IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL G. LINDELL, JR., Plaintiff-Relator, v. ALEX KALUGIN AND COUNTRYSIDE COUNSTRUCTION, INC., an Oregon corporation, Defendants-Adverse Parties.	)	Clackamas County Circuit Court Case No. CV10040946 Supreme Court No. S059437 MANDAMUS PROCEEDING

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I. Introduction

Amicus Curiae Oregon Association of Defense Counsel ("OADC") appears in support of defendant-adverse party Countryside Construction Inc.'s positions in this case. Although OADC supports defendant's arguments on all issues on review, OADC focuses its analysis on: (1) the trial court discretion allowed by ORCP 44 A to tailor conditions on an ORCP 44 A medical examination that it determines are appropriate to the situation; (2) the impropriety of re-writing ORCP 44 A or usurping trial court discretion in matters concerning ORCP 44 A medical examinations, particularly when neither the Council on Court Procedures or the legislature has approved either the changes sought by plaintiff or the condition *compelled* by the alternative writ; (3) this court's surprising exercise of mandamus authority to review and then control trial court discretion, in violation of ORS 34.110; and, (4) to amplify the reasons why the trial court was well within the discretion that remains in ORCP 44 A to deny the presence of counsel, or any observer or recording, at the neuropsychological examination requested.

Fully aware that the Council on Court Procedures, if not the legislature directly, is the proper authority to consider proposed amendments to the Oregon Rules of Civil Procedure, the plaintiffs' bar has attempted repeatedly, but unsuccessfully, over the last decade to have the Council approve and

propose amendments to ORCP 44 A, to require the presence of an observer and/or a recording.[1] The Council has noted the sharp division in views between the plaintiffs and defense bars as to whether ORCP 44 A needed amendment and, if so, how. Minutes, Council on Court Procedures, June 12, 2004, 4 (comments by Justice Durham) (App. 13). Those efforts have failed, as the discussion below in section C shows. The vanguard has now shifted to this court, where plaintiff, with OTLA's support, seeks to accomplish judicially, what they have been unable to accomplish through the Council, or the legislature.

This court recognized half a century ago that a fundamental purpose of the medical exam requested by the defense is to obtain an neutral assessment of the plaintiff's injuries in an objective environment by an examiner selected by the defense. *See Pemberton v. Bennett*, 234 Or 285, 287, 381 P2d 705 (1963). ORCP 44 A preserved the examination, and, consistent with *Pemberton*, maintained discretion in the trial court to determine, when the parties could not otherwise agree, the conditions appropriate to the

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[1] The Council on Court Procedures was formed in 1978 and in 1979 proposed a comprehensive body of civil trial court rules, which were approved by the legislature, effective January 1, 1980. The primary function of the Council since then has been to amend the ORCP "whenever the need for, or utility of, amendment is demonstrated." www.councilonourtprocedures.org, *History of the Council* page. The legislature has retained the power to rescind ORCP amendments proposed to it by the Council and to amend the ORCP on its own initiative. *Id.*

circumstances presented. ORCP 44 A. No matter how tempting the inducement, this court should decline the unmistakable invitation to tread where the Council has refused to go, or to re-write ORCP 44 A through mandamus review by reading into the rule a requirement that does not exist. The court's writ in this case can and should be righted by dismissing the mandamus proceeding on the basis that the writ was improvidently granted, or returning the exercise of discretion to the trial court through the court's review on the merits.

II. This Court's Mandamus Authority is Statutorily Defined and Limited To Prevent the Direction of Trial Court Discretion

ORS 34.120 provides that the Supreme Court may take original jurisdiction in mandamus proceedings as provided in section 2 of amended Article VII of the Oregon Constitution. ORS 34.110 specifies when and to whom a writ of mandamus may issue:

> "A writ of mandamus may be issued to any inferior court, corporation, board, officer or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station; but *though the writ may require such court * * * to exercise judgment, or proceed to the discharge of any functions, it shall not control judicial discretion.* The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law."

ORS 34.110 (emphasis added).

In light of the statutory mandate, this court has long held that mandamus is not available to review the exercise of trial court discretion, *State ex rel Douglas County v. Sanders*, 294 Or 195, 198 n 6, 655 P2d 175 (1982), or a remedy available to control judicial discretion, *Sexson v. Merten*, 291 Or 441, 445, 631 P2d 1367 (1981). It has, however, been held a proper remedy when an inferior court acts in excess of its lawful authority. *State ex rel Keisling v. Norblad*, 317 Or 615, 623, 860 P2d 241 (1993) (claim of fundamental legal error underlying trial court ruling precluding Secretary of State from submitting legislatively proposed constitutional amendments to voters as single measure), *abrogated on other grounds as explained in League of Oregon Cities v. State*, 334 Or 645, 657 n 14, 56 P3d 892 (2002).[2]

Because this court's mandamus authority is statutorily limited, the only conclusion to draw from the fact that the alternative writ issued here is that this court somehow concluded the trial court had acted in excess of its lawful authority, *Keisling*, 317 Or at 623; *Sexson*, 291 Or at 445, or outside the permissible range of discretionary choices open to it, when it denied the presence of plaintiff's counsel at the neuropsychiatric evaluation. *See Riesland v. Bailey*, 146 Or 574, 578-80, 31 P2d 183 (1934). The court's

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[2] OADC appreciates that the court must also have agreed that appeal following trial would not afford plaintiff an adequate remedy, *see Sexson*, 291 Or at 445, a conclusion with which OADC respectfully disagrees.

apparent conclusion necessarily depends on ORCP 44 A and the proper construction of the rule.

A. ORCP 44 A

ORCP 44 A provides that the trial court may order a party to submit to a physical or mental examination by a physician or a mental examination by a psychologist. The rule further provides:

> "The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and *shall specify the time, place, manner, conditions, and scope of the examination* and the person or persons by whom it is to be made."

ORCP 44A (emphasis added). Of course, "[t]he best indication of legislative intent is the words of the statute themselves." *England v. Thunderbird & SAIF Co.*, 315 Or 633, 638, 848 P2d 100 (1993). The court may not insert what has been omitted or omit what has been inserted. ORS 174.010; *State v. Rogers*, 330 Or 282, 290, 4 P3d 1261 (2000).

On its face, ORCP 44 A permits the trial court discretion whether to grant an order for a medical or psychological examination of a plaintiff when requested by a defendant. ORCP 44 A does not, by its plain terms, require any specific conditions on the examination, only that the order must specify the manner and conditions under which the examination will be conducted. Respectfully, and most assuredly, ORCP 44 A does not contain any provision

requiring the attendance of counsel at a defense neuropsychiatric examination.

Plaintiff's Petition itself acknowledged the discretion to tailor the conditions for an ORCP 44 A examination. The Petition asked this court "to enter an Order establishing appropriate protections concerning the scope, manner and conditions of the defense psychological examination pursuant to ORCP 44 A." Petition for Writ of Mandamus, p 3. Plaintiff did not, in fact, argue that he had a *right* to have his *lawyer* in attendance, only generally that his right to assistance of counsel would be served by an observer, which could include a friend, *or* family member, *or* his lawyer, *or* a video *or* audio recording of the examination. *Id.*; Memorandum of Law – Mandamus, p 3. Plaintiff's analysis, although unclear, was that any of this range of protections would serve that interest. In light of that argument, plaintiff did not argue, let alone demonstrate any immutable constitutional right to have counsel present in an ORCP 44 A physical or mental examination.

