COUNCIL ON COURT PROCEDURES

University of Oregon
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Eugene, Oregon 97403-1221

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July 6, 1994

Dennis James Hubel, Esq.
Karnopp, Petersen, Noteboom, Hubel Hansen & Arnett
Riverpointe One
1201 N.W. Wall Street, Suite 300
Bend, OR 97701-3011

Dear Denny:

Many thanks for your June 28 explanatory letter of the Procedure and Practice Committee's proposed amendments to ORCP 55. In return I enclose a copy of my covering letter to the Council, which expresses some concerns about process and also suggests the possibility of a joint effort to devise a related statutory amendment. The latter might come too late in the biennium, however, or might be objectionable on its merits.

Cordially,

Maurice J. Holland
Executive Director

Enc.

cc: Kathy Chase
Doug Wilkinson

July 6, 1994

To: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

From: Maury Holland

Re: **Supplemental Material for 7/16/94 Meeting Re ORCP 55**

1. I have just received the attached letter of Denny Hubel covering a number of amendments to ORCP 55 proposed by the OSB Procedure & Practice Committee ("PPC"). It seemed important to get this material out to you promptly, so I have not yet had time to consider these proposed amendments carefully enough to determine whether they impinge upon any amendments to 55 H likely to be reported by our own 55 H subcommittee at our 7/16/94 meeting. My initial sense is that the PPC's proposed amendments are not likely to overlap or be inconsistent with the proposals presumed to be forthcoming from our 55 H subcommittee, because the former appear not to be addressed to either of the specific problems that subcommittee has been addressing--the problem of how to alert practitioners to the fact that some subpoenaed hospital records might be withheld with no indication thereof on the return, and the problem faced by hospital administrators or records custodians in responding to 55 H subpoenas when records protected by federal or state privacy regulations are requested.

There is one important thing all Council members should understand about the PPC's proposed amendments to Rule 55. As I have just learned from Susan Grabe (the OSB Law Improvement Coordinator, not a typo for Justice Susan Graber), these amendments have been officially forwarded by the OSB Board of Governors' Committee on Legislation and Public Policy to the Office of Legislative Counsel as proposed legislation for the 1995 session. Susan wanted me, and wants all Council members, to understand that this was not intended as a hostile action or as in any way intended to preempt the role of the Council. Forwarding of these proposed amendments was prompted by the fact that an understanding exists between the OSB and the Legislative Counsel that the former will forward to the latter any proposed legislation desired by the Bar no later than June 30 preceding the next following legislative session. Neither the PPC nor the Legislation and Public Policy Committee felt it could pass up this deadline on the chance that the Council would agree with these proposed amendments and promulgate them in identical or substantially identical form at its December meeting.

My understanding of what Susan Grabe told me is that, should the Council agree with these proposed amendments and be willing to promulgate them as rules amendments, that of course would be possible, and might be preferable for the following two reasons: first, the PPC's proposed amendments, if promulgated by the Council, would become effective unless the 1995 Legislature statutorily overrode them, whereas, as proposals from the OSB, they would become effective only if the Legislature enacted them; and secondly, it would be more in keeping with the Council's "primary jurisdiction" with respect to ORCP amendments. Again, according to what Susan told me, were the Council to accept the PPC's proposed amendments and agree to promulgate them as ORCP 55 amendments effective unless legislatively overridden, the Legislation and Public Policy Committee would presumably notify the Legislative Counsel that they were withdrawn in the form of proposed legislation. In past biennia Staff Comments to various ORCP amendments promulgated by the Council have credited the PPC as their source, and that could surely be done again in this instance.

Despite Susan's assurances, the bona fides and factual foundation I do not for a moment doubt, it seems to me that what has happened here presents the Council with a rather delicate problem. This problem is highlighted by the fact that, almost invariably in the past, when ORCP amendments have been submitted directly to the Legislative Counsel for direct legislative action, the Chair of the Council has sent a letter to the Chairs of the Senate and House Judiciary Committees requesting that they not be acted upon until first submitted to the Council for its consideration, even when that would entail a full biennium's delay. Such letters were obviously part of the Council's efforts to preserve its primary jurisdiction over ORCP amendments, so that even if it does not necessarily have the last word, it at least has the first. I have not yet checked our archives to see whether objecting letters of this kind have been sent in response to submissions by state agencies as opposed to private groups or individuals, or in response to submissions by the OSB in particular. Of course, it goes without saying that it would be extravagantly self-aggrandizing for the Council to take the position that no person or organization, including the OSB, may ask the Legislature to revise the ORCP without its seal of approval. Such an arrogation of power would be enough to call down the wrath of nearly everyone, including the OSB, on the Council. But that is not really the issue here. Rather, the issue is whether any individual or organization, including even the OSB, should first obtain the Council's judgment, one way or the other, concerning one or more proposed ORCP amendments before taking them to the Legislature. That much deference, and no more, might well be something the Council should invariably request of the Legislature. Naturally, nothing more than a

request, not an insistence, to the Legislature is involved, since no one could seriously argue that the Council can bar resort to the Legislature by the OSB or anyone else as a matter of right.

My discussion of this issue has been at some length because, despite the shortness of remaining meeting time and the considerable number of other issues on its agenda, the Council might want to consider at the 7/16/94 meeting whether it wishes at this late date to concentrate special and intense effort to considering the PPC's proposed amendments with a view to promulgating them if it can satisfy itself that they are sound, which it is my initial reaction that they assuredly are. If that could be done, despite the lateness of the hour and the press of other business, it could avoid the painful, no-win choice of the Council's either ceding some of its primary jurisdiction by default or, alternatively, getting the session 1995 off to a wonderful start by asking the Judiciary Committees to defer action on these amendments, an action hardly calculated to cement the support the Council has always enjoyed from the OSB, to say nothing of its cordial and collaborative relations with the PPC. The PPC has obviously put in a great deal of effort in devising these amendments, and it might well be that their soundness is so self-evident that the Council will have no difficulty approving and promulgating them.

2. At the Council's 5/14/94 meeting Mike Phillips asked me to check back through the minutes to see whether the Council has ever considered expanding the use of the affidavit procedure provided by 55 H for subpoenaing of hospital records to other kinds of records of regularly conducted activity. Responding to that question, the minutes of Council meetings have for the past 7 or 8 years been strewn with discussions concerning 55 H. Almost all of this discussion has been concerned with the vexed questions of defining a "hospital" for purposes of 55 H and with spelling out the details of its affidavit procedure. On only one occasion that Gilma and I have been able to locate was there passing reference to any consideration being given to expanding this procedure to other kinds of business records. The following appears from the minutes of the 12/9/89 meeting:

> **Agenda Item No. 6: (Records subpoena subcommittee report).** The subcommittee, consisting of Larry Thorp, Judge Graber, and Henry Kantor, had been appointed at the Council's October 14, 1989 meeting to review the appropriateness of the affidavit procedure to respond to a records subpoena for a variety of public and private entities other than hospitals. Larry Thorp stated the subcommittee had conferred on the telephone. He said that there was some problem with the existing language of the rule incorporating various health care entities -

> by cross-reference. Before the subcommittee decides what to do it wanted advice from the Council whether the application of the rule should be expanded and, if so, in what direction. After extended discussion, it was suggested that the committee clean up the language and limit application to hospitals and similar health care facilities. . . .

The minutes do not disclose the reasons why the Council instructed the subcommittee not to consider expansion of the affidavit procedure--the term "extended discussion" often covers a multitude of sins. Reading between the lines, however, it appears that the Council wanted the problems with existing 55 H, problems with which we are still wrestling, to be resolved before expanding the scope of the section's applicability to other kinds of records. Following the above quoted reference the question of expanding this procedure drops from sight.

You didn't ask, but for what it is worth, my opinion is that it is crazy to limit the affidavit procedure to hospital records when it would seem equally useful in subpoenaing all sorts of "records of regularly conducted activity" within the meaning of ORE 803, ORS 40.460(6). Unless I am missing something, the PPC's proposed ORCP 55 amendments accomplish a number of useful things, but do not expand the affidavit procedure beyond hospital records. Thus, proposed new 55 F(3) would authorize subpoenaing of records other than hospital records, along with any other kind of "tangible things," but does not include any provision whereby a custodian's affidavit could substitute for sworn testimony for purposes of admissibility in evidence. Had such a provision been included, it would almost certainly be invalid as expanding a rule of evidence <u>if promulgated by the Council</u>, though not if enacted by the Legislature. The difficulty is that the statutory evidentiary provision, ORS 41.930 (copy attached), is specifically linked to ORCP 55 H and, in express terms, limited to "hospital records."

