may make such order for the payment of [costs of] any unpaid judgment for costs and disbursements against plaintiff in the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

E. unchanged.

* * *

RULE 55

SUBPOENA

A. and B. unchanged.

C. Issuance.

C.(1) By whom issued. A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C., or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths

or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

C.(2) through H.(5) unchanged.

* * *

RULE 57

JURORS

A. through B. unchanged.

C. Examination of jurors. The full number of jurors having been called shall thereupon be examined as to their qualifications. [The court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.] The court may examine the prospective jurors to the extent it deems appropriate, and thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant.

D. through F. unchanged.

* * *

Rule 55 Subpoena

Rule 55 appears, to a great extent, to be a recodification of Chapter 44 ORS, with certain exceptions.

ORS 44.150, providing for service of a subpoena on a concealed witness, was omitted from these proposed rules. Although this provision has rarely been used, there is no other provision which would cover this situation. The omission should be reviewed by the committee.

Rule 55(A), which defines a subpoena, omits the portion of ORS 44.110 that requires a witness to remain until the testimony is closed, unless sooner discharged, but at the end of seven days' attendance the witness may demand of the party, or his attorneys, the payment of his legal fees for the next following day, and if not then paid, he is not obliged to remain longer in attendance. This omitted language may be necessary to cover certain situations involving multiple depositions where some of the depositions must be carried over to the following day.

Rule 55(G) does not take in ORS 44.180, ORS 44.210, and ORS 44.220. These statutes should not be eliminated as being unnecessary. They are the only statutes that provide for enforcement of the provisions for subpoenaing witnesses.

RULE 55

SUBPEONA

A. Defined; form. A subpoena is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. Every subpoena shall state the name of the court and the title of the action.

B. For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

COMMENT: Section B. of Rule 55 adds another provision to present Oregon statute, and increases the number of motions available to litigant's attorneys. Likewise, it increases the power of the judiciary in this state.

Under Section B.(1), a party would be able to claim that essential evidence in its possession should not be subject to subpoena because the evidence is allegedly

based upon an "unreasonable or oppressive" request. Neither "unreasonable" nor "oppressive" is defined. No specific enumeration of grounds is given for a judge to determine what is or is not "unreasonable or "oppressive." Therefore, Section B.(1) should be deleted from the rule.

Section B.(2) leaves undefined the meaning of "cost of producing." Does that phraseology refer to handling charges, as certainly one does not want non-original documents produced for trial? And if so, does that mean that a culpable defendant can escape liability by claiming documents or items (e.g., products) in its possession should not have to be produced at trial unless an arbitrarily high, but "reasonable" cost is paid the opposing party?

If, on the other hand, "cost of producing" refers to photocopying, the rule also makes no sense. For a party needs to observe the original documents, not copies. Should the party request copies of the original, after having them produced for reviewing, he rightly is required to bear the expense of that copying.

Therefore, Section B.(2) should be deleted.

D. Service; service on law enforcement agency; proof of service.

D.(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person over 18 years of age. The service shall be made by delivering a copy to the witness personally and giving or offering

to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

D.(2) Service on law enforcement agency.

D.(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D.(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D.(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time and location of the court appearance. If the officer cannot be notified, the law enforcement

agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D.(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department."

D.(3) Proof of service. Proof of service of a subpoena is made in the same manner as proof of service of a summons.

COMMENT: Rule 55 D.(2)(b) requires that a police officer be served a subpoena at least 10 days before trial. In a large county, this requirement is particularly burdensome for litigants because often an attorney will not know whether his case is going to trial until less than 10 days before the trial itself.

To make the rule consistent internally, the language of Section D.(1) should be sufficient without a special and arbitrarily fixed time designated for police officers. This would result in a savings of unnecessarily issued subpoenas and conceivably would result in less burdensome paperwork and scheduling for police departments as a result of trial cancellations and postponements, which is now the case.

Rule 55 Subpoena

Rule 55 appears, to a great extent, to be a recodification of Chapter 44 ORS, with certain exceptions.

ORS 44.150, providing for service of a subpoena on a concealed witness, was omitted from these proposed rules. Although this provision has rarely been used, there is no other provision which would cover this situation. The omission should be reviewed by the committee.

Rule 55(A), which defines a subpoena, omits the portion of ORS 44.110 that requires a witness to remain until the testimony is closed, unless sooner discharged, but at the end of ~~seven~~ each days' attendance the witness may demand of the party, or his attorneys, the payment of his legal fees for the next following day, and if not then paid, he is not obliged to remain longer in attendance. This omitted language may be necessary to cover certain situations involving multiple depositions where some of the depositions must be carried over to the following day.

