***** NOTICE *****

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES
Saturday, December 10, 1994
9:30 a.m.
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

AGENDA

1. Call to order

2. Approval of September 10, 1994 minutes

3. Proposed amendments to Oregon Rules of Civil Procedure (attached) (John Hart):

   a) Rule 15: Time for Filing Pleadings or Motions
   b) Rule 22: Counterclaims, Cross-claims, and Third Party Claims (adding "may assert" in two places in subsection C(1))
   c) Rule 22: Counterclaims, Cross-claims, and Third Party Claims (deleting "agreement of parties who have appeared and" in subsection C(1))
   d) Rule 32: Class Actions
   e) Rule 55: Subpoena
   f) Rule 57: Jurors
   g) Rule 58: Trial Procedure
   h) Rule 68: Allowance and Taxation of Attorney Fees and Costs and Disbursements
   i) Rule 69: Default Orders and Judgments

6. New matters

7. Old business

8. New business

9. Adjournment

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COUNCIL ON COURT PROCEDURES
Minutes of Meeting of September 10, 1994
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:
J. Michael Alexander
Jack A. Billings
Marianne Bottini
Sid Brockley
Patricia Crain
William A. Gaylord
Susan P. Graber
Bruce C. Hamlin
John E. Hart
Nely L. Johnson
Bernard Jolles
John V. Kelly
Michael H. Marcus
John H. McMillan
Michael V. Phillips
Milo Pope
Charles A. Sams
Stephen J.R. Shepard
Nancy S. Tauman

Excused:
William D. Cramer, Sr.
Mary J. Deits
Stephen L. Gallagher, Jr.
Rudy R. Lachenmeier

The following guests were in attendance: Phil Goldsmith, Charles Tauman, Alan Wight, and Doug Wilkinson. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item # 1: Call to order. The Chair, Mr. Hart, called the meeting to order at 9:40 a.m. Mr. Hart expressed thanks to the subcommittee on the Future of the Council for the excellent report it has prepared for his signature and submission to the Emergency Board in compliance with the budget note to the 1993-95 appropriation bill (see Attachment A to these minutes), copies of which were distributed at this meeting. Mr. McMillan stated that all credit for this report was owing to Mr. Hamlin, who was chair of this subcommittee and who, according to Mr. McMillan, did the greatest share of the work.

Agenda Item # 2: Approval of August 13, 1994 minutes. The minutes of the August 13, 1994 meeting, as circulated as Attachment A to the Agenda of said meeting, were without objection approved, subject to the corrections set forth in Attachment B to these minutes. Maury Holland commented that in showing a member as "excused" rather than "absent" all that is meant is that the member in question had given advance notice of his or her absence. He did not want members to think that he takes it upon himself to pass upon the sufficiency of any reason a member might give for having to be absent. He added that sometimes a member giving advance notice that he or she will be absent includes the reason, but that he does not ask for any.

Agenda Item 3: Proposed Amendments to ORCP 55. Mr. Hart

first noted that Maury Holland had prepared a large number of proposed amendments to Rule 55 apart from those prepared either by the Council subcommittee or by the OSB Procedure and Practice Committee (P&PC) (see Attachment B to the Agenda of this meeting). Prof. Holland explained that these additional amendments were done, not in order to make substantive changes in Rule 55, but to improve the quality of draftsmanship throughout the rule. Justice Graber and Mr. Hamlin stated that, in view of the limitation of time and the urgency of fully resolving any issues presented by the amendments specifically proposed by the Council subcommittee or by the P&PC, the amendments prepared by Prof. Holland should be set aside for possible consideration at some later time. Justice Graber's motion to this effect, seconded by Mr. Gaylord, carried unanimously.

Discussion then turned to proposed new subsection 55 F(3). Mr. Phillips expressed the thought that each of the proposals that had been presented might contain or create drafting problems that would be difficult to resolve properly in the time available, and suggested that action on this might be deferred. The consensus of the meeting, however, was that any problems that might be created by the various versions of proposed subsection 55 F(3) should be overcome if possible, because of the members' sense that the basic thrust of what the P&PC had proposed in this regard was too worthwhile to defer for another biennium. Mr. Doug Wilkinson, on behalf of the P&PC, was recognized, and urged that the Council approve something as close to what the P&PC had proposed as possible.