With some trepidation I raise the question whether, this late in the biennium, there might yet be time for the Council, perhaps in collaboration with the PPC, to draft a proposed amendment to ORS 41.930 that would make the affidavit procedure applicable to subpoenaing of any "records of regularly conducted activity" within the meaning of ORE 803(6), ORS 40.460(6). Although I have not immersed myself in the legislative history of this statute or of ORCP 55 H, my hunch is that the reason they were both limited to hospital records was that, understandably, it was the hospitals that complained most strenuously about the enormous burdens on their records custodians in the absence of an affidavit procedure. From the perspective of the efficient and economical conduct of litigation involving "business records"

more generally, it is difficult to see why the savings achieved by the affidavit procedure should be confined to one class of such records when equal reliability would seem achievable with some or all other classes. If the Council is willing to make a special effort in this regard, with full assistance of the PPC if that can be obtained, would not the savings of aggravation, costs and cumbersomeness be well worth it? My personal view is that it would be, unless this is a more controversial area than I am aware, so that any thought of expanding the affidavit procedure would spark a firestorm of opposition or polarize the bar in the manner of discovery sharing or dispensing with claim forms in class action procedure. I personally cannot see where the opposition would come from, but, then, I live in what is widely imagined to be an ivory tower, not the real world. Another consideration, on the negative side, however, is that if the OSB is subject to a June 30 deadline in submitting proposed legislation, might this also apply to the Council? If so, might the Legislative Counsel waive it in light of what would seem, at least to me, the large benefits of a statutory amendment along these lines? Yet another negative consideration is that, in the past, some Council members have expressed the thought that the Council should not get into the practice of proposing legislation except such as is needed to work in tandem with an ORCP amendment to make the latter workable.

cc: Kathy Chase
Denny Hubel
Doug Wilkinson

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August 5, 1994

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland, Executive Director M.J.H.

RE: Additional Comments re Rule 55 H Proposed Amendments

Attached is a letter from Ms. Karen Creason regarding proposed amendments to ORCP 55 H. Ms. Creason's comments seem to me important and useful, so I wanted all of you have them right away. The fact that she has found some additional glitches after all the review and researching to which these amendments have been subjected shows how confoundedly difficult it is to get this stuff 100% right.

Enc.

cc: Ms. Kathy Chase (w/enc.)
Ms. Karen Creason
Mr. Dennis Hubel (w/enc.)
Mr. Doug Wilkinson (w/enc.)

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ackadopted 8/5/94

August 3, 1994

Mr. Maury Holland
University of Oregon
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Eugene, Oregon 97403-1221

Re: Council on Court Procedures

Dear Maury:

Thanks for the agenda and materials for the Council's August 13 meeting. It was helpful to see the Practice and Procedure recommendations on Rule 55 alongside those of the Council. There are several matters not previously mentioned in the subcommittee discussions which deserve comment:

1. Given the evolution of subpoenas to permit use of a subpoena to obtain third-party documents without a person appearance at some proceeding, the retention of the term "duces tecum" in 55.H(2), H(2)(a) and H(2)(d) is no longer appropriate--the provisions should apply to all hospital records subpoenas, regardless of whether or not a personal appearance is required.

2. The requirement of notice to the "injured party" and all other parties which is found in H(2)(b) needs to be rephrased--the patient whose records are sought is not necessarily "injured"; mental health, drug or alcohol treatment records are often sought in custody cases, for example. The patient may not even be a party. Records of persons involved in an incident but who settled or who are technically not parties (e.g. records of allegedly abused children sought in a divorce/custody action) are often subpoenaed. Thus substitution of the word "patient" or "person whose medical records are sought" for "injured party" would be helpful. In addition, the notice requirement should apply whether production is to be with or without an appearance: either way the patient needs an opportunity to object to disclosure of his/her records. Such notice is mandatory under federal

drug/alcohol record disclosure requirements. I suggest deleting "in accordance with this subparagraph" or substituting "If the subpoena directs delivery of hospital medical records ...." as the leadin.

3. The placement of "only" in H(2) is rather important. For the revisions to work, it must be clear that the provisions of section H apply to all attempts to subpoena hospital medical records, i.e. the restrictions and conditions of this section cannot be circumvented by issuing a subpoena under some other provision or section. "Hospital records may be obtained by subpoena only as provided in this section" would be appropriate wording.

4. While it doesn't pose a problem to hospitals, per se, you should be aware that Practice and Procedures' proposed H(2)(b)(1) and (1)(A) would put other participants in breach of various laws protecting specific kinds of medical records since those statutes and regulations mandate that there be no "redisclosure" of records properly disclosed to designated person(s) pursuant to a consent or court order, absent additional consent or court order. If the court order or consent doesn't permit disclosure to all the people who would be given access under this provision, the person making the redisclosure would be in violation of his/her legal duties.

(5) Finally, assuming the other changes proposed by the CCP subcommittee are adopted, retention of section H(2)(c) probably makes little sense: the court order or consent permitting the disclosure will come before the protected records are mailed and there is no need for provisions which assume protected materials can be sent in sealed envelopes in response to any subpoena with the sealed envelopes protected against opening by the receiving party until an appropriate order is entered.

Sincerely,

Karen Creason

July 15, 1994

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland

Attached (for distribution at July 16th meeting) are comment letters relating to ORCP 55 and ORCP 68.

Acknowledged 7/13/94
File

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July 11, 1994

Maury Holland
University of Oregon
School of Law
Eugene, Oregon 97403-1221

Re: Council on Court Procedures

Dear Maury:

Thanks for the copy of the final recommendations on behalf of the Subcommittee on Hospital Records, whose report will be considered by the full Council on July 16. I believe that the recommendations contained in the July 5, 1994 report properly recognize the difficult realities which restrict all of our options when dealing with specially protected medical information and permit an efficient mode of response consistent with those limitations. I very much appreciate the efforts of the Council, and especially the subcommittee, in addressing those issues, and urge that the proposed revisions and clarifications be adopted, as recommended.

Sincerely,

Karen Creason

COUNCIL ON COURT PROCEDURES

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July 12, 1994

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland

RE: ORCP 55

Enclosed is a comment letter dated July 7, 1994 from Larry Thorp regarding the Procedure & Practice Committee's proposed amendments to ORCP 55.

Enc.

cc: Dennis Hubel
Kathy Chase
Doug Wilkinson
Karen Creason
Larry Wobbrock
Bob Oleson
Susan Evans Grabe

Acknowledged 7/11/94

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MARVIN O. SANDERS
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JACK B. LIVELY
(1923-1979)
JILL E. GOLDEN
(1951-1991)

July 7, 1994

Maury Holland
School of Law, Room 311
University of Oregon
1101 Kincaid Street
Eugene, OR 97401

Re: ORCP 55 Changes

Dear Maury:

I reviewed the draft of the revisions to ORCP 55 circulated by the Procedure and Practice Committee with Dennis Hubel's letter dated June 27, 1994. Although I reviewed all of the proposed changes, I will only comment on those made to Section H. That is not to imply, however, that I do not believe some additional work needs to be done on some of the other suggested changes.

I believe the addition to Subsection H(2) deals with the problem first raised by Karen Creason, but I would move the new word "only" to the second line and put it after the word "tecum."

I applaud the Committee's efforts to reduce paperwork for the hospital by proposing the changes to Subsection H(2)(b), but I believe it also creates some additional problems. Some federal regulations, for example, require that certain records may only be produced by "court order". That was one of the reasons for creation of the subpoena duces tecum procedure, rather than a simple request for production, since a subpoena may for purposes of some regulatory requirements be considered a court order. Some rules, however, also require that records once disclosed by court order may not be further disseminated without either further court order or following some defined procedure. I am concerned, therefore, that while the Hospital may be safe in responding to the subpoena duces tecum, it may run afoul of regulatory limitations by automatically copying other parties who request copies of the records.

I do not have a solution to this problem, but it is one that the Council should consider.

Very truly yours,

THORP, PURDY, JEWETT,
URNESS & WILKINSON, P.C.

Laurence E. Thorp

LET:kb
cc: Karen Creason

COUNCIL ON COURT PROCEDURES

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July 8, 1994

TO: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland

RE: **7/16/94 COUNCIL MEETING: Agenda No. 5 -- Report of Subcommittee on Hospital Records**

Attached is a July 5, 1994 report (containing proposed amendments to ORCP 55) from J. Michael Alexander on behalf of the Subcommittee on Hospital Records. Comments will be received at the Council's July 16th meeting.

Enc.

BURT, SWANSON, LATHEN, ALEXANDER, McCANN & SMITH, P.C.

ATTORNEYS AT LAW

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OF COUNSEL

GEORGE N. GROSS
DAVID W. HITTLE

July 5, 1994

John Hart
Attorney at Law
1000 SW Broadway, 20th Floor
Portland OR 97205

Maury Holland, Executive Dir.
Council on Court Procedures
University of Oregon Law School
Eugene OR 97403-1221

Re: Council on Court Procedures

Gentlemen:

The subcommittee on the proposed amendments to ORCP 55 recently met and came up with a proposal which we hope will resolve the hospital's concerns about the proper way to respond to a subpoena in light of State and Federal law restricting disclosure of certain records. The proposed change is essentially consistent with my letter of May 13th. Our suggestions involve amendments to Rules 55(H)(2), and 55(H)(2)(a), and 55(H)(3)(a)(ii).

The current rule 55(H)(2) reads as follows:

> Hospital records may be obtained by subpoena duces tecum as described in this section; **if disclosure of such records is restricted by law, the requirements of such law must be met.**

We would suggest that the amended rule should read as follows:

(NEW LANGUAGE IN BOLD FACE – DELETED LANGUAGE IN BRACKETS)

> Hospital records may be obtained by subpoena duces tecum **only** as provided in this section. **However**, if disclosure of such **requested** records is restricted **or otherwise limited by State or Federal** law [the requirements of such law must be met] **such protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law protecting such records have been complied with, and such compliance is evidenced through an appropriate court order or execution of an appropriate consent by the patient. Absent such court**

> **order or consent, production of records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate court order or consent by the patient does accompany the subpoena, then production of all records shall be considered production of the records responsive to the subpoena.**

The second proposed change is to Rule 55(H)(2)(a), to make it consistent with the change in 55(H)(2). Current 55(H)(2)(a) reads as follows:

> 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.