The court's apparent conclusion that the trial court acted outside the bounds of its discretion in failing to condition the examination on the presence of counsel cannot be squared with the plain text of ORCP 44 A, this court's own decisions, or the legislative history of the rule.

B. The Court's Alternative Writ Erroneously Commands the Exercise of Discretion in a Particular Manner

On July 28, 2011 the court issued its order allowing Relator Lindell's petition and issued its ALTERNATIVE WRIT MANDAMUS commanding the trial court:

> "* * * to enter an order permitting plaintiff Lindell to have legal counsel present as an observer at the ORCP 64[*sic*] examination of plaintiff, under the condition that legal counsel is unobtrusive and does not interfere with the examination except as necessary to protect the legal interests of plaintiff Lindell * * *."

ORDER; ALTERNATIVE WRIT OF MANDAMUS pp 1 – 2.[3] Two things immediately stand out in the action on the petition for writ of mandamus. The first is the surprising exercise of mandamus authority in a discovery matter which all the parties, at least inferentially, acknowledge is inherently a question of trial court discretion; that is, what conditions, if any, are appropriate to place on a neuropsychiatric examination requested by defendant pursuant to ORCP 44 A. The second is that the court's alternative writ commands the trial court to exercise its discretion in a particular way – that is, to enter an order that permits relator to have legal counsel present at

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[3] In the alternative, the WRIT provided that the court could show cause for not doing so. *Id.* at 2. That, of course, is what Hon. Roderick A Boutin did, bringing the issues before the court, but under its statutory mandamus authority. ORS 34.110.

the examination, when plaintiff's petition sought a writ compelling the trial court to enter an order "permitting plaintiff to bring an observer and/or to audio or videotape the defense psychological examination." In other words, plaintiff's petition asked this court to issue a writ that would have directed the trial court to order one of the *range* of conditions that would have satisfied plaintiff: presence of an "observer," to include a friend *or* family member *or* counsel, "and/*or* to audio *or* videotape the psychological examination." Memorandum of Law-Mandamus, p 9; Petition for Mandamus, pp 2-3 ("[P]laintiff petitions this court for a Writ of Mandamus compelling the trial court to enter an Order adequately protecting plaintiff and plaintiff's access to counsel in his personal injury case by ordering that he may bring an observer and/or he may audio or videotape the examination."); Presumably, any one of the conditions requested would have satisfied plaintiff, and, given the Second Assignment of Error in plaintiff-relator's merits brief, would satisfy plaintiff even now.

Despite the requirement in ORS 34.150 that an alternative writ shall show "the obligation of the defendant to perform the act," as well as the omission to perform, ORS 34.150 (2)(A) and (B), what led this court to pick from the range of conditions requested is unknown. If the court was of the opinion that an abuse of discretion had occurred because the trial court failed to order any of the requested conditions, the appropriate order would have

been to require the court to order a protection from the alternatives requested. The conundrum is that such an order would only highlight the discretionary nature of the ruling in question.

The court's alternative writ, and any peremptory writ that might follow, raises significant – if not disturbing – questions about the new reach of mandamus authority.[4] It may be that the court desires to review ORCP 44 in its entirety in conjunction with its consideration of the provisions of ORCP 44 C, currently under review in *A.G. v. Guitron*, 238 Or App 223, 241 P3d 1188 (2010), *rev granted* 350 Or 241 (2011) (argued and submitted). Although a global review of a discovery rule that has been much debated in the trial courts may be desired, that reasoning, if used, is not sound. This court recognized in *State ex rel Pac. Tel & Tel. Co. v. Duncan,* 191 Or 475, 495, 230 P2d 773 (1951), that the legislature intended that mandamus should be an extraordinary remedy, and writ of mandamus as authorized by statute is a command and not a means of controlling judicial discretion or bringing about its appellate review. In *State ex rel Coast Holding Co. v. Ekwall*, 144 Or 672, 676, 26 P2d 52 (1933), *overruled in part on other grounds by State*

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[4] *State ex rel Anderson v. Miller*, 320 Or 316, 882 P2d 1109 (1994), is inapposite. Although the court exercised mandamus authority in that case, the court found a right to videotape a deposition in ORCP 39 C(4), which provides that a notice of deposition "may provide that the testimony be recorded by other than stenographic means." 320 Or at 319. Notably, ORCP 44 A contains no similar wording.

ex rel Maizels v. Juba, 254 Or 323, 326-28, 460 P2d 850 (1969), the court stated:

> "We know of no rule of law more firmly established both by statute and by the decisions of this court than the rule that, so long as an inferior court or tribunal acts within the scope of its authority touching any matter about which it must exercise its discretion, its action cannot be revised by mandamus."

The second point is equally as concerning. The command to the trial court was to issue an order that requires that relator's attorney be allowed to attend the examination. This reaches even beyond the relief requested – which was to have an observer present or to allow a recording. There is no provision in ORCP 44 A that a party being examined in every case is entitled to have an observer present, let alone that there is a right to have an attorney attend. Oregon case law has certainly never recognized such a right. Instead, this court has long recognized the discretion afforded the trial court to fashion conditions appropriate to the circumstances. *See Pemberton*, 234 Or at 288-89.

The legislature, working through the Council on Court Procedures, has rejected attempts over the years to amend ORCP 44 A to incorporate provisions to require the presence of a representative at a Rule 44 A examination. Yet the alternative writ issued removed the discretion to deny the attendance of a plaintiff's attorney. This ruling is contrary both to the admonitions against mandamus as a tool to control trial court discretion, as

well as against substituting judicial judgment for that of the legislature. *See Holien v. Sears, Roebuck and Co.*, 298 Or 76, 95-96, 689 P2d 1292 (1984) ("The responsibility of this court is to apply and interpret the law, not to assume the role of a legislative chamber.")

C. Legislative History

ORCP 44 A is a statute. *See State v. Arnold*, 320 Or 111, 119, 879 P2d 1272 (1994) (construing ORCP 64 B(4)).

> "In interpreting a statute, this court's task is to discern the intent of the legislature. ORS 174.020. To do that, this court examines both the text and context of the statute. The text of the statute is the starting point for interpretation and is the best evidence of the legislature's intent. If the legislature's intent is clear after an inquiry into text and context, further inquiry is unnecessary."

Arnold, 320 Or at 119 (*citing PGE v. Bureau of Labor and Ind.*, 317 Or 606, 610-11, 859 P2d 1143 (1993)); *see also State v. Gaines*, 346 Or 160, 165, 206 P3d 1042 (2009) ("cardinal rule" of statutory construction is to pursue intention of legislature, if possible, as codified in ORS 174.020). To determine the intent of the legislature, the court starts with its text, read in context. *Gaines*, 346 Or at 171. The court will consult proffered legislative history where that legislative history appears useful to the court's analysis. ORS 174.020; *Gaines*, 346 Or at 172. The legislative history of ORCP 44 A reveals the error in the court's exercise of mandamus authority in this case.

ORCP 44 A was first adapted in 1978 from various sources, including FRCP 35. The parties, and OTLA, have demonstrated the divergent views among the courts concerning the discretion afforded the trial court by the federal rule, and related statutes and rules of civil procedure in other jurisdictions to allow or prohibit the plaintiff's counsel or other person from being present during the examination, and to allow or prohibit tape recording (whether audio or video), absent unusual or compelling circumstances.