Attention then focused upon the version of proposed subsection 55 F(3) that appears at Attachment A p. 3 of the minutes of the August 13 '94 meeting that had been drafted by Justice Graber. There followed a lengthy debate about whether that version would give the person subpoenaed the option of complying by mailing copies of requested materials or by permitting inspection and copying of originals and, if so, whether affording that option would be desirable. Mr. Phillips stated he generally approved of this version, but suggested addition of language saying that the subpoena could specify the time and place where the inspection and copying would take place.

Justice Graber then offered the following slightly modified version of proposed subsection 55 F(3):

> F(3) A party who issues a subpoena may command the person to whom it is issued, other than a hospital, to produce books, papers, documents, or tangible things by mail or otherwise, at a time and placed specified in the subpoena, without commanding inspection of the originals or a deposition. In such instances, the person to

whom the subpoena is directed complies if the person produces the copies of the specified items in the specified manner and certifies that the copies are true copies of all the items responsive to the subpoena or, if all items are not included, why they are not.

Mr. Hart then called the question on tentative adoption of the above proposed new subsection 55 F(3). The vote to approve was unanimous, 18 in favor, 0 opposed.

Justice Graber, seconded by Mr. Hamlin, then moved that subsection 55 D(1) be left in its present form except as amended by P&PC proposal #2 shown on p. 2 of Attachment C to these minutes, and that P&PC proposal #3 on p. 5 not be adopted. This motion carried by a vote of 15 in favor, 0 opposed.

Discussion then turned to subsection 55 D(3) and P&PC proposal #4 (see p. 7 of Attachment C) that is intended to authorize service of subpoenas not requiring appearance at trial or deposition by mail. After lengthy discussion the Council, on motion of Mr. Gaylord, seconded by Judge Brockley, voted to retain the present paragraph 55 D(3)(d), but as amended to delete the word "not" in the first line of said paragraph. In connection with this vote, the Council also unanimously voted to amend subsection 55 D(1) as follows, referring to the 6th line on p. 5 of Attachment C: by adding "whether the subpoena is served personally or by mail," following "[c]ommand to appear at trial or hearing or at deposition, ..." and preceding "[s]hall be served on each party ..." It was also agreed that subsection 55 D(3) should be renumbered to appear as follows:

D(3) **Service by mail.**

D(3)(a) Under the following circumstances, service of a subpoena to a witness by mail shall be the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a)(i) The attorney certified in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D(3)(a)(ii) The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)(a)(iii) The subpoena was mailed to the witness more than 10 days before trial by certified

> mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.
>
> D(3)(b) Service of subpoena by mail may be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

Discussion then turned to P&PC proposal #5 (see p. 8 of Attachment C). Mr. Hamlin, seconded by Justice Graber, moved that this proposal be adopted. This motion carried unanimously.

Mr. Hamlin, seconded by Judge Marcus, then moved that the words "duces tecum" be deleted from the second line of subsection 55 H(2) (see p. 9 of Attachment C), together with the adoption of CCP proposal #8 (see p. 9 of Attachment C), but changing the fourth line from the bottom (of p. 9 of Attachment C) by inserting a period following the word "consent" and deleting the immediately following words "[by] the patient." In the interest of clarification, Justice Graber proposed as a friendly amendment to the foregoing motion that subsection 55 H(2) be amended to read as follows:

> H(2) **Mode of compliance.** Hospital records may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law have been complied with and such compliance is evidenced through an appropriate court order or through execution of an appropriate consent. Absent such consent or court order, production of the requested records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate consent or court order does accompany the subpoena, then production of all records requested shall be considered production of the records responsive to the subpoena.

The Council then voted unanimously to amend subsection 55 H(2) as shown immediately above. Mr. Hamlin suggested that the word "section" at the end of the first sentence of this subsection should be changed to "rule," which was agreed to.

Justice Graber, seconded by Judge Marcus, then moved that paragraph H(2)(a) be amended by deleting the words "duces tecum" in the second line thereof and by adopting CCP proposal #9 (see

p. 10 of Attachment C). This motion carried unanimously.

Discussion then turned to P&PC proposals #10 and #11 (see pp. 10-11 of Attachment C). Mr. Jolles asked whether H(2)(b)(iv) would be left in or deleted. Mr. Phillips responded that he had intended to move deletion of H(2)(b)(iv) for the reasons set forth in the correspondence attached to the agenda of this meeting. He stated that some lawyers have read this provision not to require that copies be provided to lawyers for other parties. He further stated that in his opinion if records are subpoenaed in connection with a deposition, that would result in a copy being provided to a court reporter who could then provide copies to, or allow inspection by, other parties in a form that would make them admissible in evidence at trial. This, he thought, would also tend to avoid multiple requests for the same records. Mr. Hamlin agreed with concerns expressed by Mr. Hart about what Mr. Phillips proposed, and stated that he opposed both deleting H(2)(b)(iv) and adopting P&PC proposal #11. In light of the number of concerns and reservations that were expressed about it, Mr. Phillips withdrew his motion.