The amended 55(H)(2)(a) would then read as follows:

> 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 of 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.

Finally, again in an effort to achieve consistency, we would suggest amendments to Rule 55(H)(3)(a)(ii). The current rule reads as follows:

> 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.

The amendment would read as follows:

> 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) 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.

The subcommittee feels that these changes will allow the custodian of hospital records to honestly and accurately sign an affidavit that he or she is producing records responsive to a subpoena even though all of the records described in the subpoena may not be delivered to the requesting party due to restrictions under the State or Federal law. It will also give some message to practitioners that certain records are protected, and that steps beyond the mere issuance of subpoena are necessary to obtain these records.

The subcommittee also discussed a problem relating to Rule 55(H)(2)(b) and 55(H)(2)(c). No specific suggestions are being submitted, but the subcommittee does feel that this is an area for discussion among the council as a whole. Rule 55(H)(2)(b)(iv) allows for delivery of hospital records to the attorney or party issuing the subpoena when no hearing is scheduled. Most of us acknowledge that this is the common practice, in other words, that a defense counsel may merely subpoena records to his office. Rule 55(H)(2)(c) then describes how medical records will be opened. The rule seems to contemplate that the records shall only be opened in the presence of all parties who have appeared in person or by

counsel at the trial, deposition, or hearing. It does not address the issue of how records are opened when they are delivered to the attorney who has issued the subpoena. The common practice of these records being opened by defense counsel seems to be inconsistent with the rules. We were wondering whether this presents a problem that should be addressed through any amendment to the rules, including a suggestion that ORCP 55(H)(2)(b)(iv) be deleted.

We look forward to comments at the next meeting of the council.

Sincerely,

BURT, SWANSON, LATHEN, ALEXANDER, McCANN, & SMITH, P.C.

J. Michael Alexander

FOR THE SUBCOMMITTEE ON HOSPITAL RECORDS COMPRISED OF: Honorable Sid Brockley, Mike Phillips, Rudy Lachenmeier and J. Michael Alexander

JMA/jb
CC: Mike Phillips
Rudy Lachenmeier
Honorable Sid Brockley

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July 6, 1994

Dennis James Hubel, Esq.
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Dear Denny:

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Cordially,

Maurice J. Holland
Executive Director

Enc.

cc: Kathy Chase
Doug Wilkinson

July 6, 1994

To: CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES

From: Maury Holland

Re: **Supplemental Material for 7/16/94 Meeting Re ORCP 55**

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There is one important thing all Council members should understand about the PPC's proposed amendments to Rule 55. As I have just learned from Susan Grabe (the OSB Law Improvement Coordinator, not a typo for Justice Susan Graber), these amendments have been officially forwarded by the OSB Board of Governors' Committee on Legislation and Public Policy to the Office of Legislative Counsel as proposed legislation for the 1995 session. Susan wanted me, and wants all Council members, to understand that this was not intended as a hostile action or as in any way intended to preempt the role of the Council. Forwarding of these proposed amendments was prompted by the fact that an understanding exists between the OSB and the Legislative Counsel that the former will forward to the latter any proposed legislation desired by the Bar no later than June 30 preceding the next following legislative session. Neither the PPC nor the Legislation and Public Policy Committee felt it could pass up this deadline on the chance that the Council would agree with these proposed amendments and promulgate them in identical or substantially identical form at its December meeting.

My understanding of what Susan Grabe told me is that, should the Council agree with these proposed amendments and be willing to promulgate them as rules amendments, that of course would be possible, and might be preferable for the following two reasons: first, the PPC's proposed amendments, if promulgated by the Council, would become effective unless the 1995 Legislature statutorily overrode them, whereas, as proposals from the OSB, they would become effective only if the Legislature enacted them; and secondly, it would be more in keeping with the Council's "primary jurisdiction" with respect to ORCP amendments. Again, according to what Susan told me, were the Council to accept the PPC's proposed amendments and agree to promulgate them as ORCP 55 amendments effective unless legislatively overridden, the Legislation and Public Policy Committee would presumably notify the Legislative Counsel that they were withdrawn in the form of proposed legislation. In past biennia Staff Comments to various ORCP amendments promulgated by the Council have credited the PPC as their source, and that could surely be done again in this instance.

Despite Susan's assurances, the bona fides and factual foundation I do not for a moment doubt, it seems to me that what has happened here presents the Council with a rather delicate problem. This problem is highlighted by the fact that, almost invariably in the past, when ORCP amendments have been submitted directly to the Legislative Counsel for direct legislative action, the Chair of the Council has sent a letter to the Chairs of the Senate and House Judiciary Committees requesting that they not be acted upon until first submitted to the Council for its consideration, even when that would entail a full biennium's delay. Such letters were obviously part of the Council's efforts to preserve its primary jurisdiction over ORCP amendments, so that even if it does not necessarily have the last word, it at least has the first. I have not yet checked our archives to see whether objecting letters of this kind have been sent in response to submissions by state agencies as opposed to private groups or individuals, or in response to submissions by the OSB in particular. Of course, it goes without saying that it would be extravagantly self-aggrandizing for the Council to take the position that no person or organization, including the OSB, may ask the Legislature to revise the ORCP without its seal of approval. Such an arrogation of power would be enough to call down the wrath of nearly everyone, including the OSB, on the Council. But that is not really the issue here. Rather, the issue is whether any individual or organization, including even the OSB, should first obtain the Council's judgment, one way or the other, concerning one or more proposed ORCP amendments before taking them to the Legislature. That much deference, and no more, might well be something the Council should invariably request of the Legislature. Naturally, nothing more than a

request, not an insistence, to the Legislature is involved, since no one could seriously argue that the Council can bar resort to the Legislature by the OSB or anyone else as a matter of right.

My discussion of this issue has been at some length because, despite the shortness of remaining meeting time and the considerable number of other issues on its agenda, the Council might want to consider at the 7/16/94 meeting whether it wishes at this late date to concentrate special and intense effort to considering the PPC's proposed amendments with a view to promulgating them if it can satisfy itself that they are sound, which it is my initial reaction that they assuredly are. If that could be done, despite the lateness of the hour and the press of other business, it could avoid the painful, no-win choice of the Council's either ceding some of its primary jurisdiction by default or, alternatively, getting the session 1995 off to a wonderful start by asking the Judiciary Committees to defer action on these amendments, an action hardly calculated to cement the support the Council has always enjoyed from the OSB, to say nothing of its cordial and collaborative relations with the PPC. The PPC has obviously put in a great deal of effort in devising these amendments, and it might well be that their soundness is so self-evident that the Council will have no difficulty approving and promulgating them.

2. At the Council's 5/14/94 meeting Mike Phillips asked me to check back through the minutes to see whether the Council has ever considered expanding the use of the affidavit procedure provided by 55 H for subpoenaing of hospital records to other kinds of records of regularly conducted activity. Responding to that question, the minutes of Council meetings have for the past 7 or 8 years been strewn with discussions concerning 55 H. Almost all of this discussion has been concerned with the vexed questions of defining a "hospital" for purposes of 55 H and with spelling out the details of its affidavit procedure. On only one occasion that Gilma and I have been able to locate was there passing reference to any consideration being given to expanding this procedure to other kinds of business records. The following appears from the minutes of the 12/9/89 meeting:

> **Agenda Item No. 6: (Records subpoena subcommittee report).** The subcommittee, consisting of Larry Thorp, Judge Graber, and Henry Kantor, had been appointed at the Council's October 14, 1989 meeting to review the appropriateness of the affidavit procedure to respond to a records subpoena for a variety of public and private entities other than hospitals. Larry Thorp stated the subcommittee had conferred on the telephone. He said that there was some problem with the existing language of the rule incorporating various health care entities -

> by cross-reference. Before the subcommittee decides what to do it wanted advice from the Council whether the application of the rule should be expanded and, if so, in what direction. After extended discussion, it was suggested that the committee clean up the language and limit application to hospitals and similar health care facilities. . . .

The minutes do not disclose the reasons why the Council instructed the subcommittee not to consider expansion of the affidavit procedure--the term "extended discussion" often covers a multitude of sins. Reading between the lines, however, it appears that the Council wanted the problems with existing 55 H, problems with which we are still wrestling, to be resolved before expanding the scope of the section's applicability to other kinds of records. Following the above quoted reference the question of expanding this procedure drops from sight.

You didn't ask, but for what it is worth, my opinion is that it is crazy to limit the affidavit procedure to hospital records when it would seem equally useful in subpoenaing all sorts of "records of regularly conducted activity" within the meaning of ORE 803, ORS 40.460(6). Unless I am missing something, the PPC's proposed ORCP 55 amendments accomplish a number of useful things, but do not expand the affidavit procedure beyond hospital records. Thus, proposed new 55 F(3) would authorize subpoenaing of records other than hospital records, along with any other kind of "tangible things," but does not include any provision whereby a custodian's affidavit could substitute for sworn testimony for purposes of admissibility in evidence. Had such a provision been included, it would almost certainly be invalid as expanding a rule of evidence <u>if promulgated by the Council</u>, though not if enacted by the Legislature. The difficulty is that the statutory evidentiary provision, ORS 41.930 (copy attached), is specifically linked to ORCP 55 H and, in express terms, limited to "hospital records."