Rule 55(G) does not take in ORS 44.180, ORS 44.210, and ORS 44.220. These statutes should not be eliminated as being unnecessary. They are the only statutes that provide for enforcement of the provisions for subpoenaing witnesses.

creates a continuing obligation to attend, or whether the duty is limited to the day named in the subpoena. United States v. Snyder, 413 F.2d 288, 289 (9th Cir 1969) (continuing obligation: construing Federal Rule of Criminal Procedure 17); O'Brien v. Walker, 7 Ill Dec 372, 364 NE2d 533, 538-9 (1977) (no continuing obligation); In re Ragland, 343 A2d 558, 559 (DC App 1975) (continuing obligation); Brady v. State 47 SE 535 (1904) (obligation to attend from term to term). Some states like Oregon, have a provision like the sentence quoted supra. See 3A ARK STAT ANN § 28-509 (1962); CAL CIVIL PRO CODE § 2064 (1955). I can find no case law interpreting such a section to impose a continuing obligation to attend. Indeed, in In re Grand Jury Subpoenas, 363 So2d 651 (La 1978) the court specifically found a continuing obligation to attend, even in the absence of such "until discharged" language.

Suppose Party A notices a deposition and subpoenas witness W. The deposition begins on Day 1, but cannot be completed by a reasonable hour. Can W be compelled to attend on day 2? Or, suppose W_1 and W_2 are noticed and subpoenaed to

be deposed. W1 is deposed on Day1 and the attorneys do not get to W2. Can he be compelled to return on Day2? There is at least some doubt as the rule is drafted now. Perhaps a sentence should be added to the end of Rule 55 A reading:

> "A subpeona creates a continuing obligation to attend until discharged."

That language would seem to be broad enough to include discharge by the parties deposing the witness, or by court order under Rule 36 C.

Rule 55 ~~G~~ supersedes ORS 44.180, 44.210 and 44.220. The subcommittee claims these are vital for the enforcement of subpeonas. ORS 44.180 provides for compelling a person present not on subpeona to testify and so has nothing to do with enforcement. I would think that a court would have inherent power to order a person appearing in court to testify. In a deposition situation the parties would have to subpeona the person

if he would not voluntarily be deposed. Presumably if he were present he would be willing to testify. But would that always be true? ORS 44.210 and 44.220 provide for a form of arrest to compel testimony. This ~~probably~~ possibly ~~would~~ be accomplished on a citation for contempt under Rule 46 C, but at greater cost and delay. While body attachments appear to be infrequently used in civil cases, the statutes permitting them have been assumed to be ~~constitutional in~~ permissible ~~allowed~~ in some courts. Allison v. County of Ventura, 68 Cal App 3d 689, 137 Cal Rptr 542 (1977). Kieffer v. Miller, 560 SW2d 431 (Tex Civ App 1977). I can find no case holding such an attachment unconstitutional, though writ refnre they are strictly construed.

RESPONSE TO
TRIAL PRACTICE
SUBCOMMITTEE REPORT

Rule 55

Subpeona

ORS 44.150, providing for service of a subpeona on a concealed witness, was not superseeded by the rules. ~~It remains as a statute.~~ An early Council comment noted: "This appears to [be] more than a procedural rule and for safety's sake should be retained as a statute."

The third sentence of ORS 44.110 was eliminated by the Council as "unnecessary". It reads:

> . It also requires that he remain till the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or his attorney, the payment of his legal fees for the next following day and if not then paid, he is not obliged to remain longer in attendance.

As the Subcommittee report notes, there might be situations where parties would wish to hold a witness over from one day until the next. There is some difference of opinion as to whether a subpeona

~~363 S.2d 654~~
~~235 NE2d 17~~
~~377 NE2d 1330~~
~~378 NE2d 1158~~

REASON. The Bar Committee pointed out that in some cases an attorney feels he or she has a good basis for dismissal for lack of personal jurisdiction. If that is sustained the case is dismissed without any necessity for detailed investigation of the rest of the case. Allowing the attorney one motion to raise personal jurisdiction without preclusion will avoid time and expense to investigate the entire case.

B. Rule 33

B. Intervention of right. At any time before trial, any person shall be permitted to intervene in an action when a statute of this state, [or] these rules, or the common law, confers an unconditional right to intervene.

REASON. This clarifies Council intent relating to intervention.

