative was \$3.50 per member of a class numbering 42,500, or a total cost of about \$150,000, an expenditure that turned out to be wasted since the action was settled on terms whereby each class member was to receive an equal share of the settlement amount.

Discussion of this item concluded with Judge Bloch commending the committee for its hard work, and commenting that if the currently proposed amendments were defeated at this meeting, his sense was that they had considerable support and that the issues they posed would inevitably return to the Council. He therefore urged that Mr. Goldsmith and other proponents of this proposal attempt to work with Mr. Gardner and others who shared his concerns in an effort to formulate reforms in class action practice that would represent common ground and as broad a consensus as can possibly be achieved in this area.

Ms. Clarke, sensing that no further discussion of this item was in order, called for a vote on final promulgation of the proposed amendments. Mr. Sugerman so moved, seconded by Ms. Amato. This motion failed to carry by a roll call vote of 13 in favor, 9 opposed, and 1 abstaining, since a vote on final promulgation required a minimum of 15 votes in favor. (A record of this vote is filed with the original of these minutes.)

**4a. Rule 9--Service and filing of Pleadings and other Papers:** A motion offered by Mr. Corson, seconded by Mr. Buckle, to promulgate the proposed amendment

Item 4a, cont'd.

to section 9 F of this rule, as set forth on an attachment to the agenda of this meeting, was carried by unanimous voice vote.

Don 9/2

**4c. Rule 44--Physical and Mental Examinations of Persons; Reports of Examination:** Discussion of this item began by Justice Durham, who chaired the committee that prepared the proposed amendments to this rule, thanking those who had served as its members, namely, Mr. Buckle, Mr. Corson and Judge Johnson. He then referred to comment letters that had been sent in by Messrs. Michael Brian, Robert J. Neuberger and Lawrence Wobbrock, none of which, he noted, arrived in time for the committee to consider them before this meeting.<sup>1</sup>

Justice Durham stated that he had reluctantly concluded that various questions raised by these proposed amendments require further study, and that therefore the time was not ripe for their promulgation, a conclusion which he said he believed was shared by the other members of the committee. Mr. Buckle indicated agreement with Justice Durham's statement. Justice Durham added that he especially regretted the fact that failure to promulgate these amendments would mean that ORCP 44 would remain, for the time being, without a provision requiring that examinations be recorded.

On motion of Mr. Brothers, seconded by Judge Coon, it was voted to table these amendments on the understanding that the effect of this would be to return them for further consideration by the committee during the 2005-07 biennium. All members present voted in favor of this motion except for Judge Barron and Mr. Bloom, who both voted No. Judge Coon suggested that the committee give particular attention to the final sentence in subsection 44 A(4) of the proposed amendments, which read: "The examinee may refuse to disclose information or a communication that is protected from disclosure by the law of privilege." The point of this suggestion was that the language of this sentence did not make clear that an examinee's representative could instruct the examinee not to make the disclosure.

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**4d. Rule 46--Failure to make discovery; sanctions:** On motion duly made and seconded it was voted to promulgate the proposed amendment to subsection 46 A(2). This voice vote was unanimous except for Mr. Bloom, who voted No.

In view of the previous vote to table the proposed amendments to Rule 44, on motion duly made and seconded it was unanimously voted not to promulgate the proposed amendments to subsection 46 B(2) and paragraph 46 B(2)(e), but to table them.

At this point Judge Bloch excused himself from the meeting.

**4e. Rule 54--Dismissal of actions; compromise:** On motion duly made and seconded it was unanimously voted to promulgate the proposed amendments to Rule 54.

**4f. Rule 59--Instructions to jury and deliberation:** On motion duly made and seconded it was unanimously voted to promulgate the proposed amendments to section H of this rule.

**4g. Rule 67--Judgments:** On motion of Judge Barron, duly seconded, it was unanimously voted to promulgate the proposed amendments to section C of this rule.

**4h. Rule 83--Provisional process:** On motion duly made and seconded it was unanimously voted to promulgate the proposed amendments to this rule deleting reference to notice of bulk sales.

**Agenda Item 5. Suggestions regarding staff comments.** Prof. Holland stated that in some past biennia he had prepared "Staff Comments" which sought briefly to elucidate the reasoning and purposes which led the Council to promulgate ORCP amendments, thus providing a summary legislative history of them. He added that he would be happy to prepare explanatory comments to the amendments which the Council voted to promulgate at this meeting. He raised the question whether comments would serve much of a useful purpose since they are not published in either the West Publishing or the Oregon Revised Statutes versions of the ORCP, whereas they used to be published in the version distributed by Butterworth, which has been discontinued.