With some trepidation I raise the question whether, this late in the biennium, there might yet be time for the Council, perhaps in collaboration with the PPC, to draft a proposed amendment to ORS 41.930 that would make the affidavit procedure applicable to subpoenaing of any "records of regularly conducted activity" within the meaning of ORE 803(6), ORS 40.460(6). Although I have not immersed myself in the legislative history of this statute or of ORCP 55 H, my hunch is that the reason they were both limited to hospital records was that, understandably, it was the hospitals that complained most strenuously about the enormous burdens on their records custodians in the absence of an affidavit procedure. From the perspective of the efficient and economical conduct of litigation involving "business records"

more generally, it is difficult to see why the savings achieved by the affidavit procedure should be confined to one class of such records when equal reliability would seem achievable with some or all other classes. If the Council is willing to make a special effort in this regard, with full assistance of the PPC if that can be obtained, would not the savings of aggravation, costs and cumbersomeness be well worth it? My personal view is that it would be, unless this is a more controversial area than I am aware, so that any thought of expanding the affidavit procedure would spark a firestorm of opposition or polarize the bar in the manner of discovery sharing or dispensing with claim forms in class action procedure. I personally cannot see where the opposition would come from, but, then, I live in what is widely imagined to be an ivory tower, not the real world. Another consideration, on the negative side, however, is that if the OSB is subject to a June 30 deadline in submitting proposed legislation, might this also apply to the Council? If so, might the Legislative Counsel waive it in light of what would seem, at least to me, the large benefits of a statutory amendment along these lines? Yet another negative consideration is that, in the past, some Council members have expressed the thought that the Council should not get into the practice of proposing legislation except such as is needed to work in tandem with an ORCP amendment to make the latter workable.

cc: Kathy Chase
Denny Hubel
Doug Wilkinson

COUNCIL ON COURT PROCEDURES

University of Oregon
School of Law
Eugene, Oregon 97403-1221

Telephone: (503) 346-3990
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January 19, 1994

TO: Rudy R. Lachenmeier
Member, Subcommittee on Hospital Records

FROM: Maury Holland M.J.H.
Executive Director

Enclosed are materials to assist you in your work on this subcommittee. You expressed interest in receiving minutes of the Council's December 1992 meeting, as well as some of the minutes of Council meetings prior to the December meeting. Gilma is attending to the copying of those materials; they should reach you by the middle of next week.

Encs.

cc: Mike Phillips
Mick Alexander
Sid Brockley
Karen Creason
Larry Thorp
Larry Wobbrock

UNIVERSITY OF OREGON

December 9, 1993

TO: **SUBCOMMITTEE ON HOSPITAL RECORDS:**

Mick Alexander
Sid Brockley
Mike Phillips
Karen Creason
Larry Thorp
Larry Wobbrock

FROM: Maury Holland, Executive Director M.J.H
(telephone: 346-3834)

Enclosed for your reference is a packet of materials compiled by Gilma Henthorne relating to some preliminary work done regarding ORCP 55 H during the 1991-93 biennium.

The Council is grateful for the willingness of Karen Creason, Larry Thorp, and Larry Wobbrock to serve as members of this subcommittee. Each of them were involved, in one way or another, with the preliminary work that was done on subpoenaing of hospital records last biennium. My understanding with these "outside" members was that, although they are of course cordially welcome to attend any meetings of the Council where this matter is on the agenda and to participate in discussion, they should not feel obligated to do so. The expectation is that they could make their contribution by means of exchange of drafts, comments, perhaps a phone conference or two, and so forth.

Enclosures

c: John Hart

OFFICE OF THE PRESIDENT
Eugene OR 97403-1226 · Telephone (503) 346-3036 · Fax (503) 346-3017

HOSPITAL RECORDS
(Materials from 1991-93 Biennium)

Excerpts - 12/14/91 minutes

October 17	Oregon State Bar Center
November 14	Oregon State Bar Center
December 12	Oregon State Bar Center

Agenda item No. 8: Videotape depositions - status report (Executive Director). The Executive Director recommended this item be carried on the agenda for the next few meetings since the Council had received only one letter so far on the subject. The Chair asked that a handout entitled "The Video Advantage" appearing in the ABA Journal be attached to the minutes of this meeting for the perusal of Council members.

NEW BUSINESS

A letter, together with an article entitled "More Public Access to Discovery Documents," from Bernard Jolles dated December 11, 1991 was distributed at the meeting and is also attached to these minutes. In addition, the Chair requested that another article appearing in the ABA Journal entitled "Secrecy versus Safety" be attached to these minutes.

The Chair announced that Circuit Judge Charles Sams had been appointed to the Council for a four-year term to replace Judge Mattison, whose term had expired.

The Chair stated that Phil Goldsmith had sent a packet of materials containing proposed revisions to ORCP 32, and packets were distributed to those members present (packets will be mailed to those members not present). The Chair appointed a subcommittee consisting of Janice Stewart, Maury Holland, and Mike Phillips to take a look at the subject, determine whether Council action is necessary, and report back at the next meeting. Janice Stewart was asked to chair the subcommittee.

A letter from Attorney Karen Creason dated December 4, 1991 was distributed at the meeting and is also attached to these minutes. Ms. Creason's concern was that the amendments to Rule 55 promulgated by the Council (which become effective January 1, 1992) introduced a significant problem because of the failure to exempt hospital records from its reach (leaving them to be covered by the preexisting 55 H rules). Justice Graber said she thought Creason was correct; the Council did not intend to make hospital records subject to the new procedure but failed to exclude them in the rule. The Executive Director stated he would come back with some specific suggestions to amend Rule 55.

Judge Snouffer suggested that there were some problems with ORCP 70 relating to submission of forms of judgment. It was

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December 4, 1991

Professor Fredric R. Merrill
School of Law
University of Oregon
Eugene, OR 97403

Re: Council on Court Procedures

Dear Fred:

This letter is to confirm an issue we discussed by telephone a week or so ago. Among the amendments promulgated by the Council which become effective January 1, 1992 are changes to Rule 55 concerning subpoenas. In particular, it is my understanding that the intent of the addition to Rule 55A/B is to permit the use of subpoenas to obtain non-party documents without conducting a pro forma deposition of the holder of the documents, in much the same way that preexisting Rule 55H permitted with respect to hospital records. I believe that the proposed change, while generally desirable, has unintentionally introduced a significant problem, because of the failure to exempt hospital records from its reach (leaving them to be covered by the preexisting 55H rules).

In particular, I am concerned that attorneys will use Rule 55A/B to attempt to obtain hospital records rather than continuing to use Rule 55H. If they do so, 55B indicates that the receiving hospital must produce the requested materials unless within 14 days after service, it serves written objections to the inspection or copying of the designated material. As you know there are numerous authorities in both case law and health care provider regulations requiring medical providers to protect the confidentiality of medical information they hold and to release it only upon proper authorization. Often the patient is not even a party to the lawsuit. A hospital receiving such a subpoena would be required to routinely prepare an objection. That responsibility is even more urgent if the record happens to contain particular kinds

of information subject to special protections in the federal law (for example, drug and alcohol treatment information) or entitled to special protection under state statutes (HIV tests, certain mental health records, etc.). With respect to those kinds of information, there are explicit statutory provisions prohibiting response to such a demand short of a court order or specific written patient consent. The mere issuance of a subpoena by a litigant will not suffice in such cases even if the patient happens to be a party or otherwise gets notice of the demand.

When litigants used the 55H process to obtain hospital records, that problem was circumvented because the facility was authorized to prepare a certified copy of the record, seal it (together with the appropriate information necessary to authenticate it), and forward that sealed package to the presiding officer - judge, workers' compensation hearing officer, etc. The materials were not thereafter opened and distributed absent a direction of the presiding officer to do so. That minimal judicial involvement is lacking under the revised 55A and B processes; the hospitals will have to routinely object to assure that patient rights are protected and to avoid liability for unauthorized release of information. Such objections will, in turn, clog the court motion calendar unnecessarily.

I believe the appropriate resolution of the problem is to exempt production of hospital records from Rule 55A and B and require that they be obtained, as before, under Rule 55H. To do otherwise will impose significant burdens on the parties, the courts, and on the hospitals who will be called on to prepare the necessary objections.

I would very much appreciate the Council's attention to this problem. If something in its prior action addresses this concern, I would appreciate your official comments on how the problem is avoided under the rule changes you have proposed. As I mentioned on the phone, I serve as counsel to the Oregon Association of Hospitals and will need to get information out in their next newsletter about this new process. Unless some reasonable assurances are available to indicate that they are protected in responding to 55A and B requests for documents which are not accompanied by either patient consent or court order, I will have to advise them to make official objections in all cases. In addition, I expect

they will experience considerable confusion trying to figure out whether a subpoena is being issued under 55A and B or under 55H (i.e., whether or not they can respond by preparing the certified copy and mailing it to the presiding judge rather than delivering it directly to a party). I suspect that attorneys preparing subpoenas will have little appreciation for the distinction, either. Given the January 1 implementation date, I would appreciate your response about "legislative history" of the changes as soon as possible.

Sincerely,

Karen K. Creason

KKC:jb

Excerpts - 2/8/92 minutes

projects which the Council is presently pursuing, Janice Stewart asked for the Council's direction as to whether the subcommittee should spend the time on it now in order to get it done in time for the 1993 legislative session. Maury Holland said he thought that if the subcommittee went forward with studying the proposals now, it would pre-empt the Council from pursuing any other significant large issue. Mike Phillips agreed that it is one of three potentially time-consuming matters before the Council and thought it should be dealt with by the Council. He felt that the Council should prioritize the matters under consideration.