C. Rule 55

A. Defined; form. A subpoena is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. It also requires that the witness remain till the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, he is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

REASON. This appears in the existing statute and was deleted as unnecessary. After discussion with Committee representatives, it appears there may be some disagreement about the continuing obligation of a witness to attend, and the sentence should be added.

The Council did not accept the changes proposed by the Bar Committee relating to Rule 44 D. which appear on page 10 of the March 29, 1977, memorandum.

The Council considered the changes that have been adopted by the Joint Committee in work sessions to date. It was suggested that changing "certified" to "true" in Rule 7 D.(2) did not clarify what was needed. The present practice involves having a party or attorney sign a statement on service copies saying, "I certify the foregoing paper is a true, exact and full copy of the original." Perhaps this could be clarified by adding the following sentence to section A.:

> For purposes of this rule, a "true copy" of a summons and complaint means an exact and complete copy of the original summons and complaint with a certificate upon the copy signed by an attorney of record, or if there is no attorney, by a party which indicates that the copy is exact and complete.

It was also suggested that the word "affidavit" in lines 9 and 12 of subparagraph 7 F.(2)(a)(i) should be changed to "certificate" to conform to the previously adopted change in line 1.

The Council also considered the remaining changes in the Committee memo of March 29, 1979, which will be considered at the next work session.

The Council accepted the proposed changes submitted by Committee staff to sections 44 A. (page 8 of March 29 Committee memo); 44 E. (page 11 of March 29 Committee memo); 54 A. (page 11 of March 29 Committee memo); 54 D. (page 15 of March 29 Committee memo); 55 C. (page 18 of Committee memo); and, 57 C. (page 19 of Committee memo).

The Council also endorsed the changes suggested by Frank Pozzi to section 54 B.(4) (page 14 of March 29 Committee memo) and section 64 B. (page 26 of Committee memo). The changes would appear as follows:

Rule 54

B.(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication [with] without prejudice.

Rule 64

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

Rule 55

A. Defined; form. A subpoena is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. It also requires that the witness remain till the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, he is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

Item 14, page 8, ORCP 36 A. The Council decided that the language from the federal rule should not be included in this section.

Item 15 and 16, page 8, ORCP 36 B.(3) and ORCP 46 A.(2). Judge Wells moved, seconded by Austin Crowe, that "and subsection B.(4) of this rule" should be deleted from the first sentence of 36 B.(3) and that "to furnish a written statement under 36 B.(4), or if a party fails" should be deleted from the first sentence of 46 A.(2). The motion passed unanimously.

Item 17, page 9, ORCP 46 D. Judge Wells moved, seconded by Austin Crowe, to delete the following language from 46 D.: ["or (3) to inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 that there is a question regarding the existence of coverage,"]. The motion passed unanimously.

Item 18, page 9, ORCP 52 A. Judge Sloper moved, seconded by Judge Wells, that the last sentence of section A. be changed to read as follows: "At its discretion, the court may grant a postponement, with or without terms." The motion passed unanimously.

Item 19, page 9, ORCP 55 D. On motion made by Judge Casciato, seconded by Judge Wells, the Council unanimously voted to change "over 18 years of age" to "18 years of age or older" in 55 D.(1) to conform to ORCP 7 E. and 7 F.(2)(a).

Item 20, page 9, ORCP 55 F.(2). The Council discussed the suggestion of adding "by subpoena" after "required" in both sentences of F.(2). It was pointed out that the section does not make any distinction between "parties" and "non-parties" and a suggestion was made to include the language "a resident of this state and not a party." The Council decided to defer action until consideration of a redraft of the section.

Item 21, page 10, ORCP 60. On motion made by Judge Sloper, seconded by Austin Crowe, the Council unanimously voted to change "defendant" to "party against whom the claim is asserted" in the last sentence of the rule.

Item 22, page 10, ORCP 62. The Executive Director was asked to prepare a draft of ORCP 62 which would not require findings of fact or conclusions of law for cases subject to de novo review upon appeal.

Judge Jackson stated that the judgments subcommittee would be meeting soon and would have a report at the next meeting.

Don McEwen stated that he had written a letter to all circuit court judges requesting their views and comments regarding any problems with third party practice.

The Council discussed the question of use of Rule 36 B. to authorize interrogatories relating to expert witnesses. It was pointed out that:

21 H. CONTINUED

motion shall not waive any defense or objection asserted therein by filing a responsive pleading.