OADC focuses, as should the court, on Oregon law and practice. Before the adoption of ORCP 44, this court decided *Pemberton*, 234 Or at 287, which addressed the question of whether counsel had a right to be present during a medical examination requested by the defendant:

> "We hold that whether or not counsel can insist on being present at a medical examination of his client by a physician other than the treating physician, is a matter largely within the discretion of the trial court."

See also Carnine v. Tibbetts, 158 Or 21, 34, 74 P2d 974 (1937) (holding that trial court abused its discretion by refusing to order a physical examination, court stated requirement of physical examination by a physician selected by the opposing party is largely within the discretion of the trial court). *Pemberton* was the law in Oregon when ORCP 44 A was adopted, and it remains the law today. Nothing in ORCP 44 A suggests an intent to curtail trial court discretion, already recognized by this court, in ordering medical

and psychological examinations.

The debate over amending ORCP 44 A to require attendance of a representative for the injured party, or a recording, has waged to varying degrees at the Council on Court Procedures several times over the years. Despite much discussion and dedicated effort by plaintiffs-oriented lawyers, both on and off the Council, the Council has rejected, for lack of necessary support, proposed revisions to ORCP 44 A that would require the presence of plaintiff's counsel or other representative at an ORCP 44 A medical examination, or permit a video or audio recording.

Among the alternative amendments under consideration in the 1999-2000 biennium, were proposals that would have permitted counsel or other representatives to be present. Minutes, Council on Court Procedures, December 9, 2000, pp 3-4 (App 8-9). The alternative amendments failed, including Alternative One, which would have stated:

> "Representation; reservation of objections; assertion of privileges. The examinee may have counsel or another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges."

Agenda, Council on Court Procedures, December 9, 2000, Proposed 44 A, Alternative One (App. 7-9). This proposal also would have permitted any

party, the examinee, or the examining physician or psychologist to record the examination by audiotape in an unobtrusive manner. *Id.*

One member, Mr. Ralph Spooner, acknowledged the amendments as an effort by the plaintiffs bar "to get a major change in long-established practice adopted." Minutes, December 9, 2000, p 3 (App. 8). Justice Durham, then a judicial member of the Council, was not convinced that any abuses were occurring in connection with court-ordered medical examinations. He added that "the present situation is one of unguided judicial discretion exercised by individual trial judges." *Id.* He commented, however, that many trial judges "now wished the Council to provide greater direction with respect to whether and how examinations would be recorded and the circumstances, if any, where a plaintiff-examinee's counsel or other representative could be present during examinations." *Id.* Justice Durham viewed Alternative One as a compromise position, which would afford greater consistency "while not depriving trial judges of their appropriate discretion." *Id.*

Alternative Two would have permitted any party to record the examination stenographically or by audio recording, but not require a representative. *See* Agenda, Council on Court Proceedings, December 9, 2000Proposed 44 A, Alternative Two (App 9-10). Alternative Three would have expressly provided that counsel or other representative may attend by agreement of the parties or on order of the court, but did not have a recording

component. *Id.* at Alternative Three. According to Mr. William Gaylord, "the plaintiffs bar supported only Alternative One and was opposed to Alternatives Two and Three." Minutes, December 9, 2000, p 3 (App 8). Thus, the plaintiffs' bar did not support any amendment that left the trial court with discretion to deny attendance of counsel or other representative. In the end, all the proposed alternatives failed to pass, and the text of ORCP 44 A was left unchanged. *Id.* at App. 9.

In 2004, Justice Durham chaired a committee that again proposed amendments to ORCP 44 A regarding court ordered physical and mental examinations. In March, Justice Durham reported that some members sought to have "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." Minutes, Council on Court Procedures, March 13, 2004, p 4 (App. 11).

In June 2004, the committee presented its report. Discussion included the history of the proposed amendments to ORCP 44 A in 2000, and that those amendments had failed to obtain a supermajority by one vote. Minutes, Council on Court Procedures, June 12, 2004, p 4 (App. 13). Justice Durham noted the "sharp division" in views between the plaintiffs' and defense bars as to whether ORCP 44 A needed amendment and, if so, how. *Id.* Justice Durham discussed the view of some that the current rule was 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." *Id.*

The Council reviewed the proposed amendments, discussed the views in favor and against, and heard comments from guests, including a neuropsychologist, Dr. Larry Friedman. The minutes show:

> "[Dr. Friedman] 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."

Id. at App. 14. The June discussion concluded with straw votes, showing a divided committee on whether ORCP 44 A should be amended. *Id.*

When the Council met again in September, Justice Durham reported on the committee progress. He explained the committee proposal took into

account, but did not reflect, the views of all the committee members. Minutes, Council on Court Procedures, September 11, 2004, p 3 (App. 16). By then, the effort to require presence of a representative had been abandoned. Justice Durham noted that the revised proposal then being considered deleted the provision "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." *Id.*

Justice Durham continued:

> "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."

Id. The discussion continued:

> "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."

Id. Thus, as of 2004, there was a clear understanding by the Council that a party being examined had no right to the attendance of counsel or other representative absent agreement or court order. On that understanding, the Council voted to publish the proposed amendments to allow recording of ORCP 44 A examinations, with approved "friendly amendments." *Id.* at App. 14.

The proposed changes got no further than publication. In December 2004, the proposed amendments to ORCP 44 A were tabled:

> "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."

Minutes, Council on Court Procedures, December 11, 2004, p 5 (App. 19).

Efforts to amend ORCP 44 A since 2004 have been in rather short-lived. In October 2005 the Council formed a subcommittee to study issues related to the production of records by plaintiff's expert witnesses. Minutes,

Council on Court Procedures, October 8, 2005, p 4 (App. 21). Mr. Ben Bloom raised a concern that "there might well be some problems concerning IME's that need fixing." *Id.* The committee was asked to "gather their thoughts" and report back on any conclusions reached. *Id.* In November 2005, the Council heard a brief report from the Rule 44 Committee. The minutes note:

> "There was also discussion of Rule 44 A's practice regarding who can be present, whether a recording can be made, etc. . . . Ms. McKelvey, [vice chair] then asked if there was a consensus of the group whether they should look at the Rule 44 A IME issue this year. The Council decided not to look at the IME issue."

Minutes, Council on Court Procedures, November 12, 2005, p 3 (App. 23).

In 2007 the committee charged with reviewing ORCP 44 A (App. 27) concluded that the rule should not receive further study. Minutes, Council on Court Procedures, December 8, 2007, p 6. The Council had also discussed briefly the prior efforts to amend ORCP 44 B and agreed not to reconsider amendments to the rule at that time. Minutes, Council on Court Procedures, November 10, 2007, p 9 (App. 25).

This review shows that although ORCP 44 A has had vigorous debate at the Council on Court Procedures through the years, the undebatable understanding, even by proponents of change, is that ORCP 44 A vests discretion in the trial courts to tailor the conditions appropriate for an

ORCP 44 A examination to the particular circumstances presented. Minutes, Council on Court Procedures, December 9, 2000, p 3 (App. 8) ("present situation is one of unguided judicial discretion exercised by individual trial judges") (Justice Durham); Minutes, Council on Court Procedures, June 12, 2004, p 4 (App. 13) (view that the current rule was faulty "in failing sufficiently to set rules, leaving too much latitude to negotiation between parties and the discretion of individual judges" (reported by Justice Durham). The "sharp division in views between the plaintiffs' and defense bars as to whether ORCP 44 A needed amendment and, if so, how," *id.*, has not changed. The forum, however, has shifted, through a surprising exercise of mandamus jurisdiction.