Phil Goldsmith summarized the proposed changes to ORCP 32 set out in his February 7, 1992 letter (attached to these minutes).

The Chair stated that if action is not taken by the Council during this biennium, there will be class action activity in the legislature. Since the Council has requested that proposals be presented to it first in advance of going to the legislature, the Council has an obligation to consider the class action proposals. He said that, unless the Council felt differently, he would like to vest the subcommittee with the power to take testimony -- by written submission or by telephone -- to present to the Council. There was no opposition.

Agenda Item No. 6: Administrative subpoenas and hospital records (Executive Director's memorandum, page 5). A memorandum dated January 28, 1992 from Karen Creason had been distributed at the meeting and is also attached to these minutes. It was the consensus that consideration of this agenda item should be deferred until all Council members had an opportunity to review Ms. Creason's memorandum. The Chair suggested placing it on the agenda for the March meeting.

Agenda Item No. 7: Costs - copying of public records (Executive Director's memorandum, page 7). After discussion, a motion was made and seconded to adopt the language amending ORCP 68 A(2) set out on page 7 of the Executive Director's memorandum. After further discussion, a motion was made and seconded to modify the previous motion to delete the words "pursuant to ORS 40.570 (Oregon Evidence Code, Rule 1005)". The motion passed unanimously.

Agenda Item No. 8: ORS sections limiting ORCP 7 E (Executive Director's memorandum, page 8). The Executive Director did a computer search to see how many ORS sections changed the limits on who may serve summons found in ORCP 7 E, and found that the only ORS section that modifies ORCP 7 E is ORS 180.260, which allows employees of the Department of Justice to serve summons and process in cases in which the State is interested. A motion was made and seconded to adopt the additional language ",except as provided in ORS 180.260", in ORCP

Attachment to 2/8/92 minutes

STOEL RIVES BOLEY JONES & GREY

MEMORANDUM

January 28, 1992

TO: FRED MERRILL
COUNCIL ON COURT PROCEDURES

FROM: KAREN K. CREASON

RE: Rule 55: Discovery of Hospital Records

As you know from our prior conversations, I represent the Hospital Association, and in that capacity had occasion to review last year's changes to Rule 55. I am concerned that the changes made to Rule 55 to allow compelled production of nonparty records by subpoena, unrelated to any trial, hearing or deposition, would create undesirable impacts if applied to production of hospital records.

Pre-existing Rule 55H allowed hospitals to respond to record subpoenas without the personal appearance of the custodian only in a specific manner, i.e. by sending sealed, certified copies of the records to the presiding officer of the proceeding. It allowed those sealed records to be opened only under controlled circumstances. The expansion of section F - which I understand was intended to permit a party to compel production of non-Hospital nonparty records without a hearing or deposition - has created problems for hospitals because the changes in that general section did not clearly exclude use of that section to obtain hospital records. (Despite retention of 55H concerning hospital records, nothing appears to preclude alternative use of the new more liberal provisions of 55F.) Under the revised section F, hospitals would have the burden to file formal objections with the court in all cases where they receive such a subpoena if the substantive physician-patient privileges or special federal protections of certain kinds of records have not been waived by patient consent or judicial process about which the hospital is unlikely to be informed. The use of section F to subpoena hospital records would thus create three undesirable effects: (1) it would ultimately be futile for the subpoenaing party; (2) it would increase hospital costs in filing the objections; and (3) it would clog court motion dockets.

I believe the solution is three-part: (1) to make 55H the exclusive means of subpoenaing hospital records; (2)

kkcp1715

within 59H to clearly state, contrary to provisions of Section F, that hospital records cannot be subpoenaed for production without a related trial, hearing or deposition to provide the presiding officer to take charge of the sealed records; and (3) to clarify the provisions concerning the circumstances under which the sealed records may be opened, in a way which continues to allow hospitals to send the sealed records into the judicial system in an economical way and assures that they are opened and released by the judicial recipient only under proper circumstances.

I have enclosed a draft which I think addresses those concerns.

Karen K. Creason

cc: Mr. Dan Field, Oregon Association of Hospitals

D.(1) Service. .....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, if permitted under paragraph H of this rule, shall be served . . .

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, if permitted under Section H of this rule, only in the county ....A nonresident of this state who is not a party to the action may be required by subpoena to attend or to produce books, papers, documents or tangible things, if permitted under section H of this rule, only in the county ... .

H.(2) Mode of compliance. Hospital records may be obtained by subpoena ducestecum only as provided in this section; if disclosure of such records is restricted by law, the requirements of such law must be met. Subpoenas may be used to obtain hospital records only at trial, hearing or deposition and not for production of records without patient consent in the absence of such formal proceedings.

H.(2) Certification in lieu of appearance:

H.(2) (a) Except as provided in subsection (3) of this section . . .

H.(2)(b) The copy of the records . . . .(iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business. A copy of any subpoena seeking production of hospital records shall be served on the person whose records are sought, not less than 14 days prior to service of the subpoena on the hospital. The copy of the records shall remain sealed and shall be opened only (a) at the time of trial, deposition, or other hearing, or (b) in advance of the trial or hearing by any party or attorney of records of a party in the presence of the custodian of court files if that party has given reasonable written advance notice of intent to inspect at a specified time and no objection to the subpoena or inspection has been filed. Records which are not introduced in evidence . . .

at the discretion of the judge, officer or body conducting the proceeding

H.(2) d) For purposes of this section, . . .shall not be subject to the requirements of subsection (3) of section D. of this rule.

H(2) (e) Affidavit of custodian of records.

H.(2) (f). The records described . . .referred to therein.

H (2) (g) . If the hospital has none . . .of which the affiant has custody.

H(2)(h). When more than one . . . may be made.

H (3) Personal attendance of custodian . . .

H(3)(a). The personal attendance of a custodian of hospital records and production of original hospital records is required at a trial, hearing or deposition if the subpoena duces tecum contains . . .sufficient compliance with this subpoena.

H (3) (b) The statement provided in H(3) (a) shall not be used in a subpoena of hospital records other than for a hearing trial or deposition.

H.(3) (c). If more than one subpoena . . .first such subpoena.

H(4). Tender and payment . . .

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ALDEN B. WOLFE, CLI
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DONNA WILSON
MARDEL SKILLMAN
LUCIE KRUEGER, RN, MN, FNP
TRIAL ASSISTANTS

March 16, 1992

Oregon Association of Hospitals
Bldg. 2, Suite 100
4000 Kruse Way Place
Lake Oswego, OR 97035

COPY

Gentlemen:

Hospitals, clinics, and individual physicians in the state of Oregon are regularly required to incur expense and inconvenience because of the present practices of obtaining medical records for purposes of litigation. A simple change in the Oregon Rules of Civil Procedure could significantly reduce that workload.

Whether the claim has resulted from a motor vehicle collision, a defective product, or professional negligence, the parties require accurate and complete copies of the medical records.

At the present time it is common for plaintiff's counsel to obtain some or all of the medical records before an action is filed. Once the suit is filed, each defendant normally seeks, through a subpoena duces tecum, to obtain another complete record. Then at or prior to trial another subpoena will usually be issued requiring the medical provider to deliver a third set of records for the trial. In some cases I've seen, the medical provider has been required to produce the same set of records as many as 7 times.

To reduce the inconvenience and expense imposed upon the medical providers, I have for many years urged opposing counsel to cooperate and to obtain the records only one time. The procedure is to subpoena one set of the records early on and have that copy delivered in a sealed envelope, in response to the subpoena, to a certified court reporter. The court reporter then makes true copies for each of the litigants and retains the original copy furnished by the medical provider, in a sealed envelope for trial. Not only does this practice obviate repeated inconvenience and expense to the medical provider, it is also more convenient and less expensive for the litigants.

I have been frustrated however, in that I find that only

attachments to Agenda for 5-9-92 Council meeting 10

occasionally will opposing counsel agree to such a procedure. Rather, each attorney tends to want to seek his or her own set of records.

I am proposing to the Council on Court Procedure that the Oregon Rules of Civil Procedure be amended specifically providing for such a procedure. Once an action is filed, any of the litigants has a right to subpoena a copy of the records. But the subpoena would require that the set of records provided by the medical provider, in response to the subpoena, not simply be sent to the office of the attorney issuing the subpoena, but rather, go to a court reporter. The reporter would make a record of having received the medical records in a sealed envelope and duly provide a true copy thereof to each litigant entitled to a copy. The reporter would then preserve the original set of records in a sealed envelope to be used as the trial exhibit.

While I have on some occasions persuaded opposing counsel to follow this procedure, and it has worked without a hitch, and with savings to all involved, I continue to be frustrated that many counsel are unwilling to so cooperate. I am troubled about the additional expense, the waste of paper, and waste of time that results.

Our office will be presenting a proposal to the Council on Court Procedure that promulgates amendments to the Oregon Rules of Civil Procedure and we suggest that your respective organizations consider the proposal and lend support.

If you or representatives of your respective organizations have any interest in discussing the matter or helping to refine the proposal, I would be pleased to hear from you.

