COUNCIL ON COURT PROCEDURES
Minutes of Meeting of May 14, 1994
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	J. Michael Alexander	Rudy R. Lachenmeier
	Patricia Crain	Michael H. Marcus
	William D. Cramer, Sr.	John H. McMillan
	William A. Gaylord	Michael V. Phillips
	John E. Hart	Milo Pope
	Nely L. Johnson	Nancy S. Tauman
Excused:	Sid Brockley	Bruce C. Hamlin
	Mary J. Deits	John V. Kelly
	Stephen L. Gallagher, Jr.	Charles A. Sams
	Susan P. Graber	
Absent:	Jack A. Billings	
	Marianne Bottini	
	Bernard Jolles	
	Stephen J.R. Shepard	

The following guests were in attendance: Kathy Chase, liaison from the Oregon State Bar Procedure & Practice Committee; James L. Murch, representing the Oregon Bankers' Association; Bob Oleson, with the Oregon State Bar; Charles S. Tauman, Executive Director, Oregon Trial Lawyers' Association. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. The Chair, Mr. Hart, called the meeting to order at 9:37 a.m.

Agenda Item 2: Approval of April 16, 1994 minutes. The minutes of the April 16, 1994 meeting were approved without objection.

Agenda Item 3: Status Report from Subcommittee on Hospital Records--ORCP 55 H (Mick Alexander, Rudy Lachenmeier). Mr. Alexander reported on a lengthy discussion between himself and Mr. Lachenmeier in which they had agreed that it should be relatively easy to solve this problem from the perspective of hospital administrators. He added that, after consultation with the full subcommittee, he expects to have specific language to propose at the July meeting. He further stated that it should be equally simple to solve the reported problem of some proponents trying to evade the requirements of 55 H by resort to 55 A and B.

Mr. Hart then asked whether there were comments from other members. Judge Marcus stated the issue of waiver of

confidentiality by instituting personal injury litigation as a matter of state law (i.e., ORCP 44 C and E) creates serious difficulty if and to whatever extent this might run afoul of federal regulations. He added that the Council might have to acknowledge the fact that certain kinds of hospital records are absolutely privileged and thus unattainable regardless of what amendments might be made to the ORCP discovery rules. Mr. Alexander responded that he did not believe that the pertinent federal regulations create any absolute privilege, but do contain rather elaborate procedures, by way of court orders or authorizations, by which records can be obtained. But, he added, it would not be an easy task to sort out and deal with all the requirements of these regulations in the context of amending 55 H. One obvious difficulty, he stated, is that, unless certain preliminary requirements are first complied with, these privacy regulations would appear to prohibit hospitals from even responding to a subpoena that certain requested records were being withheld or from in any manner disclosing that such records exist. He indicated, in other words, that no simple solution was evident respecting the problem of alerting practitioners that some existing records in the custody and control of a hospital and within the scope of a 55 H subpoena are not being furnished, or even merely alerting them that records custodians might not include any indication of records being withheld in their returns to subpoenas. Mr. Hart mentioned that, in order to deal with this problem, it might be necessary to venture into the area of evidentiary privilege or other matters beyond the jurisdiction of the Council.

Judge Johnson suggested it might be advisable to add some language at the appropriate place in the ORCP that would simply red flag for practitioners the possibility that certain materials sought by subpoena might be withheld, pursuant to state or federal law, with no indication to that effect in the return. Judge Marcus pointed out that 55 H(2) already contains the following caveat: "Hospital records may be obtained ... ; if disclosure of such records is restricted by law, the requirements of such law must be met." Mr. Phillips commented that one feature of Oregon procedure complicating matters is that hospital records can be subpoenaed directly to lawyers' offices without any judicial proceeding or deposition being involved, and therefore without any control by a court.