Judge Brockley then moved that the P&PC proposal #10 be adopted and that its proposal #11 be rejected. Mr. Hamlin suggested a friendly amendment to the effect that the final sentence of 55 H(2)(b) be amended to read: "If the subpoena directs delivery of the records in accordance with subparagraph H(2)(b)(iv), then a copy of the subpoena shall be served on the person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the hospital." The Brockley motion, as thus amended, carried by unanimous vote.

Judge Brockley, seconded by Judge Marcus, then moved that P&PC proposal #11 (see pp. 11-12 of Attachment C) not be adopted. Mr. Gaylord, seconded by Ms. Tauman, moved adoption of what would become H(2)(b)(1)(A) proposed by the P&PC as part of its proposal #11 (see p. 11 of Attachment C). The latter motion failed to carry by a vote of 13 opposed, 4 in favor. The former motion was not voted upon because the vote described in the immediately preceding paragraph, adopting the P&PC proposal #10, also determined that its proposal #11 not be adopted.

Mr. Hamlin, seconded by Justice Graber, then moved adoption of CCP proposal #12 (see p. 13 of Attachment C). This motion carried by unanimous vote.

Agenda Item 4: Proposed amendments to Oregon Rules of Civil Procedure (apart from Rule 55 (Mr. Hart) (N.B: Except as otherwise indicated, all references in this agenda item are to Attachment C to the Agenda of this meeting). Judge Marcus,

seconded by Mr. Shepard, moved adoption of the amendment proposed to section A of Rule 15 (see C-2 of Attachment C). This motion carried by unanimous vote.

Judge Marcus, seconded by Judge Brockley, move adoption of the amendment proposed to subsection C(1) of Rule 22 (see C-3 - C-4 of Attachment C). This motion carried by unanimous vote.

Judge Marcus, seconded by Judge Sams, moved adoption of the amendments proposed to transfer existing section C of Rule 69 to become new section B of Rule 58 and renumbering of both rules accordingly (see pp. C-6 - C-9 of Attachment C). This motion carried by unanimous vote.

Judge Marcus, seconded by Mr. Hamlin, moved adoption of the amendment additionally proposed to subsection C(1) of Rule 22 (see p. C-11 of Attachment C). After some discussion, this motion carried by a vote of 10 in favor, 6 opposed.

Judge Marcus, seconded by Mr. Jolles, moved adoption of the amendment proposed to subsection F(2) of Rule 32 (see p. C-14 of Attachment C), together with an amendment to subsection F(3) of Rule 32 proposed by letter from Mr. Phil Goldsmith to Judge Marcus dated 9/9/94 (see Attachment D to these minutes), but with the words "for individual monetary recovery" substituted for the words "for monetary relief." This motion carried by vote of 15 in favor, 0 opposed, 2 abstaining.

With reference to the amendment proposed to section C of Rule 57 (see p. C-16 of Attachment C), Mr. Phillips stated he was not persuaded the existing rule needed changing, but that if it were to be changed, he preferred a change in the direction of the statute governing juries in criminal cases (see p. C-21 of Attachment C). Mr. Hamlin moved, seconded by Judge Marcus, that the only change to be made in section 57 C should be to substitute "the jurors" for "each juror." Mr. Hart noted that the P&PC had taken great efforts to document existence of what they perceive to be a problem. The immediately aforementioned motion carried by a vote of 14 in favor, 1 opposed, and 1 abstaining, but was subsequently withdrawn in favor of a motion by Judge Pope, seconded by Mr. Phillips, that section 57 C be amended as proposed by Mr. Phillips (see p. C-20 of Attachment C). This motion carried by a vote of 16 in favor, 1 opposed.

Judge Marcus, seconded by Mr. Gaylord, moved adoption of the amendment proposed to subparagraph C(4)(c)(ii) of Rule 68 (see p. C-17 of Attachment C). Justice Graber questioned what was intended by "interested party," as opposed to "party to the litigation." Ms. Tauman stated she thought the amendment should provide for findings and conclusion at the request of "any party

to the litigation." Several members noted the opposition to this proposed amendment by a number of trial judges who had expressed their belief that it would mandate an unwise use of their time. Judge Brockley reiterated his strong opposition to this proposal.