III. Oregon Law Favors a Medical Examination Unhampered By Conditions that Diminish the Accuracy of the Process

The parties have amply demonstrated the wide range of discretion exercised by the trial courts in imposing conditions on medical and psychological examinations in Oregon and elsewhere. This court was not persuaded almost fifty years ago when it decided *Pemberton v. Bennett* that a party's right to have counsel represent him in litigation carries with it a right to have counsel present at a physical examination. 234 Or at 288. Although a trial court *could* condition the examination upon the attorney being present, if factors such as the medical problem in issue or the nature of the proposed

exam supported it, this court recognized that "a medical examination is not an occasion when the assistance of counsel is normally necessary." *Id.* The court reviewed some of the reasons, which were among the same reasons for Pro Tem Judge Boutin's order (ER 1-3) in this case:

> "On the other hand, a medical examination is not an occasion when the assistance of counsel is normally necessary. This is so because of the nature of a medical examination, which is very different, for example, from an oral discovery examination by opposing counsel. It is also not ordinarily regarded as an adversary proceeding because a medical examiner is not supposed to be, and ordinarily is not, seeking to establish facts favorable to the party who engaged him to make the examination. This is the case even though the examining physician is selected and compensated by the opposing party. Unfortunately, such objectivity is not always present.
>
> "The presence of an attorney in an examination would probably tend to prolong the examination and could create an atmosphere in which it would be difficult to determine the examinee's true reactions. This would result in it becoming more difficult to secure a medical examination by the kind of physician whose opinions are particularly desired by the court, i.e., those who regard the examination as an objective attempt to find the facts regardless of the consequences to any party."

234 Or at 288.[5]

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[5] In *Pemberton*, the plaintiff assigned error to the trial court's granting of defendants' motion to require plaintiff to be physically examined by a physician selected by the defendants, out of the presence of plaintiff's attorney. *Id.* at 286. This court held that without any showing by plaintiff in what way the examination would be prejudicial, the trial court had no basis for determining whether the examination should be conducted and the assignment was groundless. *Id.* at 289.

The Oregon Court of Appeals expressed the same concerns in *Tri-Met, Inc. v. Albrecht,* 95 Or App 155, 157-158, 768 P2d 421 (1989), *rev'd on other grounds*, 308 Or 185, 777 P2d 959 (1989):

> "[T]he presence of an attorney at a medical examination is not favored. It could tend to prolong the examination and create other than a neutral setting for what is supposed to be an objective evaluation. * * * [T]he presence of an attorney at an independent medical examination . . . would only serve to threaten the objective environment and . . . could lead to obstruction of the examination." (citations omitted).

A. Presence of Another Deprives Defendant of Choice of Examiner

Under Oregon law, a defendant is presumptively entitled to choose the physician conducting the examination of the plaintiff and a claim of bias is not sufficient to defeat that choice. *Bridges v. Webb*, 253 Or 455, 457, 455 P2d 599 (1969). An obvious problem with requiring an observer, or recording the medical examination, has been addressed by Oregon law: it will operate to deprive defendant of its choice of physician examiners, just as defendant Countryside demonstrated would occur in this case. *See* Memorandum in Opposition to Plaintiff's Position for Mandamus, p. 7. In *Bridges*, the court pointed out that defendant's choice of examiners should be honored, absent a valid objection, in the interests of "provid[ing] both parties with an equal opportunity to establish the truth." *Id.* A defendant is

entitled to have plaintiff examined by a doctor "in whom defendant has confidence and with whom he can consult." *Id.*

B. Observers Undermine the Goal of Putting Defendants on Equal Footing

Oregon federal courts have also recognized the tendency to interject an adversarial atmosphere as an unavoidable reality with allowing observers. In *Romano v. II Morrow, Inc.*, 173 FRD 271, 274 (D Or 1997), the plaintiffs wanted a non-attorney observer present during their physical examinations. The court noted that an observer, court reporter or recording device would constitute a distraction during the examination and would diminish the accuracy of the process. *Id.* The presence of an observer would also "interject an adversarial, partisan atmosphere into what should be otherwise a wholly objective inquiry." *Id.* (quoting *Shirsat v. Mutual Pharm. Co.*, 169 FRD 68 (ED Pa 1996)).

The adversarial influence by observers, even non-attorney observers, is a real impediment to the examination itself. Scenarios are increasingly common in which the representative requested is not a family member or friend, but, for example, a life care planner or a non-treating expert hired by a plaintiff's counsel as the "representative". What is the purpose of the presence of such individuals but to influence the examination or plaintiff's performance?

Still, there are even more compelling reasons for an attorney not to be present. A lawyer is even more likely to create an adversarial or partisan atmosphere in an examination than would a non-lawyer observer. In *Wood v. Chicago, M., St. Paul & Pac. R. Co.*, 353 NW2d 195, 197 (Minn App 1984), the court noted:

> "To require routinely that attorneys be present during adverse medical examinations is to thrust the adversary process itself into the physician's examining room. The most competent and honorable physicians in the community would predictably be the most sensitive to such adversarial intrusions. The more partisan physicians might feel challenged to outwit the attorney. Thus, we fear that petitioner's suggested remedy would only institutionalize the abuse, convert adverse medical examiners into advocates, and shift the forum of controversy from the courtroom to the physician's examination room."

Further, if there is any matter during the examination which the plaintiff wants to contest, the attorney is necessarily a witness to such matter. Of course, a lawyer may not act as an advocate at trial if she is likely to be a witness.

The plaintiff's medical condition is something uniquely within the knowledge of the plaintiff. The need to put defendants more closely on an equal footing with plaintiff with regard to knowledge about the plaintiff's alleged injuries is an important function of ORCP 44. Neither defendants and their counsel, nor an "observer" on their behalf, are allowed to be present when the plaintiff is examined by the plaintiff's own physician or

other expert. No tape recordings of such examinations are available to the defendants. Yet the plaintiff's condition is central to the claim being litigated. *See generally, Bridges*, 253 Or at 457 (endorsing the policy of putting both parties on an equal footing through defendant's choice of medical examiner).[6]

The absence of discovery of expert witnesses is an even more compelling reason why, in Oregon, defendants should be afforded medical examinations without interference or monitoring by plaintiffs, and why there should be no rule requiring the presence of counsel, or an observer. At least under the federal rules, a defendant does have some access to plaintiff's expert witnesses, by interrogatory and deposition, to find out what they know about plaintiff's condition and what conclusions the experts reached. In Oregon, by contrast, none of that direct information is available to a

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[6] *See also Tomlin v. Holecek,* 150 FRD 628, 632 (D Minn 1993), in which the court said that one of the central purposes of the rule is "to provide a 'level playing field' between the parties in their respective efforts to appraise" the plaintiff's condition. To that end the party requesting the examination should be free from oversight by the opposing party. As the court noted:

> "To the extent that the Plaintiff regards [the examination by defendant's examiner] as providing an unacceptable degree of license with which she [the examiner] may question him at will, that degree of latitude is no treater than the liberality extended to the Plaintiff's consultants, who are expected to testify in this matter on the same general subject matter as may be expected from [defendant's examiner]." *Id.* at 633.

defendant.

