COUNCIL ON COURT PROCEDURES
Minutes of Meeting of July 16, 1994
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

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

The following guests were in attendance: Kathy Chase, Phil Goldsmith, James Murch, and Alan Wight. 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 9:45 a.m.

Agenda Item 2: Approval of May 14, 1994 minutes. The minutes of the May 14, 1994 meeting were approved without objection.

Mr. Hart expressed some concern about the absence of at least fifteen members, the number of affirmative votes that will be minimally necessary to promulgate amendments. He also mentioned that, because of submission deadlines and publication dates of the Judicial Advance Sheets, the Council will have to complete its drafting of amendments for promulgation in December no later than the September meeting. He emphasized the importance of full attendance at the August and September meetings, and also indicated that members should plan on the probability of the September meeting lasting longer than the customary time, perhaps even resuming for some time in the afternoon after a brown bag lunch break.

Agenda Item 3: Report of subcommittee on clarifying amendment to ORCP 32 F (Michael Marcus) (see Attachment A to Agenda of this meeting). Judge Marcus summarized the problem created by certain amendments of Rule 32 during the last

biennium, and also recalled that at the May 14, 1994 Council meeting preliminary agreement was reached that the amendment of subsection 32 F(2) as set forth in the aforementioned Attachment A would satisfactorily fix the problem without reopening contentious issues concerning the claim form procedure's scope of /application. He added that this preliminary agreement was subject to whatever might result from archival research by Mr. Phil Goldsmith into the legislative history of the 1973 statute, former ORS 13.220 through 13.390, from which ORCP 32 was largely derived, as well as any changes Mr. Goldsmith might propose on the basis thereof. Judge Marcus then recognized Mr. Goldsmith to present the written materials he had distributed to Council members at the beginning of the meeting (letter to The Honorable Michael H. Marcus from Phil Goldsmith dated 7/14/94, a memorandum obtained from the State Archives reflecting the legislative history of SB 163, and a letter to Phil Goldsmith from Charles R. Williamson dated 7/15/94, attached to these minutes).

Mr. Goldsmith stated his understanding to be that the Council does not wish to revisit the policy issues regarding Rule 32 that were debated in the last biennium, but rather to devise a clarifying amendment to subsection 32 F(2) that would recover the legislative intent regarding claim forms as it existed prior to those debates and the resulting amendments promulgated 12/12/92. He further stated that his examination of the archival material, together with his discussions with several individuals directly involved in the 1973 legislation, left him convinced that the clarifying amendment currently proposed by Judge Marcus's subcommittee would give the mandatory claim form procedure a somewhat broader application than is consistent with the pertinent legislative history. Mr. Goldsmith therefore proposed that, in lieu of the amendment proposed by Judge Marcus's subcommittee, subsection 32 F(2) be amended to begin with the following language: "Except in a class action in which the court makes a finding of superiority based in part or in whole on subsections B(1) or B(2) ..." The purpose of this amendment, he added, would be to make clear what he believed was intended by the 1973 legislation and what was assumed by the Council in promulgating the 1992 amendments to Rule 32, namely, that solicitation of claim forms would not be mandatory in "hybrid" class actions wherein money damages might be sought in addition to injunctive or declaratory relief, nor in class actions certified in whole or in part on the basis of class members being parties needed for just adjudication, as sometimes happens in so-called "limited fund" cases.

Mr. Goldsmith was asked how the amendment he proposed would relate to the issue of fluid recoveries in class actions. He responded that, while the requirement of claim forms is not unrelated to the fluid recovery issue and the two are often regarded as two sides of the same coin, that is not really

accurate, since the question whether some portion of a monetary recovery can be awarded to some stranger to the litigation to the extent it cannot be awarded to class members who have been harmed is clearly distinguishable from the question whether recovery can be awarded to class members who have sustained harm, but have not "opted in" by returning claim forms. Judge Marcus said that he believed Mr. Goldsmith's understanding of the relevant legislative history was correct, but expressed some doubt whether that intent could now be recaptured without reviving the heated controversies encountered during the last biennium, something his subcommittee he understood was charged to try to avoid.

Mr. Alan Wight, of Portland, then spoke in support of the amending language proposed by Judge Marcus's subcommittee and in opposition to that proposed by Mr. Goldsmith. He pointed out that 1973, when the statute under discussion was enacted, was quite early in the evolution of class action litigation in both federal and state courts. He therefore thought it highly unlikely that the 1973 legislature was thinking in as refined a fashion as Mr. Goldsmith contended. He also pointed out that he had followed the enactment of the 1973 statute very closely, since it arose out of two cases in which he had been involved, and that from all that he recalled he believed the intent was to require claim forms in any class action where money damages were sought, regardless of more refined distinctions. Mr. Wight added that an important reason he favored the amendment proposed by the Marcus subcommittee was that he believed that claim forms are required by the due process clause of the fourteenth amendment of the U.S. Constitution. Justice Graber asked Mr. Wight to specify how he thought that claim forms are required by due process. Mr. Wight responded by referring to a number of federal court cases, including one recently decided by the Ninth Circuit. Several Council members indicated that they believed these cases have to do with the due process requirement of notification and the opportunity to opt out, not with any requirement that class members opt in, which is essentially what Oregon's claim form procedure amounts to.