Mr. Chuck Tauman, Executive Director of OTLA, was then recognized and spoke in support of a requirement that, if requested, findings of fact and conclusions of law be provided on the record in connection with rulings on fee petitions. He added that he and his organization believe that the Legislature has provided for attorney fee awards in many circumstances as a matter of sound public policy, and that findings and conclusions would assist in the implementation of that policy. Mr. Hart then called the question, and the motion carried by a vote of 9 in favor, 8 opposed.

Agenda Item 5: Appointment of final review committee. Mr. Hart appointed Judge Marcus, Mr. Hamlin and himself to constitute a final review committee to double-check the accuracy of the texts of tentatively adopted amendments in the form they would be forwarded for required publication in the Judicial Advance Sheets. Maury Holland reminded the Council that, pursuant to the statutory amendment by the 1993 Legislature, tentatively adopted amendments could not be further revised following their publication in the Judicial Advance Sheets, so that the only choices the Council could make at the Dec. 10 meeting would be to either promulgate or not promulgate them.

Agenda Item 6: New Matters. No new matters were raised.

Agenda Item 7: Old business. No items of old business were raised.

Agenda Item 8: New business. No items of new business were raised. Mr. Hart noted that there was no reason for the Council to meet in October or November, but once again stressed the vital importance of full attendance at the Dec. 10 '94 meeting, since a minimum of 15 votes are required for final promulgation of ORCP amendments.

Agenda Item 9: Adjournment. The meeting adjourned at 2:00 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

PROPOSED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

(For final consideration by the Council on Court Procedures on 12-10-94)

PROPOSED AMENDMENTS
TO
OREGON RULES OF CIVIL PROCEDURE

Contents

TIME FOR FILING PLEADINGS OR MOTIONS
RULE 15

A. Time for filing motions and pleadings. A motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a crossclaim [~~of a party summoned under the provisions of Rule 22 D~~] shall be filed with the clerk by the time required by Rule 7 C(2) to appear and defend. Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.

B. Pleading after motion.

B(1) If the court denies a motion, any responsive pleading required shall be filed within 10 days after service of the order, unless the order otherwise directs.

B(2) If the court grants a motion and an amended pleading is allowed or required, such pleading shall be filed within 10 days after service of the order, unless the court otherwise directs.

C. Responding to amended pleading. A party shall respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

D. Enlarging time to plead or do other act. The court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or allow any other pleading or motion after the time limited by the procedural rules, or by an order to enlarge such time.

COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS
RULE 22

A. Counterclaims.

A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against a plaintiff.

A(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

B. Cross-claim against codefendant.

B(1) In any action where two or more parties are joined as defendants, any defendant may in such defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action and shall be: (a) one arising out of the occurrence or transaction set forth in the complaint; or (b) related to any property that is the subject matter of the action brought by plaintiff.

B(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

B(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C. Third party practice.

C(1) After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later that 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain agreement of parties who have appeared and leave of court. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in [~~sections A and B of~~] this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any

person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

C(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C(1) of this section.

D. Joinder of additional parties.

D(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29.

D(2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.

D(3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E. Separate trial. Upon motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS RULE 22

* * * * *

C. Third party practice.

C(1) After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later that 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third party plaintiff must obtain [~~agreement of parties who have appeared and~~] leave of court. The person served with the summons and third party complaint, hereinafter called the third party

defendant, may assert any defenses to the third party plaintiff's claim as provided in Rule 21 and counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and may assert the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

C(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C(1) of this section.

* * * * *

CLASS ACTIONS
RULE 32

F. Notice and exclusion.

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F(2) Prior to the [~~final~~] entry of a final judgment against a defendant the court shall request members of the class who may be entitled to individual monetary recovery to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total

amount of damages determined to be allowable by the court for each individual class member who has filed a statement required by the court, assessable court costs, and an award of attorney fees, if any, as determined by the court.

F(3) Failure of a class member to file a statement required by the court will be grounds for [~~the~~] entry of judgment dismissing such class member's claim for individual monetary recovery without prejudice to the right to maintain an individual, but not a class, action for such claim.

* * * * *

SUBPOENA
RULE 55

A. Defined; form. A subpoena is a writ or order directed to a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until 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, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For production of books, papers, documents, or tangible things and to permit inspection. A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody, or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things but not commanded to also appear for deposition, hearing, or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has

been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents, or tangible things, 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 reasonable 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.