Judge Marcus wondered whether, when a subpoena might require production of records privileged under state or federal law, the ORCP might somehow provide that any such subpoena must be accompanied by an appropriate authorization or court order. Several members commented in response to this suggestion that,

since proponents often will not know whether protected hospital records exist in a given case, the cumbersome procedure of obtaining an order or authorization might have to be undertaken in every case where hospital records are involved. Mr. Phillips inquired of Ms. Chase whether the OSB Practice & Procedure Committee is still exploring the possibility of extending the affidavit procedure of 55 H to other sorts of institutional records, such as employment records. She responded in the affirmative.

Mr. Hart reminded everyone that any amendments that might be proposed would have to be ready for tentative adoption no later than the October meeting. In addition to the subcommittee continuing its efforts to deal with it, Mr. Hart said that he would consider how best to get word disseminated to the Bar that practitioners should be alert to the existence of this problem, as well as providing some information about what the Council is attempting to do to minimize it.

Agenda Item 4: Report from Subcommittee on Clarifying Amendment to ORCP 32 F (Michael Marcus). Referring to the proposed amendment to 32 F(2) set forth in his 2/26/94 letter to Maury Holland (Attachment B to the agenda of this meeting), Judge Marcus reported that Mr. Phil Goldsmith has not yet completed his research into the relevant legislative intent and has asked this subcommittee to defer any formal proposal to the Council until that research can be completed.

Mr. Jim Murch, present on behalf of the Oregon Bankers Association, was recognized to speak. He stated that he did not have any objection to the substance of the proposed amendment, but suggested that it might be simplified to read as follows:

> F(2) Prior to entry of a final judgment against defendant, the court shall request members of the class who may be entitled to monetary relief ...

Judge Marcus stated that Mr. Murch's suggestion would involve something of a substantive change. Mr. Hart then asked for comments from members concerning this suggestion. Judge Marcus asked Mr. Murch whether he would have any objection to changing "who may be entitled to monetary relief" to "who may be entitled to individual monetary recovery." Mr. Murch responded that he did not object to those changes. The consensus was that "recovery" was less ambiguous.

Mr. Hart concluded this discussion by suggesting that Mr. Goldsmith be given more time to complete his research, and that the subcommittee circulate any proposed language to Messrs. Goldsmith and Murch for their comments. He expressed the hope that the subcommittee would have a formal proposal for the Council's tentative adoption at the July meeting.

Agenda Item 5: Report regarding ORCP 22 C(1). (Rudy Lachenmeier). Mr. Lachenmeier said that the letter he received from Bruce Hamlin dated 5/13/94 (Attachment A to these minutes), together with his own examination of some pertinent CLE materials, strongly convinced him that the two appearances of "shall" in the present text of 22 C(1), in contrast to the use of "may" elsewhere in this subsection, create a potentially serious ambiguity that should be corrected. He also expressed concern about the fact that, entirely independent of the language of this subsection, there probably are certain kinds of counterclaims that are made compulsory by decisional law respecting finality of judgments, and said that it might be helpful if a comment to this rule were added to provide warning about this. He moved that 22 C(1) be amended in accordance with the draft he had prepared and circulated to members at the beginning of this meeting (Attachment B-I). He noted that, in addition to the two insertions of "may assert" to govern counterclaims and cross-claims asserted by third-party defendants, his draft would also delete the needless, and hence possibly confusing, reference in the concluding portion of the third sentence of this subsection to "sections A and B," so that the conclusion of this sentence would read: "as provided in this rule." This motion was seconded by Judge Marcus. Following brief discussion this motion carried by unanimous vote.