In preparing a defense in personal injury actions, Oregon defendants are hamstrung by a rule that is unique to Oregon – that defense counsel can have no communication with treating doctors. In Oregon, a defendant is not allowed to make inquiry of plaintiff's treating physician, because of the physician-patient privilege, which is not ordinarily waived until the time of trial. *State ex rel Grimm v. Ashmanskas*, 298 Or 206, 213, 690 P2d 1063 (1984). In almost every other state the physician patient privilege is waived upon filing.

In Oregon, plaintiff controls if and when the privilege will be waived before trial, and plaintiff can delay that waiver by choosing to delay, or deferring entirely, depositions of defendants or other providers. No inquiry whatsoever can be made of any of plaintiff's other experts because of Oregon's rule prohibiting discovery of expert witnesses. *Stotler v. MTD Prods., Inc.*, 149 Or App 405, 943 P2d 220 (1997). Although the plaintiff himself may be deposed, he does not have the medical knowledge to provide any significant medical information about his condition, what examinations and tests were conducted, or the thought process by which his physicians reached their conclusions.

In order to afford a defendant the fullest opportunity to evaluate plaintiff's alleged injury, the examining physician must be given an

opportunity to conduct a complete examination, with as few constraints as reasonably necessary, and without interference from witnesses or audio or videographers. The reason is that this examination is a defendant's only opportunity to obtain an independent evaluation what, medically or psychologically, is actually wrong with the plaintiff.

Oregon defendants have no way to evaluate plaintiff's injuries first hand, except through the medical examination opportunity offered by ORCP 44 A. Rule 44 A is the only certain way a defendant gets to talk to a doctor who examined the patient to find out what the physical or mental condition is. Putting impediments in the way frustrates the free exercise of the physician's examination. As the court recognized in *Pemberton*, two important things happen. It discourages doctors from participating, and, in a case by case basis, it interferes with the adequacy of a medical exam.

Trial judges are appropriately given the discretion to sort through and balance the competing interests of the examinee and the defendant. They are keenly aware that, at trial, one of the first questions from plaintiff's counsel on any cross examination of a defense expert witness who bases his or her opinion only on medical records is, "Did you ever lay eyes or hands on the patient?" The medical and mental examinations provided for in ORCP 44 A are a defendants' only opportunity to address that question head on.

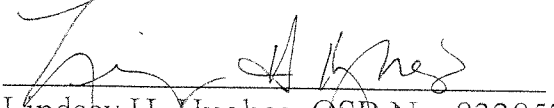
IV. Conclusion

The court should not take on the legislative function that plaintiff has brought to its doorstep. The petition for writ of mandamus raised a discretionary ruling of the trial court and sought an order that would require the trial court to "establish appropriate protections" from a variety of safeguards sought. Although the petition did not advocate for a particular relief, this court has nonetheless exercised its mandamus authority to control the trial court's exercise of discretion, by requiring a particular condition to the psychological examination of plaintiff.

The alternative writ issued is, respectfully, an enigma on many fronts. The court should not compound the errors underlying the issuance of the alternative writ by issuing a peremptory writ that directs the trial court to do what ORCP 44 A does not compel, and the Council on Court Procedures has refused to require each time the issue has been considered. The trial court's discretion in matters of ORCP 44 A examinations should be preserved.

DATED this 18th day of November 2011.

KEATING JONES HUGHES PC

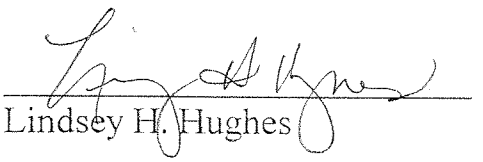


Lindsey H. Hughes, OSB No. 833857
Attorneys for Amicus Curiae
Oregon Association of Defense Counsel

Certificate of Compliance

I certify that this brief complies with the word count limitation pursuant to ORAP 5.05(2)(b); the word count is **7531** words. I further certify that this brief is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(4)(f).

In addition, I certify that this document was converted into a searchable PDF format for electronic filing and was scanned for viruses; it is submitted to the court brief bank virus-free as required by ORAP 9.17(5)(b).



Lindsey H. Hughes

Appendix

*** NOTICE ***
PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, December 9, 2000
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Call to order (Mr. Alexander)
2. Approval of 9-9-00 minutes (enclosed)
3. Proposed amendments to Oregon Rules of Civil Procedure (attached) (Mr. Alexander):
   - a) RULE 7 — SUMMONS
   - b) RULE 21 — DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS
   - c) RULE 32 — CLASS ACTIONS
   - d) RULES 44/46 — PROPOSAL NO. 1: PROPOSED AMENDMENTS TO RULES 44 A/46 B - PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS
   - e) RULE 46 — FAILURE TO MAKE DISCOVERY; SANCTIONS
   - f) RULES 44/55 — PROPOSAL NO. 2: PROPOSED AMENDMENTS TO RULES 44/55 - PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS; PRETRIAL DISCOVERY OF HEALTH CARE RECORDS
   - g) RULE 58 — TRIAL PROCEDURE
4. COMMENTARY: ORS 1.735 (Mr. Alexander)
5. Suggestions regarding Staff Comments (mailing to follow)
6. Discussion regarding Oregon Rules of Juvenile Court Procedure (ORJCP)
7. Election of year 2001 officers
8. Election of Legislative Advisory Committee (LAC) for the 2001 Legislative Assembly
9. Old Business
10. New Business
11. Adjournment

# # #

PROPOSAL NO. 1: PROPOSED AMENDMENTS TO RULES 44 A/46 B

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS RULE 44

A Order for examination. When the mental or physical condition or the blood relationship of a party, or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or a mental examination by a psychologist or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. (The Council is considering whether or not to promulgate one of the following three alternatives which would be inserted here.)

<u>Alternative One</u>

<u>Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:</u>

<u>A(1) *Compliance with agreed conditions.* The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.</u>

<u>A(2) *Representation; reservation of objections; assertion of privileges.* The examinee may have counsel or</u>

another representative present during the examination. All objections to questions asked and the procedures followed during the examination are reserved for trial or other disposition by the court. The examinee may assert, either personally or through counsel, a right protected by the law of privileges.

A(3) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

A(4) *Record of examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(5) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Alternative One includes the following proposed amendment to paragraph B(2)(e) of Rule 46: Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has

failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

Alternative Two

Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

A(1) *Compliance with agreed conditions.* The parties and the examinee shall comply with any conditions for the examination to which they agree in writing.

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination without an order by the court.

A(3) *Record of examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(4) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and

copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Alternative Two includes the following proposed amendment to paragraph B(2)(e) of Rule 46: Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

Alternative Three

The examinee's counsel or other representative may attend the examination by agreement of the parties or on order of the court. Unless the trial court requires otherwise, the following conditions shall apply to a compelled medical examination under this rule:

A(1) *Compliance with agreed conditions.* The parties, the examinee, and their representatives shall comply with any conditions for the examination to which they agree in writing.

A(2) *Obstruction.* No person may obstruct the examination. If any person suspends the examination, the court may order a resumption of the examination under any conditions that the court deems appropriate. The parties may agree to resume an incomplete examination

without an order by the court.

A(3) *Record of examination.* Any party, the examinee, or the examining physician or psychologist may record the examination stenographically or by audiotape in an unobtrusive manner. A person who records an examination by audiotape shall retain the original recording without alteration until final disposition of the action unless the court orders otherwise.

A(4) *Transcription of record.* Upon request, and upon payment of the reasonable charges for transcription and copying, the stenographic reporter shall make a transcription of the examination and furnish a copy of the transcript, or in the case of an audiotape record, the person who records the examination shall make and furnish a copy of the original recording, to any party and the examinee.