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 or, if separate from a subpoena commanding the attendance of a person, to produce books, papers, documents, or tangible things and to permit inspection thereof: (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.

D. Service; service on law enforcement agency; service by mail; 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 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, whether or not personal attendance is required, ~~for~~ one

day's attendance fees. 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). Copies of each subpoena commanding production of books, papers, documents, or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, whether the subpoena is served personally or by mail, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

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) **Service by mail.**

D(3)(a) Under the following circumstances, service of a

subpoena to a witness by mail shall be the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a)(i) The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness[~~,~~] indicated a willingness to appear at trial if subpoenaed;

D(3)[~~(b)~~](a)(ii) The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)[~~(c)~~](a)(iii) The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

D(3)[~~(d)~~](b) Service of subpoena by mail may [~~not~~] be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

D(4) **Proof of service.** Proof of service of a subpoena is made in the same manner as proof of service of a summons.

E. Subpoena for hearing or trial; prisoners. If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F. Subpoena for taking depositions or requiring production of books, papers, documents, or tangible things; place of production and examination.

F(1) **Subpoena for taking deposition.** Proof of service of a notice to take a deposition as provided in Rules 39 C and 40 A, or of notice of subpoena to command production of books, papers, documents, or tangible things before trial as provided in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein.

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 or to produce books, papers, documents, or tangible things 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 an examination or to produce books, papers, documents, or tangible things 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.

F(3) **Production without examination or deposition.** A party who issues a subpoena may command the person to whom it is issued, other than a hospital, to produce books, papers, documents, or tangible things by mail or otherwise, at a time and place specified in the subpoena, without commanding inspection of the originals or a deposition. In such instances, the person to whom the subpoena is directed complies if the person produces copies of the specified items in the specified manner and certifies that the copies are true copies of all the items responsive to the subpoena or, if all items are not included, why they are not.

G. Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, such party's complaint, answer, or reply may be stricken.

H. Hospital records.

H(1) **Hospital.** As used in this [~~section~~] rule, unless the context requires otherwise, "hospital" means a health care facility defined in ORS 442.015(14)(a) through (d) and licensed under ORS 441.015 through 441.097 and community health programs established under ORS 430.610 through 430.700.

H(2) **Mode of compliance.** Hospital records may be obtained by subpoena [~~duces tecum~~] only as provided in this section[~~,~~]. However, if disclosure of [~~such~~] any requested records is restricted [~~by~~] or otherwise limited by state or federal law [~~the requirements of such law must be met.~~], then the protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law have been complied with and such compliance is evidenced through an appropriate court order or through execution of an appropriate consent. Absent such consent or court order, production of the requested records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate consent or court order does accompany the subpoena, then production of all records

requested shall be considered production of the records responsive to the subpoena.

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~~] responsive to 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 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 involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with [~~this~~] subparagraph H(2)(b)(iv), then a copy of the subpoena shall be served on the [~~injured party~~] person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the hospital.

H(2)(c) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, 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(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first

class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D of this rule.

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~~] responsive to the subpoena; (iii) that 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 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.

JURORS
RULE 57

* * * * *

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 thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant.~~] When the full number of jurors has been called, they shall be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court shall regulate the examination in such a way as to avoid unnecessary delay.

* * * * *

TRIAL PROCEDURE
RULE 58

A. Order of proceedings on trial by the court. Trial by the court shall proceed in the order prescribed in subsections (1) through (4) of section [B] C of this rule, unless the court, for special reasons, otherwise directs.

B. Failure to appear for trial. When a party who has filed an appearance fails to appear for trial, the court may, in its discretion, proceed to trial and judgment without further notice to the non-appearing party.

[B]C. Order of proceedings on jury trial. When the jury has been selected and sworn, the trial, unless the court for good and sufficient reason otherwise directs, shall proceed in the following order:

[B]C(1) The plaintiff shall concisely state plaintiff's case and the issues to be tried; the defendant then, in like manner, shall state defendant's case based upon any defense or counterclaim or both.

[B]C(2) The plaintiff then shall introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.

[B]C(3) The parties respectively then may introduce rebutting

evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense, or counterclaim.

[B]C(4) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.

[B]C(5) Not more than two counsel shall address the jury in behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours.

[B]C(6) The court then shall charge the jury.