There was then discussion of a second proposed amendment to 22 C(1) prepared by Mr. Lachenmeier (Attachment B-II to these minutes). This amendment would retain the requirement that "leave of court" be obtained in order validly to serve a third-party complaint and summons more than 90 days after service of plaintiff's complaint on a third-party plaintiff, but would delete the additional requirement that "agreement of parties who have appeared" also be obtained. Judge Marcus stated that he preferred the change proposed by Mr. Lachenmeier to no change at all, but suggested that making the two requirements disjunctive or alternative, rather than conjunctive as they now are, might be better. Prof. Holland wondered why, in any case in which all the existing parties agree to a late third-party joinder, there should be any reason to bother a motion judge to decide whether to grant leave. Bill Cramer suggested that it might make more sense to abolish the 90-day period during which there can be

third-party joinder as of right and require discretionary leave of court in all instances. Mr. Hart stated he thought it useful to give defendants 90 days in which to bring in third-party defendants for contribution and the like, and said that the real issue is what should be required after the 90 days have elapsed. He continued by asking whether this question should be put over until the next meeting when a supermajority hopefully will be present. Mr. McMillan remarked that, after such extended discussion, he thought there should be a vote. He then moved the question and Mr. Gaylord seconded. The motion failed to carry on a vote of 6 in favor, 6 opposed and 0 abstentions. Mr. Hart directed that the minutes reflect that this remains an open issue for possible further consideration. Judge Johnson said that possibly a compromise, whereby 120 days would be substituted for 90 days, might be worth consideration.

Agenda Item 6: Report from Subcommittee on Findings in Connection with attorney fee awards--ORCP 68 C(4)(c)(ii). (Mick Alexander.) Mr. Alexander reported that there was general agreement within the subcommittee that there should be some provision for findings in connection with rulings on attorney fees, and that the preferred proposed amendment was alternative 3 at the bottom of Attachment D p. 1 to the agenda of this meeting, which reads: "The trial court shall make findings of fact and conclusions of law on awards of attorney's fees if requested by any interested party." This sentence would replace the present second sentence of 68 C(4)(c)(ii), which reads: "No findings of fact or conclusions of law shall be necessary."

Prof. Holland asked whether there was any point in requiring "conclusions of law" in addition to "findings of fact," and Judge Marcus responded that there are situations where conclusions of law would be useful. Mr. Hart asked the members whether there was a consensus that there be some form of amendment to require finding and conclusions. Only three members expressed opposition to any change to the present language of this subparagraph. Mr. Gaylord moved that alternative 3, as set forth above, be adopted, which was seconded by Judge Marcus. However, no vote was taken on this motion, thus continuing this proposal on the Council's agenda.

Mr. Hart asked Prof. Holland to prepare and circulate prior to the July meeting a summary of amendments tentatively adopted to date. He noted that, at that meeting, there will probably be tentative adoption of amendments respecting hospital records and class actions. This work product, together with amendments previously adopted, should then probably be disseminated to the bench and bar, and perhaps to legislators as well, so that

comments might be received and considered at the October meeting or earlier. As a courtesy to the trial judges, he directed Prof. Holland to circulate copies of alternative 3, the pending amendment to 68 C(4)(c)(ii), to all presiding trial court judges in the state with an indication that this is under consideration by the Council and inviting any reactions they might have.

Agenda Item 7: Other matters for consideration. Brief discussion was had concerning the April 22, 1994 letter to Ms. Crain from Mr. Ronald K. Cue (Attachment E to the agenda of this meeting). It was generally agreed that this relates to an apparent inconsistency between the Juvenile and the Evidence Codes, and hence is beyond the Council's jurisdiction. It was suggested that this matter be referred to the Family Law Committee of the OSB.

Agenda Item 8: Old business. In response to a query from Mr. Hart, no member raised any item of old business. However, Prof. Holland reminded the members of the suggestion of Senator Springer that the best chance of obtaining an appropriation for the Council's 1995-97 budget would be to have it incorporated as an item in the biennial budget of the Judicial Department if that could be done.

Agenda Item 9. New business. In response to a query from Mr. Hart whether any member had any item of new business to propose, Mr. McMillan made pointed reference to the just issued *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System* prepared under the chairmanship of former Chief Justice Ed Peterson. Mr. McMillan also noted that all present members of this Council are white. Some members commented that the membership of the Council is determined by the Bar Board of Governors and other appointing authorities, not by the Council itself, and Mr. McMillan said he was aware of this fact.