Several members commented that if any staff comments were to be prepared, they would have to be carefully reviewed by Ms. Clarke or perhaps a committee appointed for that purpose. It was also observed that well drafted amendments should not require explanatory comments. The consensus of members appeared to be that no staff comments should be prepared in connection with the amendments promulgated at this meeting.

**Agenda Item 6. Election of Year 2005 Officers.** Ms. Clarke explained that ORS 1.730(2)(b) provides that the Council elects its Chair "annually," and that, for obvious reasons, the other officers, the Vice Chair and the Treasurer, have been elected at the same time. Several members recalled that it had been the unvarying customary practice of the Council to elect the members who served as officers in the first year of a biennium to the same offices in the second year. By unanimous voice vote Ms. Clarke was elected to be Chair, Ms. McKelvey to be Vice Chair, and Ms. Johnston to be Treasurer of the Council in the year 2005.

**Agenda Item 7. Election of Legislative Advisory Committee (LAC) for the 2005 session of the Legislative Assembly.** Ms. Clarke explained that ORS 1.760(1) requires that, prior to each legislative session, the Council elect five of its members to constitute the Legislative Advisory Committee during that session, two members of which must be judges, two practitioners, plus the public member. She noted that the functions of this committee are set forth in ORS 1.760(2). By unanimous voice vote the following members were elected to constitute the 2005 Legislative Advisory Committee:

**Item 7, cont'd.**

Ms. Johnston, Chair; Judge Barron, Ms. Clarke, Judge Harris, and Ms. McKelvey, members.

**Agenda Item 8. Old business.** No item of old business was raised.

**Agenda Item 9. New business.** There was discussion of what the Council and its members might do during the forthcoming legislative session to, if possible, get its funding at least partially restored, and, even if refunding proved impossible, to ensure that the Council would survive in substantially its current form. It was noted that a totally unfunded state agency, such as the Council then was, requires a waiver of liability for various service assessments normally charged against agency funds, charges which in the past amounted to about \$6,000 each biennium.

Ms. Susan Grabe, the OSB's Public Affairs Director, stated that the Oregon State Bar remained strongly supportive of the Council, and would do everything it could to ensure its survival and, to any extent possible, advocate its being refunded. She added that refunding had every appearance of being an uphill battle given the current fiscal climate in the state. She emphasized the importance of individual Council members contacting their legislators, as well as any legislative leaders they might know, preferably before the opening of the 2005 session, particularly in light of the fact that many legislators who in the past had been strong supporters of the Council would not return for the 2005 session. Several members expressed appreciation to Ms. Grabe for the time and effort she had expended on the Council's behalf, and for all they were confident she would continue to do in the future.

Mr. John Borden of the Legislative Fiscal Office said that he would soon be meeting with Representative Dennis Richardson, and that he would pass on anything he might learn to Ms. Clarke. He added that there would be a House Bill to appropriate funds for the Council, and that there would be a hearing on the bill before a subcommittee of the Joint Committee on Ways & Means. Prof. Holland asked whether this meant that the Council might actually be refunded at least partially, to which Mr. Borden replied that the bill and hearing would merely serve a "place holder" function and probably did not portend refunding.

Ms. Clarke stated that she hoped to have a telephone conference with the Legislative Advisory Committee in the near future. She also asked that members pass along to her any thoughts and suggestions they might have concerning how best to deal with the legislature, as well as about the Council's future generally.

Prof. Holland stated that in recent past biennia the OSB Board of Governors had shown consistent willingness to reappoint to second four-year terms any members whose first terms would expire. He further stated that, unless otherwise instructed by any

**Item 9, cont'd.**

member who did not wish to be appointed to a second term, he would forward a request and recommendation to the Board that all members whose first terms would expire in August of 2005 be reappointed for a second term.

This item was concluded by Ms. Clarke expressing deep appreciation on behalf of the Council to those members whose second terms of membership would expire in August of 2005, and were ineligible for immediate further reappointment, for their service and contributions to the work of the Council, which expression was followed by a round of applause. Justice Durham remarked that this meeting marked the completion of ten years membership on the Council and that he had enjoyed the experience enormously.

**Agenda Item 10. Adjournment:** Without objection Ms. Clarke declared the meeting adjourned at 12:00 p. m.

Respectfully submitted,

Maury Holland, Executive Director