[C]D. Separation of jury before submission of cause; admonition. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case, they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

[D]E. Proceedings if juror becomes sick. If, after the formation of the jury, and before verdict, a juror becomes sick, so as to be unable to perform the duty of a juror, the court may order such juror to be discharged. In that case, unless an alternate juror, seated under Rule 57 F, is available to replace the discharged juror or unless the parties agree to proceed with the remaining jurors, a new juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards formed.

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS RULE 68

* * * * *

C. Award and entry of judgment for attorney fees and costs and disbursements.

* * * * *

C(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and

disbursements. [~~No findings of fact or conclusions of law shall be necessary.~~] The trial court shall make findings of fact and conclusions of law on awards of attorney fees if requested by any interested party.

* * * * *

DEFAULT ORDERS AND JUDGMENTS
RULE 69

A. Entry of order of default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default.

B. Entry of default judgment.

B(1) **By the court or the clerk.** The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B(1)(a) The action arises upon contract;

B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can be computation be made certain;

B(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B(1)(d) The party against whom judgment is sought is not a minor or an incapacitated person as defined by ORS 126.003(4) and such fact is shown by affidavit;

B(1)(e) The party seeking judgment submits an affidavit of the amount due;

B(1)(f) An affidavit pursuant to subsection B(3) of this

rule has been submitted; and

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D(3)(a)(i), 7 D(3)(b)(i), 7 D(3)(e) or 7 D(3)(f).

B(2) **By the court.** In all other cases, the party seeking a judgment by default shall apply to the court therefore, but no judgment by default shall be entered against a minor or an incapacitated person as defined by ORS 126.003(4) unless the minor or incapacitated person has a general guardian or is represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

B(3) **Amount of judgment.** The judgment entered shall be for the amount due as shown by the affidavit, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B(4) **Nonmilitary affidavit required.** No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article I of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

~~[C. Failure to appear for trial. When a party who has filed an appearance fails to appear for trial, the court may, in its discretion, proceed to trial and judgment without further notice to the non-appearing party.]~~

[D]C. Setting aside default. For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B and C.

[E]D. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.

[F]E. "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the

duties of that office.

Proposed 1994 Staff Comments to Tentatively Adopted ORCP Amendments to be Considered by Council for Promulgation At Meeting on December 10, 1994

Prepared by Maury Holland, Executive Director*

{*N.B: These Staff Comments reflect my best efforts briefly to summarize the Council's collective purpose in promulgating each of the following proposed amendments, or its intent in adopting language employed, as an aid to judicial construction and to understanding by the bar and public. I therefore have no pride of authorship and welcome any additions, deletions or revisions that might be proposed.}

1. Amendment to ORCP 15.

15 A is amended at the suggestion of the OSB Practice and Procedure Committee to clarify that pleadings or motions responsive to any counterclaims or cross-claims, not merely those by a party joined under ORCP 22 D, must be filed with the clerk within 30 days after service of a pleading containing a counterclaim or cross-claim to which the pleading or motion responds, rather than 10 days after such service as might have been inferred from the prior language of this section. While this section speaks only of filing with the clerk, pleadings and motions responding to counterclaims and cross-claims must, pursuant to ORCP 9 A, also be served upon all other parties who have appeared in the action and not in default.#

{#In preparing this comment, I think I have come across a glitch which one of the 1993 amendments to our governing statute will presumably prevent the Council from fixing this biennium. 15 A as amended would state, more clearly than previously, that pleadings and motions responsive to counterclaims and cross-claims must be filed with the clerk within the 30 days provided by ORCP 7 C(2) by which a defendant must appear and defend in

response to a summons and complaint. Since a pleading or motion responsive to a counterclaim or cross-claim would clearly be either a "pleading subsequent to the original complaint," or a "written motion other than one which may be heard ex parte" within the meaning of ORCP 9 A, it would have to be served upon other parties. The problem is that 15 A provides the time within which filing with the clerk must occur, and 9 A provides that there must be service upon the parties, but I find no rule specifying the time within which the latter must occur. I suppose that everyone simply acts on the technically mistaken assumption that all pleadings or motions responsive to any sort of statement of claim must be served upon parties within the same 30-day period as 7 C(2) requires for pleadings or motions responsive to original complaints. To further complicate matters, 9 C states that "all papers required to be served upon a party by section A. of this rule shall be filed with the court within a reasonable time <u>after</u> service." (Emphasis supplied.) Since 15 A now says, and would still say as amended, that pleadings and motions responsive to counterclaims or cross-claims must be filed within 30 days with the clerk, read literally and in combination with 9 C, this would mean that these would have to be served upon parties some reasonable time <u>before</u> filing with the clerk, in other words, within less than 30 days, which of course is crazy. Naturally, everyone understands that filing with the clerk or court occurs after service upon parties so that they will show a certificate that the latter has been accomplished and also because it is the parties, not the clerk, who must respond to successive pleadings. It seems to have been nothing more than a drafting error that accounts for 15 A's imposing a 30-day deadline on filing with the clerk instead of what is obviously called for, service upon the parties.