Alternative Three includes the following proposed amendment to paragraph B(2)(e) of Rule 46: Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination, or where any person has violated an agreed condition or has obstructed an examination under Rule 44 A.

* * * * *

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of December 9, 2000
5200 Southwest Meadows Road
Oregon State Bar Center
Lake Oswego, Oregon

Present:

J. Michael Alexander
Lisa A. Amato
Richard L. Barron
Benjamin M. Bloom
Bruce J. Brothers
Kathryn S. Chase
Kathryn H. Clarke
Allan H. Coon
Don A. Dickey
Robert D. Durham
William A. Gaylord
Daniel L. Harris
Rodger J. Isaacson
Mark A. Johnson
Virginia L. Linder
Michael H. Marcus
Connie E. McKelvey
John H. McMillan
Karsten H. Rasmussen
Ralph C. Spooner
Nancy S. Tauman

NOTE: Judge Carp attended the meeting via speaker telephone.

Visitors: Mr. Don Corson, Attorney, Eugene, was a guest at the meeting representing the Oregon Trial Lawyers' Association (OTLA), together with other representatives of OTLA. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order (Mr. Alexander). Mr. Alexander called the meeting to order at approximately 9:35 a.m.

Agenda Item 2: Approval of minutes of September 9, 2000 Council meeting. The following correction was made to these minutes as distributed: On page 3, in the first line of the first full paragraph delete "in cases in Washington State where . . ." and substitute "in cases in which he was the attorney for the plaintiff-examinee . . ." Also Judges Carp and Rasmussen asked that the minutes show that they were among the four members who voted in opposition to the motion to adopt the Rule 58 amendments recorded on page 8. With these changes the minutes were approved.

withdrawing these proposals at this time. Judge Marcus commented that he believed many favored a simpler set of amendments. Prof. Holland suggested that an effort be made to see how the U.S. District Court for the District of Oregon, as well as discovery rules of other states, deal with the problems associated with discovery of medical and hospital records.

Items 3d and 3e: Proposed amendments to ORCP 44 A and 46 B (see attachment to the agenda of this meeting) (Mr. Alexander). There was a lengthy discussion concerning the relative merits and demerits of Alternatives One, Two, and Three. Mr. Gaylord stated that, generally speaking, the plaintiffs bar supported only Alternative One and was opposed to Alternatives Two and Three. He added that this was also his own position.

Justice Durham commented that his attention had been drawn to these issues, not by any belief that abuses were occurring in connection with court-order medical examinations, but because he thought that many trial judges, especially in Multnomah County, where the previous motion panel guidelines have been withdrawn, now wished the Council to provide greater direction with respect to whether and how examinations would be recorded and the circumstances, if any, where a plaintiff-examinee's counsel or other representative could be present during examinations. He added that the present situation is one of unguided judicial discretion exercised by individual trial judges. He further commented that he favored Alternative One because it represented a compromise position and also was a modest initial step toward achieving greater statewide consistency in how these matters are ruled on while not depriving trial judges of their appropriate discretion.

Mr. Spooner noted that positions had indeed evolved in the course of considering and drafting these alternative proposals. He added that he thought Alternative Two was the best among the present alternatives because it provided sanctions for disrupting examinations and also for the making of records of examinations. He further added that he thought the plaintiffs bar had exaggerated the problem of improper questioning of examinees by examiners in an effort to get a major change in long-established practice adopted.

Mr. Gaylord responded that the documented experience in Washington State showed that serious problems relating to court-order medical examinations do in fact exist. He also observed that the Washington counterpart of ORCP 44 C, which is identical to Alternative One, has worked well and has not generated any reported problems. He concluded by saying that he thought this is a matter that has been presented to the Council to deal with, and that it was its responsibility to do so.

Judge Isaacson raised the question as to whether, if one of these alternatives is promulgated, it would override the ethical prohibition against contact by a lawyer or agent of a lawyer with an opposing litigant. Judge Marcus responded that he did not think any of the alternatives would change the ethical situation one way or the other.

Following a short break, Judge Marcus, seconded by Ms. Clarke, offered a motion to promulgate Alternative One. This motion was not agreed to, 14 members voting in favor and 8 members opposed. Mr. Spooner, seconded by Judge Coon, offered a motion to promulgate Alternative Two. This motion was not agreed to, 10 members voting in favor and 12 opposed.

Discussion of this item concluded by Justice Durham saying that he wished to acknowledge the good work of Ms Clarke and Mr. Spooner in connection with this project.

Agenda Item 5: Suggestions regarding Staff Comments (Mr. Alexander). Mr. Alexander noted that most of the Staff Comments prepared by Prof. Holland related to proposed amendments that were not approved for promulgation. There was some discussion as to which, if any, other Staff Comments should be published, in particular what the Comment to the Rule 58 amendments should say about trial judges' discretion to permit oral juror questions. The consensus of the members was that no Staff Comments should be published respecting the Rule 7 and Rule 58 amendments, but that the one prepared by Prof. Holland should be published respecting the Rule 21 amendment.

Agenda Item 6: Discussion regarding the proposed Oregon Rules of Juvenile Court Procedure (ORJCP) (Prof. Holland). Prof. Holland explained that the proposed ORJCP had been prepared by the Oregon Law Commission for submission to the 2001 Legislature. He further explained that Rep. Lane Shetterly, who is the Chair of the Commission, has asked that the Council consider whether it was in a position appropriately to undertake the same responsibility respecting the ORJCP, assuming the latter are enacted by the Legislature, as it has with regard to the ORCP; that is, to keep the ORJCP up to date and propose amendments to them from time to time as needed.

Mr. Alexander stated his concern that, if the Council were to assume ongoing responsibility for the ORJCP, some number of new members with expertise in juvenile justice would have to be added to the Council's membership, those new members would probably come to constitute a separate committee composed of people with little or no interest in the ORCP. Justice Durham commented that, if this new function is going to be undertaken by the Council, the impetus should come from the Legislature and the Council should take not take the initiative by in effect asking for this additional assignment. The consensus of the members was that adding the proposed ORJCP to the Council's responsibility was not something the Council should in effect request be done.

Agenda Item 7: Election of year 2001 officers (Mr. Alexander). Judge Marcus offered a motion, duly seconded, that the existing officers of the Council be reappointed for the year 2001, they being Mr. Alexander as Chair, Mr. Spooner as Vice Chair, and Mr. McMillan as Treasurer. This motion was unanimously agreed to. Mr. Gaylord then offered a motion,

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

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

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

(MINUTES COMMENCE ON NEXT PAGE)

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

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

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

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. Svoboda 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 been 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.

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

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 aforestated 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

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.

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 Q

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.[1]

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.

Fr Don: 44 C to get exam report from expert interrogatory to ORE re waiver of medical privilege

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.

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of October 8, 2005
Oregon State Bar Center
5200 SW Meadows Road
Lake Oswego, Oregon

Members Present:

Richard L. Barron
Eric J. Bloch
Benjamin M. Bloom
Eugene H. Buckle
Brooks F. Cooper
Don Corson
Lauren S. Holland
Rodger J. Isaacson
Rives Kistler
Alexander D. Libmann
Connie Elkins McKelvey
Leslie W. O'Leary
Shelley C. Russell
David Schuman*
David F. Sugerman
John L. Svoboda
Locke W. Williams

*Participated by speaker phone.