COMMENT

This is an attempt to clarify the waiver rules of 23 D. and E. and the rule suggested in Item 11, page 7, of the May 5, 1980, staff memorandum. It recognizes that we are dealing with three separate rules. The first two deal with the result of an amended pleading:

(1) 22 D. says that when a motion is made and succeeds and parties plead over rather than standing on their pleadings, they do not waive their position that the judge erred in granting the motion.

(2) 22 E. says that any time an amended pleading is filed, whether voluntarily or as the result of a successful motion, the opposing party does not have to reassert defenses or objections made to matters in the original pleading which are also in the amended pleading.

The last rule (21 H.) has nothing to do with amendments but comes up only when a motion is unsuccessfully made. The pleading attacked stands, and there is no amended pleading. This waiver rule makes clear that by filing a responsive pleading, the party making the unsuccessful motion waives nothing. This waiver rule was added to ORCP 21 rather than to ORCP 23 because it relates to the effect of pleading over after a motion, and not to amendments.

* * *

55 F.(2)

F.(2) Place of exmamination. A resident of this state who is not a party to the action may be required by subpoena to attend an examination only in the county wherein such person resides, is employed, or transacts business in person, or at such other convenient place as is fixed by an order of court.

55 F.(2) CONTINUED

A nonresident of this state who is not a party to the action may be required by subpoena to attend only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

COMMENT

This should make clear that the reference to place of examination is only for non-party witnesses subpoenaed to attend. Under ORCP 46, a party receiving a notice of deposition would have to attend wherever the deposition is set unless a protective order was secured under ORCP 36.

* * *

ORCP 62 A.

A. Necessity. Whenever any party appearing in a civil action tried by the court so demands prior to the commencement of the trial, the court shall make special findings of fact, and shall state separately its conclusions of law thereon. In the absence of such a demand for special findings, the court may make either general or special findings. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact or conclusions of law appear therein. No findings of fact shall be required in cases which are tried anew upon the record upon an appeal.

C. Issuance.

C.(1) By whom issued. A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C., or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

C.(2) By clerk in blank. Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

* H. Hospital records.

H.(1) Hospital. As used in this section, unless the context requires otherwise, "hospital" means a hospital licensed under ORS 441.015 through 441.087, 441.525 through 441.595, 441.810 through 441.820, 441.990, 442.300, 442.320, 442.330, and 442.340 through 442.450.

H.(2) Mode of compliance with subpoena of hospital records.

H.(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within

five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases, to the officer or body conducting the hearing at the official place of business.

H.(2)(c) After filing, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part

of the record shall be returned to the custodian of hospital records who submitted them.

H.(3) Affidavit of custodian of records.

H.(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H.(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H.(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H.(4) Personal attendance of custodian of records may be required.

H.(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H.(5) Tender and payment of fees. Nothing in this [rule] section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

D.(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person [over 18 years of age] 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

* * *

F.(2) Place of examination. A resident of this state who is not a party to the action may be required by subpoena to attend an examination only in the county wherein such person resides, is employed, or transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

COMMENT

The language change in D.(1) was made to conform to ORCP 7 E. and 7 F.(2).

The reference to place of examination in 55 F.(2) is only for non-party witnesses subpoenaed to attend. Under ORCP 46,

a party receiving a notice of deposition would have to attend wherever the deposition is set, unless a protective order was secured under ORCP 36.

RULE 55

SUBPOENA

D.(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person [over 18 years of age] 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

F.(2) Place of examination. A resident of this state who is not a party to the action may be required by subpoena to attend an examination only in the county wherein such person resides, is employed, or transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

COMMENT

The language change in D.(1) was made to conform to ORCP 7 E. and 7 F.(2).

The reference to place of examination in 55 F.(2) is only for non-party witnesses subpoenaed to attend. Under ORCP 46,

a party receiving a notice of deposition would have to attend wherever the deposition is set, unless a protective order was secured under ORCP 36.

D.(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person [over 18 years of age] 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C.(6), shall be served in the same manner as provided for service of summons in Rule 7 D.(3)(b)(i), D.(3)(d), D.(3)(e), or D.(3)(f).

F.(2) Place of examination. A resident of this state who is not a party to the action may be required by subpoena to attend an examination only in the county wherein such person resides, is employed, or transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

COMMENT

The language changes in 55 D.(1) were made to conform to ORCP 7 E. and 7 F.(2) and to clarify how subpoenas for ORCP 39 C.(6) depositions should be served.

The reference to place of examination in 55 F.(2) is only for non-party witnesses subpoenaed to attend. Under ORCP 46, a party receiving a notice of deposition would have to attend wherever the deposition is set, unless a protective order was secured under ORCP 36.