This little problem could be easily fixed by further amending 15 A to substitute for "filed with the clerk" something like: "served as provided in Rule 9 A within the time provided in Rule 7 C(2)." To do this would, of course, be in violation of our statute, even though such an amendment would be merely a clarifying one which no one could reasonably object to on policy grounds. In fact, it would probably do nothing more than reflect what must already be universal practice, since I doubt whether lawyers file responses to counterclaims or cross-claims with the clerk within 30 days and then serve the parties at their leisure. Next biennium will be time enough to fix this problem. Although this problem does exist, I suppose it is not likely to have any practical impact, since despite what 15 A literally says, no one out there could believe that replies to counterclaims and answers to cross-claims are unique among pleadings in having to be filed with the clerk within 30 days and served upon parties a reasonable time thereafter. 15 A has read this way since the ORCP were promulgated in 1980, and I've never heard of anyone getting "hung up" on this issue. Incidentally, Fred Merrill's annotations show that the Legislature amended 15 A as it came to

it from the Council. I haven't yet checked, but I'd give good odds it was the Legislature that put in "filed with the clerk."}

2. Amendments to ORCP 22.

22 C(1) is amended in two respects, one of which merely confirms the Council's intent regarding the meaning of the prior language, with the other changing the meaning of this subsection in one important respect. The former is intended to make clear that, as with counterclaims and cross-claims generally under the ORCP, counterclaims by third-party defendants against plaintiffs or third-party plaintiffs, and cross-claims by third-party defendants against third-party co-defendants, are all permissive rather than compulsory.

The amendment that changes the meaning of this subsection provides that a party wishing to serve a third-party complaint and summons more than 90 days after service upon such party of the complaint or counterclaim out of which the third-party complaint arises must first obtain leave of court, but not, as previously required, also obtain agreement of all parties who have appeared. The Council is persuaded that when leave of court is obtained, there is no good reason to require in addition that agreement of the parties be obtained. When all parties have agreed that a third-party complaint and summons may be served beyond the 90-day period during which this may be done as of right, the parties will presumably consent to the motion for

leave of court and no judicial ruling will normally be necessary, although the court retains authority to deny leave despite agreement of the parties When, on the other hand, one or more parties do not so agree, the court can take into account any objection on their part, along with other pertinent factors, in deciding whether to grant leave.

3. Amendments to ORCP 32.

32 F(2) is amended to remove uncertainty left by the Council's 1992 amendments to Rule 32, specifically the amendment abolishing the classification of class actions in former section 32 B into three distinct categories. This amendment left unclear to which kind of class action the claim form or opt-in procedure required by this subsection should continue to apply. The purpose of the present amendment is to express the Council's intent that the understanding established prior to the 1992 amendments remains that this procedure applies only to class actions wherein the relief sought consists of individual monetary recoveries by class members. The Council leaves to judicial determination whether, and under what circumstances, the claim form procedure might also apply to so-called "mixed" class actions, wherein declaratory or injunctive relief is sought along with individual monetary recoveries. The Council similarly leaves to judicial determination whether, and under what

circumstances, the claim form procedure might apply as well to class actions wherein individual monetary recoveries are sought from a fund or other source that is limited, either by law or as a practical matter, to an amount less than the likely or actual aggregate of such recoveries.

32 F(3) is amended for clarity and consistency with subsection 32 F(2) above, as amended.

4. Amendments to ORCP 55.

55 D(1) is amended at the suggestion of the OSB Procedure and Practice Committee to provide that service of a subpoena, even though not commanding personal appearance at a trial, hearing or deposition, be accompanied by payment of one day's attendance fee. The purpose of this amendment is to provide some compensation to persons or organization for their time and effort in complying with subpoenas to produce books, papers, documents or tangible things by permitting inspection and copying of originals or by mailing certified copies to the address specified in the subpoena.