Members Excused:

Kathryn H. Clarke
Martin E. Hansen
Robert D. Herndon
Steven B. Reed
Ronald D. Thom

Guests:

John E. Bordon, Legislative Fiscal Office
Susan Evans Grabe, Oregon State Bar

Also present were Maury Holland, Executive Director; Mark Allen Peterson, Executive Director-Designate; and Gilma J. Henthorne, Executive Assistant.

Agenda Item 1: Call to order. In the absence of Ms. Clarke, Vice Chair Ms. McKelvey called the meeting to order at 9:45 a.m.

Agenda Item 2: Self-introductions of members and staff. Members of the Council and of the staff each briefly introducted him- or herself.

Agenda Item 3: Approval of minutes. On motion duly made and seconded, the minutes of the Dec. 11, 2004 meeting were approved as distributed with the agenda of this meeting.

amendments to this rule considered in the 2003-05 biennium commanded considerable support.

Regarding **section C of Rule 44,** Mr. Bloom commented that some lawyers interpret this section as not requiring production of records of examinations by plaintiffs' expert witnesses. He agreed to chair a committee, with Mr. Cooper and Mr. Svoboda as members, to look into this matter and report its finding and any recommendations to the Council.

Regarding **paragraph D(2)(a) of Rule 7,** Ms. Grabe asked the Council what action it wished to take concerning the "Resolution to Amend ORCP 7" submitted by Mr. Danny Lang.[1] The consensus of the members was that Mr. Lang should be invited by Ms. Grabe to attend a future Council meeting at his convenience for further discussion of this item.

Discussion then turned to what consideration, if any, should be given to the amendments to **Rule 44** published for comment, but tabled at the Dec. 11, 2004 meeting. Ms. McKelvey commented that she did not favor revisting those amendments during this biennium. ~~Judge Bloch~~ Ben Bloom said that he thought there might well be some problems concerning IME's that need fixing. Ms. McKelvey asked Mr. Buckle and Mr. Corson to gather their thoughts on this matter and report back to the Council whatever conclusions they might reach.

It was the consensus of the members that the Council's 2005-07 agenda should remain open until the Council's next meeting.

Agenda Item 7: Discussion regarding future meeting dates. The consensus of the members was that the Council would next meet, as scheduled, on Nov. 12, 2005.

Agenda Item 8: Old business (Ms. McKelvey). No item of old business was raised.

Agenda Item 9: New business (Ms. McKelvey). Ms. Henthorne was recognized and thanked on the occasion of her retirement after nearly 30 years of devoted and extraordinarily skilled service as the Council's executive assistant. On behalf of the Council, Ms. Henthorne was presented with a suitably inscribed clock. She was also presented by Prof. Holland with a letter signed by Governor Kulongoski commending her for her service, particularly for continuing it without compensation during the two years since the Council was defunded.

Agenda Item 10: Adjournment. On motion duly made and seconded, the meeting was adjourned at 11:30 a.m.

Respectfully submitted,

Maury Holland,
Executive Director

[1]A copy of this document is filed with the original of these minutes.

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, November 12, 2005
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Members Present:

Hon. Eric J. Bloch
Benjamin M. Bloom
Eugene Buckle
Brooks F. Cooper
Hon. Robert D. Herndon
Hon. Lauren S. Holland
Hon. Rodger J. Isaacson
Hon. Rives Kistler
Alexander Libman
Connie Elkins McKelvey
Leslie W. O'Leary
Shelley D. Russell
Hon. David Schuman
Hon. Ronald B. Thom

Members Excused:

Hon. Richard L. Barron
Kathryn H. Clarke
Don Corson
Martin E. Hansen
Hon. Steven B. Reed
Shelley D. Russell
David F. Sugarman
John L. Svoboda
Hon. Locke A. Williams

Guests:

Susan Grabe, Oregon State Bar. Joseph O'Leary, Council to the Judiciary Committee of the Oregon State Senate. Danny Lang, appeared briefly by telephone.

Also present were Mark A. Peterson, Executive Director; Maury Holland, Executive Director; and Tresa G. Cavanaugh, Assistant to Mark A. Peterson.

Agenda Item 1: Call to order. In the absence of Ms. Clarke, Vice Chair McKelvey called the meeting to order at 9:38 a.m.

Agenda Item 2: Self-introductions of members, guests and staff. Judge Robert D. Herndon and Joseph O'Leary briefly introduced themselves. Mark Peterson gave a summary of his background and then introduced Tresa Cavanaugh.

of the Council to advise her as to the status of the review of Rule 32 and requests that the Council consider making a recommendation in light of Senate Bill 262A.

Judge Bloch suggested that the Council allow the committee to move forward in responding to Senator Burdick's request. Justice Kistler voiced concern that the issue appears to go beyond procedure and into substance, that whether the money goes to the Attorney General's fund for indigent defense or goes to the Common School Fund seems beyond the realm of procedure and that it may be a substantive policy matter which may be beyond the expertise of the Council. Prof. Holland confirmed that the reason that the Council has had difficulty before with this issue is precisely what Justice Kistler's concern is and suggested that perhaps the *Cy pres* part should be left for the legislature to decide, that the Council has never decided where money goes. Prof. Peterson noted that there had been testimony that the *Cy pres* funds could go to the state land's division as unclaimed property, as opposed to allocating toward any particular recipient, that it could be treated as unclaimed property, and the interest could go to the Common School Fund, and that may be a little less political and substantive.

Judge Bloch then referred to the minutes of the October 8, 2005, meeting and recalled that, on the merits, there was majority support in the Council to go forward with the amendment dealing with the claims form. Judge Bloch proposed that the committee go forward and focus on the claims form issue again and not move forward with the Cy pres issue at this time. It was noted that Oregon is in the minority, possibly the only state, that always requires a claim form.

There was then further discussion that the committee should make contact with bankers and the business community. Ms. McKelvey asked Judge Bloch and Mr. Libmann to communicate with the banking community as well as other interested parties.

Rule 44 Committee Report.

Mr. Bloom reported that the committee met a couple of times and consists of Mr. Cooper, Mr. Svoboda, and himself. Mr. Bloom reported that there is a concern that allowing reports of examinations by experts violates the expert discovery ban by obtaining the report. A suggested compromise is to blacken out the names of the experts. Mr. Bloom reported that the committee was working on a couple of alternatives and will have something for the Council to review at the next meeting. There was discussion that Rule 44C is more of a problem for practitioners than for judges. There was also discussion of Rule 44A's practice regarding who can be present, whether a recording can be made, etc. Judge Holland offered to be on the committee after Ms. McKelvey noted that there are two different parts of Rule 44 and asked if anyone else wanted to join the committee. Ms. McKelvey then asked if there was a consensus of the group whether they should look at the Rule 44A IME issue this year. The Council decided not to look at the IME issue.