Sincerely,

Arthur C. Johnson

ACJ/ng
cc: Jan Baisch
Jeff Foote
Larry Wobbrock
Charlie Williamson

SACRED HEART GENERAL HOSPITAL
1255 HILYARD STREET • P.O. BOX 10905 • EUGENE, OREGON 97440 • PHONE 503/686-7300

MAR 2

COPY

March 20, 1992

Arthur C. Johnson
975 Oak St Ste 1050
Eugene OR 97401-3176

Dear Mr. Johnson:

I have reviewed your 3/16/92 letter in which you purpose to modify the Oregon Rules of Civil Procedure to delineate a new process by which medical records will be distributed to litigants once an action is filed.

In a review with our Medical Records department we feel that your proposal has merit and would like to suggest that you also include patient billing information as this also seems to be a high demand item at the time litigation is initiated.

If we can be of any assistance please contact me at 686-7243.

Sincerely,

James M. Lemieux

James M. Lemieux
Director, Risk Management

rb

HE

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DONNA WILSON
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LUCIE KRUEGER, RN, MN, FNP
TRIAL ASSISTANTS

March 25, 1992

Kent Ballentine
Oregon Association of Hospitals
4000 Kruse Way Place
Lake Oswego, OR 97035

COPY

Dear Kent:

Thank you for your phone call in response to my letter of March 16. I also received a response from James M. Lemieux of Sacred Heart General Hospital. Mr. Lemieux agreed with the general idea contained in my proposal and suggested that it be broadened to include patient billing information.

Michael Phillips of our office is a member of the Council on Court Procedure. He advises that a proposal accomplishing at least part of this proposal will be before the Council on Court Procedure at its meeting to be held in Eugene, Saturday, April 11, at 9:30 a.m. The meeting will be held at the University of Oregon Law School.

Meetings of the Council are open to the public and I would suggest that you or representatives of the Oregon Association of Hospitals, as well as others interested in such a reform, be present to express their views.

If you want any specific information concerning the pending proposal or the procedures that will be followed by the Council at its meeting on April 11, you may wish to contact the chair of the Council, Henry Kantor, 226-3232. We have asked that this matter also be put on the May agenda for the Council as that meeting will be held in Portland, and may be more convenient. You can also contact Mr. Phillips of our office. I'm sure either would be willing to confer with you and share such information.

Sincerely,

Arthur C. Johnson

ACJ/ng
cc: Mel Pyne, McKenzie-Willamette Hospital
James M. Lemieux, Sacred Heart General Hospital
Henry Kantor
Jan Baisch
Jeff Foote

13

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Oregon
Association of
Hospitals

April 13, 1992

Mr. Arthur C. Johnson
Johnson Clifton Larson & Bolin, P.C.
975 Oak St., Suite 1050
Eugene, OR 97401-3176

Dear Mr. Johnson:

Since your letter of March 16, 1992 and our subsequent phone conversation, I have gathered information and opinion on the procedures for obtaining medical records. The issue is complex, and your proposed solution leaves a number of questions unresolved. These include:

- The manner in which the records of litigants receiving ongoing treatment would be forwarded to the court; and,

- A procedure for protecting records which contain information that is not pertinent to the case at issue, and is protected from release by state or federal law. If the hospital does not control access to the record, it cannot fulfill its legal responsibility to limit release of the record to authorized parties.

In addition to these specific questions raised by your proposal, a number of related issues have been raised by others who work with these record requests on a regular basis. I believe it would be appropriate to consider all of these issues concurrently with any effort to modify ORCP 44 and/or 55. Rather than asking the Council on Court Procedures to consider individual proposals in a vacuum, I recommend that the Council sponsor a multidisciplinary task force to undertake a comprehensive review of the rules governing the subpoenaing of medical records. Such a group might include attorney's from the plaintiff's and defense bar, along with representatives from the Oregon Medical Records Association, the Oregon Medical Association, and the Oregon Association of Hospitals. I hope you will join me in urging the Council on Court Procedures to consider sponsoring such an effort.

Thank you again for the opportunity to respond to your proposal. I look forward to working with you on this issue.

Sincerely,

G. Kent Ballantyne
Senior Vice President

c: Mel Pyne, McKenzie-Willamette Hospital
James M. Lemieux, Sacred Heart General Hospital
Henry Kantor

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PURDY
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& JEWETT P.C.
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OFFICE MANAGER

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(1912-1977)
JACK B. LIVELY
(1923-1979)

April 23, 1992

Mr. Henry Kantor
Pozzi, Wilson, et al
1400 Standard Plaza
1100 SW 6th Avenue
Portland, OR 97204

Dear Henry:

I have received several letters concerning proposals to modify the procedure for subpoenaing hospital records. The issue was originally brought up when Karen Creason raised the issue of whether the modified subpoena procedure under ORCP 55H was the exclusive procedure under which hospital records could be subpoenaed. That was followed up by a letter from Art Johnson suggesting an alternative to the 55H procedure. It is also my understanding that the Council on Court Procedures as well as the Procedure and Practice Committee of the State Bar are looking into this matter.

I received a copy of G. Kent Ballantynes letter addressed to Art Johnson dated April 13, 1992 suggesting that before any changes are made a multidisciplinary task force be put together to study the issues surrounding the subpoenaing of the hospital records. Quite candidly my experience has been that trial lawyers engaged in personal injury litigation either on behalf of the plaintiff or defendant are generally unappreciative and do not understand the problems that hospitals have in disclosing their records. There are constraints under both state and federal law as well as the risk of litigation by patients for inappropriate disclosure of hospital records. Given those facts I would hate to see any changes made without an opportunity for the Oregon Association of Hospitals, the Oregon Medical Records Association, the Oregon Medical Association and the Oregon Society of Hospital Attorneys participating in that process. As a result I believe Mr. Ballantynes suggestion is a good one and should be considered.

Please call if you have any questions.

Very truly yours,

THORP, DENNETT, PURDY
GOLDEN & JEWETT, P.C.

Laurence E. Thorp

LET/cam
cc: Dan Fields
Karen Creason
Mel Pyne
Kurt Hansen

Excerpts - 5/9/92 minutes

meeting schedule is attached to these minutes.

The Chair said that he had received additional letters pertaining to class actions and that they would be distributed to the Council prior to the next meeting.

Agenda Item No. 6: Subpoenas without trial or deposition and hospital records (Executive Director's 3-12-92 memorandum (attached to these minutes) and letters from Art Johnson, James Lemieux, Kent Ballantyne, and Larry Thorp -- letters attached to agenda for this meeting). The Chair asked the members for their thoughts about the suggestion that the Oregon Association of Hospitals, the Oregon Medical Association, and the Oregon Society of Hospitals be given more of an opportunity to comment on the proposed rules and perhaps participate in a task force to discuss the issue of subpoenaing hospital records. The Chair said his concern was that it was somewhat unlikely that it could be finished in time to included as a rule amendment by August.

Bruce Hamlin suggested that the Council consider the Executive Director's 3-12-92 memorandum. Mike Phillips felt that the March 12th memorandum accomplished what was needed, i.e. it made sure that hospital subpoenas come into the system in a way that all parties can use them, and that the memorandum also solved Karen Creason's concerns. Mike Phillips made a motion, seconded by Judge Liepe, that the Council adopt the proposals made in the 3-12-92 memorandum.

Ron Marceau stated that Dennis Hubel, who is the liaison from the Bar's Procedure & Practice Committee to the Council, would be attending the Council's meeting directly and might have some thoughts on the subject. The Chair suggested that this matter be deferred until later in the meeting.

Agenda Item No. 7: Oaths for deposition by telephone (Bruce Hamlin and Mike Phillips). Bruce Hamlin had distributed proposed amendments to Rules 38, 39, and 46 prior to the meeting (they are also attached to these minutes). Bruce Hamlin stated that he and Mike Phillips had tried to incorporate suggestions made by the Council members at the February 8th meeting; they wanted to make it clear that an oath could be given during a telephone deposition over the telephone whether the deponent was located within this state or outside this state (that was designed to clear up any ambiguity with ORS 44.320). Bruce Hamlin explained the proposed amendments to Rules 38, 39, and 46 (see attached).

The Chair asked how the language proposed to be added to Rule 39 C(7) concerning "testimony ... taken by telephone other than pursuant to court order or stipulation made part of the record, ..." would bear upon either an oral stipulation at the deposition or a written stipulation, such as a letter between

attachment to 5/9/92 minutes

(NOTE: PROPOSED AMENDMENTS NEXT PAGE)

March 12, 1992

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: **Fred Merrill, Executive Director**

RE: **Agenda Item No. 5 - March 14, 1992 meeting**

I have consulted with Karen Creason and Larry Thorp regarding amendments to ORCP 55 H to solve the problem of the relationship between hospital records and a subpoena duces tecum without a deposition, hearing, or trial. We suggested the following changes to ORCP 55 H would solve the problem and would be consistent with the Council's intent in making the amendments last biennium.

DELETED LANGUAGE IS BRACKETED; NEW LANGUAGE IS UNDERLINED AND IN BOLDFACE.

SUBPOENA
RULE 55

* * * *

H. Hospital records.

* * * *

H.(2) **Mode of compliance.** Hospital records may be obtained by subpoena duces tecum as provided in this section; if disclosure of such records is restricted by law, the requirements of such law must be met.

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 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, then a copy of the subpoena shall be served on the injured party not less than 14 days prior to service of the subpoena on the hospital.

← NOTE BRACKETS

* * * *

H.(4) Limitation of use of subpoena to produce hospital records without command for appearance; [P]personal attendance of custodian of records may be required.