Agenda Item 10: Adjournment. The meeting was adjourned at 11:40 a.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

LANE
POWELL
SPEARS
LUBERSKY

ATTACHMENT A-1

Bruce C. Hamlin
(503) 778-2158

May 13, 1994

TRANSMITTED VIA FACSIMILE

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A Partnership Including Professional Corporations

Rudy R. Lachenmeier, Esq.
Lachenmeier Enloe & Rall
2149 NE Broadway
Portland, OR 97232

Re: Proposed Changes to ORCP 22

Dear Rudy:

I will not be able to attend the Council's May 14 meeting, but I wanted to share some thoughts with you about the proposed changes to ORCP 22 mentioned in your April 27 letter.

First, the language relating to defenses and counterclaims can be traced back to 1975 legislation which preceded the Council on Court Procedures and the Oregon Rules of Civil Procedure. 1975 Oregon Laws, Ch 158, § 3. The 1975 legislation was introduced at the request of the Oregon State Bar, and it adopted the equivalent Federal Rule verbatim, excluding only references to admiralty and maritime claims. 1975 Oregon Legislation 10 (OSB CLE 1975) (Laird Kilpatrick).

The language from the Federal Rule certainly creates an ambiguity. When I wrote about the language in 1985, I concluded that it probably created a compulsory counterclaim rule:

> "Although Oregon does not have a compulsory counterclaim rule, the use of the word "shall" in ORCP 22 C(1) (sixth sentence) probably requires a third-party defendant to assert all counterclaims against the third-party plaintiff, whether or not they arise out of the same transaction or occurrence. ORCP 22 A.

ATTACHMENT A-2

> By contrast, a third-party defendant's counterclaim against the plaintiff, when permitted, must arise out of the same transaction or occurrence. ORCP 22 C(1) (fifth sentence)." 1 Oregon Civil Pleading and Practice, § 14.22 (OSB CLE 1985)

I forgot that I made that statement when I defended the text of the existing rule at our January 1994 meeting.

The Civil Pleading and Practice publication is now being revised. In my draft (completed after our January meeting), I toned down the language and included it in a query which reads:

> "QUERY: Although Oregon does not have a compulsory counterclaim rule, the use of the word 'shall' in ORCP 22 C(1) (sixth sentence) might require a third-party defendant to assert all counterclaims against the third-party plaintiff, whether or not they arise out of the same transaction or occurrence. ORCP 22 A. However, the phrase 'as provided in this rule' may resolve the point, since all counterclaims and cross-claims otherwise provided for in Rule 22 are permissive. For example, a third-party defendant's counterclaim against the plaintiff, when permitted, must arise out of the same transaction or occurrence. ORCP 22 C(1) (fifth sentence). Oregon Civil Pleading and Practice, § 14.22 (OSB CLE, unpublished).

Of the two proposals relating to 22 C(1) (yours and Maury's), I prefer Maury's because it makes it clear that defenses are mandatory and counterclaims are permissive.

ATTACHMENT A-3

I also wanted to comment on your suggestion that language requiring agreement of all of the parties and leave of court be deleted from 22 C(1). I would support that change.

Best regards.

Very truly yours,

Bruce C. Hamlin

cc: Professor Maury Holland (via fax)

[illegible]

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

A. Counterclaims.

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

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

B. Cross-Claim Against Codefendant.

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

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

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

C. Third Party Practice.

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

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

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

D. Joinder of Additional Parties.

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

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

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

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

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

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

B. Cross-Claim Against Codefendant.

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

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

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

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

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

D. Joinder of Additional Parties.

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

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

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

E. Separate Trial. Upon motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.
[Amended effective January 1, 1982; January 1, 1984.]

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

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

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

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

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