Motion to amend to add punitive damages (Mr. Buckle). ORS 31.725. ORCP 23. Concern of timeliness issue. There was a question of whether there should be a time limit after filing the complaint and before trial to add punitive damages out of concern for prejudice to

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES

Saturday, November 10, 2007 - 9:30 a.m.
(Minutes amended November 26, 2007)
Oregon State Bar Center
5200 SW Meadows Road
Lake Oswego, Oregon

ATTENDANCE

Members Present:

Eugene H. Buckle
Brian S. Campf
Brooks F. Cooper
Kristen S. David
Dr. John A. Enbom
Hon. Robert D. Herndon
Hon. Jerry B. Hodson
Hon. Lauren S. Holland
Hon. Rodger J. Isaacson
Hon. Rives Kistler
Alexander D. Libmann
Hon. Eve L. Miller
Leslie W. O'Leary
Shelley D. Russell
Hon. David Schuman
John L. Svoboda
Mark R. Weaver
Hon. Locke A. Williams

Members Absent:

Don Corson
Hon. Daniel L. Harris
Martin E. Hansen
Hon. Mary Mertens James
David F. Rees

Guests:

David Nebel, Oregon State Bar

Council Staff:

Mark A. Peterson, Executive Director
Shari C. Nilsson, Administrative Assistant

ORCP AMENDMENTS CONSIDERED THIS MEETING

ORCP 1
ORCP 7
ORCP 7D(4)(a)
ORCP 18A
ORCP 18B
ORCP 19B
ORCP 21A
ORCP 27
ORCP 43B
ORCP 44
ORCP 44A
ORCP 44B
ORCP 47C
ORCP 54A
ORCP 54E
ORCP 55H
ORCP 57
ORCP 57D(2)-(4)
ORCP 58
ORCP 58B(5)
ORCP 59
ORCP 59H
ORCP 61

asked that Council members reach out to those with whom they have connections regarding this issue.

The committee's report will be circulated at the December meeting.

11. E-Filing

Mr. Cooper stated that the committee has met and has proposed changes to Rules 1 and 7. He will provide these proposals at the December meeting. Essentially the changes would be made at the beginning of the rules rather than having to amend each reference to "document." This will pave the way for the Chief Justice to allow for the transition to electronic filing by amending the UTCRs.

B. ORCP 44B (Medical Examinations)

Judge Isaacson stated that two biennia ago, a committee had done a good deal of work on ORCP 44B and had prepared amendments. The amendments were unable to obtain a supermajority due to disputes between the plaintiff and defense bar. Mr. Buckle suggested that the amendments could be recirculated but that the controversy would probably still exist. After discussion, the Council agreed not to reconsider amendments to this rule.

VI. New Matters

A. Requests for Possible Amendments from OSB Judicial Administration Committee

1. ORCP 7D(4)(a) (DMV Service Requirement)

Mr. Corson received an e-mail from Mike Bloom of the Judicial Administration Committee regarding this matter. After a brief discussion, Prof. Peterson agreed to contact Mr. Bloom and inquire further into the precise rule change being requested. This matter will carry over to the next meeting.

2. ORCP 43B (Privilege Log)

Mr. Corson received an e-mail from Mike Bloom of the Judicial Administration Committee regarding this matter. Justice Kistler inquired whether this item was raised last biennium. Prof. Peterson stated that it was mentioned in passing during the discussion on Rule 43 but that the Council had decided not to take up the matter at that time.

After some discussion on the merits of requiring a privilege log by rule, Mr. Buckle requested that Prof. Peterson contact Mr. Bloom and inquire

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES

Saturday, December 8, 2007 - 9:30 a.m.
Oregon State Bar Center
5200 SW Meadows Road
Lake Oswego, Oregon

ATTENDANCE

Members Present:

Eugene H. Buckle
Brian S. Campf
Brooks F. Cooper
Don Corson
Kristen S. David
Dr. John A. Enbom
Martin E. Hansen
Hon. Lauren S. Holland*
Hon. Mary Mertens James
Hon. Rives Kistler
Alexander D. Libmann
Hon. Eve L. Miller
Leslie W. O'Leary
David F. Rees
John L. Svoboda
Mark R. Weaver
Hon. Locke A. Williams

Members Absent:

Hon. Daniel L. Harris
Hon. Robert D. Herndon
Hon. Jerry B. Hodson
Hon. Rodger J. Isaacson
Shelley D. Russell
Hon. David Schuman

Guests:

David Nebel, Oregon State Bar

Council Staff:

Mark A. Peterson, Executive Director
Shari C. Nilsson, Administrative Assistant

*Appeared by teleconference

ORCPs Discussed this Meeting		ORCP Amendments Considered and Not Acted Upon this Biennium
ORCP 1	ORCP 44B	ORCP 19B
ORCP 7	ORCP 47C	ORCP 38B
ORCP 7D(4)(a)	ORCP 54A	ORCP 38C
ORCP 18A	ORCP 54E	ORCP 43B
ORCP 18B	ORCP 55H	ORCP 58B(5)
ORCP 19B	ORCP 56**	
ORCP 21A	ORCP 57	
ORCP 26**	ORCP 57D(2)-(4)	
ORCP 27	ORCP 58	
ORCP 38B	ORCP 58B(5)	
ORCP 38C	ORCP 59	
ORCP 43B	ORCP 59H	
ORCP 44	ORCP 61	
ORCP 44A	**informational only	

judges deny changing the amount after the initial prayer was filed.

Mr. Rees suggested redrafting the rule to state clearly that one could plead "amount not to exceed $_____." Mr. Libmann strongly suggested leaving the rule as it is, as it works well in 75% of the cases. Ms. O'Leary stated that she has a draft report and will submit it in advance of January's meeting.

4. ORCP 19B: Affirmative Defenses (Ms. David)

There was no objection to the Council accepting the committee's report, recommending making no amendment to ORCP 19B, which was presented initially at November's meeting. The report is attached as Appendix B.

5. ORCP 21A, 27, 44A, 55H: Probate Court Matters (Mr. Cooper)

Mr. Cooper indicated that the committee has met and that the consensus is that only ORCP 27 should be further studied. The committee's report will be distributed before the January, 2008, meeting.

6. ORCP 54A: Voluntary Dismissals (Mr. Campf)

Mr. Campf stated that the committee is still discussing the issue raised by Judge Roberts. Several Council members shared thoughts about this issue. These concerns included payment of expert witness fees; the current expense of trial preparation as compared to when the rule was originally passed; attorneys using the 5 day time period to their advantage; access to the court system; substantive change vs. procedural change; and arbitration dismissals. Mr. Corson suggested that any Council members with concerns about this issue bring them to the attention of the committee.

The committee's report will be issued as soon as possible.

7. ORCP 54E: Offers of Settlement (Mr. Buckle)

Mr. Buckle stated that the committee has met and has some tentative minor changes to propose. They are still considering others. One of the proposals is to change the title of the rule from "compromise" to "offer to allow judgement."

Mr. Corson asked that any Council members with concerns bring them to the attention of the committee. The committee's report will be issued as

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date below I served the foregoing BRIEF OF AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL by delivering two copies to the following attorneys:

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Lehner & Rodrigues
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Of Attorneys for Defendant-Adverse Party Countryside Construction, Inc.

Peter Glazer
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and

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Of Attorneys for Amicus Curiae Oregon Trial Lawyers Association

via first class mail addressed to the above attorneys at their most recent known addresses, placed in a sealed envelope and deposited with the U.S. Postal Service in Portland, Oregon.

On the same date and in the same manner, I certify that I filed the foregoing BRIEF OF AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL by delivering the original and 15 copies to:

Appellate Court Administrator
Appellate Court Records Section
Supreme Court Building
1163 State Street
Salem OR 97301

DATED this 18th day of November 2011.

KEATING JONES HUGHES, P.C.

Lindsey H. Hughes, OSB 833857
Of Attorneys for Amicus Curiae
Oregon Association of Defense Counsel