H.(4)(a) Hospital records may not be subject to a subpoena commanding production of such records other than in connection with a deposition, hearing, or trial.

H.(4)[(a)](b) 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)](c) 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.

* * * *

FRM:gh

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of June 13, 1992

City Countil Chambers, Civil Center
1155 East Main Street
Ashland, Oregon

Present:	William D. Cramer, Sr.	Winfrid K.F. Liepe
	Lafayette G. Harter	Ronald L. Marceau
	Henry Kantor	Michael V. Phillips
Excused:	Richard C. Bemis	Richard T. Kropp
	Susan G. Bischoff	Charles A. Sams
	Susan P. Graber	William C. Snouffer
	Bruce C. Hamlin	Janice M. Stewart
	John E. Hart	Elizabeth Welch
	Maury Holland	
Absent:	Richard Barron	Bernard Jolles
	Paul De Muniz	John V. Kelly
	Lee Johnson	Robert B. McConville

(Also present were: Attorney Dennis Hubel; Gilma J. Henthorne, Executive Assistant.)

The meeting was called to order by Chair Henry Kantor at 9:45 a.m.

Agenda Item No. 1: Approval of minutes of meeting held May 9, 1992. It was pointed out that Judge Welch should be listed as present at the May 9 meeting. Since a quorum was not present at this meeting, action was deferred concerning this agenda item until the next meeting.

Agenda Item No. 3: Subpoenas without trial or deposition and hospital records (3-12-92 memorandum attached to agenda) (Chair). Attorney Dennis Hubel said that members of the Oregon State Bar Procedure & Practice Committee were concerned because both the plaintiffs' bar and defense bar as part of the committee believed that the proposed amendments to ORCP 55 H contained in the 3-12-92 memorandum would create problems. One of the committee's fears was that a deposition would actually have to be

scheduled in order to obtain records. The Chair stated that he would prepare a memo regarding the status of this item and present it to the Council for its consideration at the next meeting.

Agenda Item No. 2: Report on Executive Director search (Chair). The Chair reported his progress in connection with the search for an Executive Director. He said that he had received an inquiry from a potential applicant who wished further information. The Chair also stated that he had made calls to the deans of the various law schools informing them of the vacancy. The Chair expressed appreciation for suggestions received from Council members.

Agenda Item No. 4: Interim report of class action subcommittee (Mike Phillips). Mike Phillips reported that Maury Holland had written an excellent memo outlining both the 1980 actions of the Council and the legislative response to that, as well as comparisons with the present proposals. He stated that the intention in terms of reporting at this meeting was to identify those areas which the subcommittee felt were substantive and not procedural. He said that the only one about which the subcommittee had concurrence is the provision that would provide that attorney fees could be awarded in class action suits only as a sanction. He said that the subcommittee planned to meet later this month and would report back at the August 1 meeting.

Agenda Item No. 5: Secrecy in personal injury actions - Rule 36 C(2) (Chair). The Chair stated he would place this matter on the agenda for the August 1 meeting.

Agenda Item No. 6: Alternate jury proposal (Judge Barron). It was suggested that this matter be placed on the agenda for a subsequent meeting.

The meeting was adjourned at 10:51 a.m.

Minutes submitted by
Gilma J. Henthorne

Excerpts - 8/1/92 minutes

actions, and agreed that these proposals came from a relatively narrow group of plaintiffs' lawyers.

The Chair then asked if any speakers wished to make comments in the form of rebuttal.

Mr. Phil Goldsmith spoke in rebuttal to some of the arguments. He took exception to Mr. Wight's contention that Eisen established individual notice as a due process requirement, and reiterated the point that procedural rules ought not attempt to codify evolving due process requirements. In response to Mr. Caswell, he stated there is already very broad trial court discretion in all class actions except those aggregating individual damage claims. He stated that the reason few class actions fail because of notice costs is because of the pre-selection on the part of attorneys. He repeated that, in his experience, in cases where individualized notice had been provided, few if any class members either opted out or intervened. In response to Win Liepe's question whether the importance of notice increases as the size of individual claims increases, Mr. Goldsmith replied in the affirmative and expressed tentative agreement that it might theoretically be possible to trigger a mandatory notice requirement by reference to some minimum average recovery, although he was not at the moment prepared to suggest how some such feature might be practically implemented.

Various Council members were then given an opportunity to ask questions of the speakers and discussion followed.

Maury Holland stated that a practical problem involved the time element, i.e., the August 21 deadline for transmittal of any proposed ORCP amendments to the Publications Section of the Oregon Judicial Department for publication in the Advance Sheets. He said the class action matter would involve a lot of debate, discussion, and heavy-duty analysis. Janice Stewart suggested that a notice setting forth the recommendations of the Subcommittee on Class Actions, both majority and minority reports, be prepared for publication to allow for additional comments from the public. A discussion followed regarding publication requirements, but a final decision was deferred until later in the meeting.

Agenda Item No. 3: Subpoenas without trial or deposition and hospital records. (Attached to these minutes is a copy of a letter dated July 30, 1992 from Dennis J. Hubel regarding amendment to Rule 55 H.) The Chair stated that Karen Creason, Portland attorney, had made a proposal to amend Rule 55 H (to solve the relationship between hospital records and a subpoena duces tecum without a deposition, hearing, or trial), and the late Fred Merrill had prepared a memo dated March 12, 1992, which suggested a proposal to address Ms. Creason's concerns. The

Chair said that the issue which the Council now needs to address is whether it is going to try to solve the problem which was first identified by Ms. Creason or take up a broader range of problems during a later biennium. Mike Phillips said that Ms. Creason's most recent letter indicated that hospitals have records which they believe they cannot provide in response to a subpoena and are making a choice not to provide them, but sign affidavits saying all the records are being provided.

John Hart made a motion, seconded by Susan Graber, that a task force be appointed to take a broader-scale, comprehensive look at the problem with Rule 55 and to submit a report to the Council for its consideration during the next biennium. The motion passed unanimously.

Agenda Item No. 4: Oaths for deposition by telephone (Acting Executive Director). Referring to the packet of materials entitled TENTATIVELY ADOPTED ORCP AMENDMENTS (attached to the original of these minutes, copies having been mailed to Council members previously), Maury Holland pointed out that the Council had not dealt with the last sentence of Rule 46 A.(1) (page 20 of the packet): "An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the county where the deposition is being taken."

Bruce Hamlin stated that the last sentence had been inadvertently omitted from his original proposal and that he had now prepared an amendment to that sentence which had been distributed prior to the commencement of the meeting. Discussion followed concerning the wording of that sentence. It was decided that Hamlin would rework the sentence and present it to the Council for its consideration later in the meeting.

Agenda Item No. 5: Exclusion of witnesses at depositions (Janice Stewart) (see page 4 of packet entitled TENTATIVELY ADOPTED ORCP AMENDMENTS). Janice Stewart stated that at the Council's February 8, 1992 meeting, the Council had voted to add the following as the second sentence of 39 D.: "At the request of a party or a witness, the court may order persons excluded from the deposition." She said that she had voted against the change because it did not accomplish what she had hoped to accomplish (it had been reported that the late Fred Merrill held the same opinion). She stated that she had wanted to make sure that the court has authority to exclude people from depositions for reasons other than just for protective orders. She said her preference is to list those people who can attend a deposition and if you want other people there, one would need a court order. Bruce Hamlin said the Council rejected that idea because of the difficulty in determining who fits within that list because of the variety of types of cases. Dick Kropp proposed the following change: "... the court may order persons other than parties

Dennis J. Hubel

...ised in Oregon
...shington

Karnopp, Petersen
Noteboom, Hubel
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Lyman C. Johnson
(1929-1986)

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July 30, 1992

VIA FACSIMILE AND REGULAR MAIL

Mr. Henry Kantor
Chair, Council on Court Procedures
Attorney at Law
14th Floor Standard Plaza
1100 S W Sixth Avenue
Portland OR 97204

Re: Council on Court Procedures 6-13 Meeting

Dear Mr. Kantor:

You asked for the input of the OSB Committee on Procedure & Practice to the Council on two topics at the Ashland meeting. Those topics were:

1. The issues with ORCP 55 regarding production of hospital records and other records which the Procedure & Practice Committee felt should be addressed in any review of ORCP 55 by the Council. In addition, I believe you inquired whether the Procedure & Practice Committee favored piecemeal revisions of portions of ORCP 55, or preferred that the entire rule be considered for changes with respect to any and all issues at one time.

2. Secrecy in personal injury actions - Rule 36 C(2) and and Justice Graber's proposal. Neither I nor our Committee have a copy of Justice Graber's proposal.

I'll start with ORCP 55. Our Committee is unanimous in its belief that the rule should not be reviewed and revised piecemeal. Rather, our concern is that the Rule, to the greatest extent practical, be viewed as a whole and that all records be treated and governed by the same procedures. As it stands now, there are some

Attachment to 8/1/92 minutes

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differences, apparently slight on the surface, but probably significant in practice, in how one obtains hospital records versus any other records with this rule.

Issues that our Committee would like to see addressed upon the Council's consideration of Rule 55 include, at a minimum, the following:

1. Avoid making hospital records more difficult to obtain either for parties to litigation or, more difficult to produce, for the hospital's records custodians. While no formal position has been taken by the Committee, there has certainly been sentiment expressed that, as it stands now, that a deposition should not required to obtain hospital records, and actual appearance by the records custodian and/or attorneys should not be required and that the scope of the records available for discovery should not be changed.