This subsection is also amended to make clear that copies of subpoenas commanding production of books, documents, papers or tangible things before trial must be served upon all other

parties within the prescribed time, whether such subpoenas are served personally or, as permitted by renumbered subsection 55 D(3), by mail.

55 D(3) is renumbered.

55 D(3)(b) is amended to provide that subpoenas commanding production of books, paper, documents or tangible things may be served by mail. Service by personal delivery remains permissible at the option of the party issuing the subpoena.

55 F(2) is amended at the suggestion of the OSB Procedure and Practice Committee by adding the words "an examination" to the second sentence regarding nonresidents, so that the wording parallels that of the first sentence regarding residents. No change of meaning is intended.

55 F(3) is added to provide that a subpoena commanding production of books, papers, documents or tangible things without a personal appearance by the person subpoenaed may, at the option of the party issuing the subpoena, specify that production shall be either by permitting inspection and copying of originals or by mailing certified true copies of the requested items to the address shown in the subpoena. The purpose of this amendment is to save the time and expense often entailed by traveling to the subpoenaed person's county of residence or place of business for

inspection and copying of originals when the party issuing the subpoena believes that mailing of certified copies will suffice. The Council's intent is that the place from which copies are mailed be deemed the place where they are produced for purposes of subsection F(2) of this rule.

55 H(1) is amended to substitute "rule" for "section" to make clear that the definition of "hospital" in this subsection applies wherever that word "hospital" appears throughout this rule, such as in new subsection F(3).

55 H(2) is amended with the intent to minimize some difficulties encountered in subpoenaing of hospital records. The term "duces tecum" is deleted because it is not accurate as applied to subpoenas commanding production of hospital records without personal appearance by their custodian. Such appearance continues to be obtainable pursuant to subsection 55 H(4) when that is deemed necessary. Also, the word "only" is added to emphasize that hospital records may be subpoenaed exclusively by compliance with this section.

The amended language of the second, third and fourth sentence of this subsection is intended to accomplish two purposes. The first is more fully to alert parties subpoenaing hospital records that some of them are prohibited by federal or state privacy regulations from being disclosed absent an

appropriate consent or court order. When necessary and obtainable, such consent or court order should accompany service of the subpoena. Unless a consent or court order accompanies service, a hospital will frequently be prohibited by state or federal regulations, not only from producing copies of requested records, but from even disclosing the existence of such records or that they are in its custody.

The second purpose of the amended language is to provide clear direction to hospitals on how to comply with subpoenas that command production of records, some of which are protected by privacy regulations and others of which are not. Unless a subpoena is accompanied by an appropriate consent or court order, only records not protected should be produced. When a subpoena commands production of records all of which are protected, and no appropriate consent or court order is provided, the hospital records custodian should notify the party issuing the subpoena, or his or her counsel, that production will not be forthcoming.

55 H(2)(a) is amended to delete "duces tecum" for the reason stated in the Staff Comment to subsection H(2) above, and to substitute "responsive to" for "described in" for consistency of usage with that subsection as amended.

55 H(2)(b) is amended to clarify which subparagraph is referenced in the fourth sentence, and to provide that copies of

hospital records subpoenas must be served upon all parties, as well as upon the person who is the subject of the records, who might not be an "injured party" as so described in the prior language of this paragraph.

55 H(3)(a) is amended to substitute "responsive to" for "described in" for consistency with subsection H(2) as amended.

5. Amendment to ORCP 57.

57 C is amended to negate any inference that might be drawn from the prior language of this subsection that the court must allow parties to examine prospective jurors singly as opposed to in panels. The Council intends that the court have broad discretion to regulate the manner in which voir dire is conducted.

6. Amendment to ORCP 58.

58 B is added to this rule by transfer from Rule 69, where it formerly appeared as section 69 C. The Council intends no change in meaning, but believes this section more appropriately belongs in this rule, since it deals with several aspects of trial procedure. The rule is renumbered accordingly.

7. **Amendment to ORCP 68.**

68 C(4)(c)(ii) is amended to require the court to make findings of fact and conclusions of law on the record in ruling upon petitions for award of attorney fees if so requested by any party interested in such award. The Council intends that the term "interested party" refer to any party to whom or by whom any portion of an award would be paid. The purpose of this amendment is to facilitate meaningful appellate review of rulings on fee award petitions.

8. **Amendment to ORCP 69.**

Former 69 C is deleted from this rule and transferred to Rule 58 as section 58 B. This rule is renumbered accordingly.