2. The Council should address whether other records should also be made available without a required appearance by the records custodian, without a required deposition and via a mail in procedure as with hospital records, with the same notice and opportunity to object as currently provided in ORCP 55, both for non-hospital records and for hospital records.

3. The Committee is in general agreement with the concepts expressed by Art Johnson that it would be desirable to develop a procedure that would require hospital records to be produced only once in litigation (with an appropriate opportunity to require subsequently generated hospital records to be produced as well) with an obligation on the party obtaining them to make them available to other parties in the case for a reasonable charge (probably the normal copy cost charge plus a reasonable share of the expense of getting the records in the first instance).

4. An issue which may or may not be appropriate for consideration by the Council, but is certainly faced by practitioners is the cost charged by records custodians for hospital records and, in some instances, other records as well. Some facilities provide the records for the subpoena fee only. Others supply the records for a subpoena fee and reasonable [something less than $.50 per page] copy costs. Others charge a rather arbitrary fee for the production of the records in addition to whatever is supplied as a subpoena fee. Some clarification in

this as to what the charges can and/or should be made would be helpful to all.

5. Lastly, the most recent discussion by the Committee suggests that perhaps some of the issues raised to date by Art Johnson and others can be simplified if we consider the produce-ability of the records versus the admissibility of the records in evidence.

Our Committee is anxious to work with the Council on any and all of these Rule 55 issues in the future, but we agree with Karen Creason's most recent correspondence of June 8, 1992, in which she suggests that all of these issues be considered simultaneously and after the next Legislative session by the Council, with an opportunity for input by all concerned parties.

With respect to confidentiality, as indicated above, the Committee does not have a copy of and has not, therefore, had an opportunity to review Justice Graber's proposal. However, the topic of confidentiality and/or secrecy in personal injury actions has been discussed both with respect to protective orders for materials obtained in discovery in such actions and secrecy/confidentiality of settlement agreements. There is no agreement on our Committee with respect to either topic. There are strong feelings on both sides of each issue that seem to be split along "party lines" between plaintiff's trial lawyers and defense trial lawyers. It's the Committee's feeling that this needs to be studied in more detail and that no action should be taken until that occurs.

Very truly yours,

DENNIS JAMES HUBEL

DJH:sb

cc: Karen Creason
Stephen Thompson
Maurice J. Holland

26

DUNN, CARNEY, ALLEN, HIGGINS & TONGUE

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BRADLEY O. BAKER
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†† ADMITTED IN OREGON AND CALIFORNIA
** RESIDENT, BEND OFFICE

February 1, 1993

RECEIVED
FEB 05 1993
KANTOR AND SACKS

Mr. Henry Kantor
KANTOR & SACKS
1100 Standard Plaza
1100 S.W. Sixth Avenue
Portland, OR 97204

Re: Council on Court Procedures: Revisions to ORCP 55

Dear Mr. Kantor:

I am writing with regard to ORCP 55 which relates to subpoenas for records. I have three changes to suggest. First, that subpoenas for books, papers, or documents, not accompanied by a demand to appear at trial or hearing, or at deposition, be allowed to be served by regular mail (i.e., revise ORCP 55D(3)(d)). Realistically, most such subpoenas are served by regular mail because this is the most efficient process. Otherwise, in a case requiring several subpoenas, the service fees can become astronomical. This is especially true if the person with the documents is out of town. It is also consistent with ORCP 55H(2)(d), which allows the service of subpoenas to hospitals by first-class mail.

Second, the time periods for giving notice to the injured party of the subpoena and for actually requiring production of the documents, should be the same for non-hospital records as for hospital records. I suggest 10 days' notice to the parties and 10 days for the responding party to produce the documents (unless the responding party is subpoenaed to court with the documents, in which case the subpoena should simply be served before the person is required to appear). Please compare the last two sentences of Section D(1), with the last sentence of Section H (2)(b) and the second to the last sentence in Section H (2)(a).

I think ten days' notice to the other party is sufficient because if the notice is mailed, it must be mailed 13 days before the subpoena is served. Thus, unless the mail is particularly slow, the other party will generally have 11 to 12 days' notice of the subpoena in any case. This should be plenty of time to file an objection.

Third, it should be made clear that certain sections of ORCP 55 do not apply to Section H, which deals with hospital records. For example, Section D does not apply. This would at least eliminate some confusion.

If you have any questions in this regard, please feel free to call me.

Very truly yours,

Helle Rode

HR:mlw
[HR\DCA9-9.W40]

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. Compromise; Effect of Acceptance or Rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

[Amended effective January 1, 1982; January 1, 1984; January 1, 1986.]

RULE 55. SUBPOENA S

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 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.

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 38C, 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 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 39C(6), shall be served in the same manner as provided for service of summons in Rule 7D(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, 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.

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

D(3)(a) 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) 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) 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) 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 39C and 40A, 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 examina-

tion 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 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.

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, unless the context requires otherwise, "hospital" means a health care facility defined in ORS 442.015(13)(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 as provided in this section; if disclosure of such records is restricted by law, the requirements of such law must be met.

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 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, then a copy of the subpoena shall be served on the injured party 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 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 55H(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.

[Amended effective January 1, 1982; January 1, 1984; January 1, 1988; October 3, 1989; January 1, 1990; January 1, 1992.]

RULE 56. TRIAL BY JURY

Trial by Jury Defined. A trial jury in the circuit court is a body of 12 persons drawn as provided in Rule 57. The parties may stipulate that a jury shall consist of any number less than 12 or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

RULE 57. JURORS

A. Challenging Compliance With Selection Procedures.

A(1) *Motion.* Within 7 days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief, on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury.

A(2) *Stay of Proceedings.* Upon motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury, the moving party is entitled to present in support of the motion: the testimony of the clerk or court administrator, any relevant records and papers not public or otherwise available used by the clerk or court administrator, and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply with the applicable

AMENDMENTS TO ORCP 55 AND ORCP 43

(1989-91 BIENNIUM)

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES
RULE 43

* * * * *

D. Persons not parties. <u>A person not a party to the action may be compelled to produce books, papers, documents, or tangible things and to submit to an inspection thereof as provided in Rule 55.</u> This rule does not preclude an independent action against a person not a party for [production of documents and things and] permission to enter upon land.

COMMENT

See comment to ORCP 55.

SUBPOENA
RULE 55

A. Defined; form. A subpoena is a writ or order directed to a person and may require[s] 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. [It also] A subpoena requiring attendance to testify as a witness requires that the witness remain [till] 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 [documentary evidence] books, papers, documents, or tangible things and to permit inspection. A subpoena may [also] command the person to whom it is directed to produce and permit inspection and copying of designated [the] books, papers, documents, or tangible things [designated therein; but] 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 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.

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 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). 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, 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.**

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) 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) 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) 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) 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. [The 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 which constitute or contain matters within the scope of the examination permitted by Rule 36 **B.**, but in that event the subpoena will be subject to the provisions of Rule 36 **C.** and section **B.** of this rule.]

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 **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.

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, unless the context requires otherwise, "hospital" means a [hospital] **health care facility defined in ORS 442.015(13)(a) through (d) and** licensed under ORS 441.015 through [441.087, 441.525 through 441.595, 441.815, 441.820, 441.990, and 442.342 through 442.450] **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 as provided in this section; if disclosure of such records is restricted by law, the requirements of such law must be met.

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 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, then a copy of the subpoena shall be served on the injured party not less than [ten] <u>14</u> 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 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 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.

COMMENT

The Council revised ORCP 55 and 43 to provide for use of a subpoena to require a non-party to produce books, papers, documents or tangible things and permit inspection thereof without scheduling a deposition. In Vaughan v. Taylor, 79 Or App 359 (1986), the Court of Appeals held that production of documents in the hands of a non-party could only be accomplished by scheduling a deposition. Under the new procedure, a subpoena for production may be used without scheduling a deposition.

The non-depostion subpoena for production and inspection must be served on each party seven days before the subpoena can be served upon the person required to produce the material. The person required to produce material must be given 14 days to respond. Both periods may be shortened by court order. The non-party subject to such subpoena may either secure a court order to control production or simply file objections to the requested production. If objections to production are filed, the party seeking production is required to secure a court order before any production is allowed.

Service by mail would not be allowed for a non-deposition subpoena for production. A non-deposition subpoena also cannot be used to force a non-party to allow entry upon land.

The Council decided that the existing definition of "hospital" in ORCP 55 H(1) was incorrect. The corrected definition includes traditional hospitals which treat the mentally or physically ill, rehabilitation centers, college infirmaries, chiropractic facilities, facilities for the treatment of alcoholism or drug abuse, and any other facilities which the Health Division determines are classified as "hospitals". Also included are: hospital-associated ambulatory surgery centers, which are surgery centers operated by hospitals but independently from the hospital campus; long-term care facilities, including both skilled nursing facilities and intermediate care nursing facilities; free-standing ambulatory surgery centers, such as those operated by many physicians groups; and, county mental health clinics. All of these, except county mental health clinics, were included in the prior definition. The new definition excludes some organizations that were covered by the prior definition, including free standing birthing centers, health maintenance organizations, and hospital

facility authorities. The definition is limited to a "licensed health care facility." It does not include the records of doctors' or chiropractors' offices. Discovery of doctors' or chiropractors' records is covered under ORCP 44.