Mr. Steve Shepard asked whether either of the amendments under discussion would involve a small or a large change in existing law, since he said that if it were the latter, he would favor deferring to the legislature. Judge Marcus responded that the 1992 amendments had inadvertently worked a rather important change in the law which neither the Council nor anyone else really intended to do, and that the Council's present purpose is merely to try to restore the law as it existed prior to those amendments insofar as claim forms are concerned.

Mr. Jim Murch, on behalf of the Oregon Bankers' Association, spoke briefly in full support of the language proposed by the Marcus subcommittee. Mr. Hart then said he thought the

discussion had lasted as long as was useful, and that he expected the amendment proposed by the Marcus subcommittee would be voted on at the September meeting unless different language is proposed before then. He also expressed his own support for the language of the Marcus subcommittee and asked all members present to say informally whether they supported or opposed it. All members present indicated that they either support that language or are leaning in that direction, with three members indicating that they do not wish to foreclose the possibility of further thought on the matter. Mr. Hart concluded this discussion by expressing the hope that absent members would give due consideration to this matter and come to the September meeting prepared to cast their votes.

Agenda Item 4: Report of Subcommittee on Findings in Connection with Fee Awards -- ORCP 68 C(4)(c)(ii) (Mick Alexander) (see Attachment B to Agenda of this meeting for text of proposed amendment and letters from judges in opposition). Mr. Alexander stated that the subcommittee needed more guidance on this difficult issue. The letters from the judges, he said, suggest that the trial bench is unanimously opposed to this amendment, yet some of what they write suggests why findings might be useful. Mr. Phillips recalled the concerns that had been expressed by Justice Durham, and Justice Graber mentioned that appellate courts generally tend to regard findings and conclusions as being helpful from their perspective. Judge Gallagher asked whether anyone had detected a groundswell of support for this amendment, to which there was no affirmative reply. Mr. Hamlin remarked that the relevant language of Rule 68 seems to have been derived from the prior statute, which means that this amendment would change long-standing practice. He expressed doubt whether such a change would be warranted in the absence of a strong showing of a broad demand for it or that it would solve some pressing problem. Justice Graber stated that she didn't believe the additional time required in the trial courts would be very substantial and noted that there can be no meaningful appellate review in the absence of findings. Mr. McMillan said that his reading of Judge Maury Merten's letter suggested to him that requiring findings might well serve the public interest by bringing out in the open things that should be brought out. Justice Graber questioned the use of the word "interested" modifying "party" in the proposed amendment. Mr. Alexander responded that the intent was to limit the right to request findings to a party who was either requesting or resisting a fee award, rather than allowing any party to the litigation to do so. Mr. Gaylord suggested that: "if requested by any party affected by the award or denial" might be better. Justice Graber suggested that some clarification might usefully be made, although no motion to amend was offered.

There followed discussion of what groups should be asked for their input in the same fashion that trial judges had been solicited. It was agreed that Maury Holland would give notice of this proposed amendment and solicit comments from the following organizations: OADC, OTLA, Oregon Legal Services, and the Litigation and Family Law Sections of the OSB.

Agenda Item 5: Report of Subcommittee on Hospital Records -- ORCP 55 H (Mick Alexander). Mr. Alexander noted that the subcommittee's recommended amendments to section 55 H are set forth in his 7/5/94 letter to John Hart and Maury Holland (attached to these minutes). He also stated that these recommended amendments are substantially the same as those set forth in his May 13, 1994 letter and preliminarily discussed at the Council meeting on May 14, 1994 (attached to these minutes). He said that the subcommittee had concluded it would be impossible to devise language that would require hospitals to disclose the identity of records withheld pursuant to federal or state privacy regulations, since the regulations appear to prohibit even that much disclosure. Mr. Gaylord raised the question of whether it might be less awkward for hospitals if language such as: "unless the subpoena is accompanied by proof of compliance," but no motion to thus amend was offered. Mr. Hart then asked for a general expression of opinion from the members present. A consensus was expressed to the effect that the amendments proposed by this subcommittee appear to be well devised to resolve the problem to which they are addressed to the maximum extent possible. Note was taken of the July 11, 1994 letter of Ms. Karen Creason, who participated as an "outside" member of the subcommittee, to Maury Holland in which she endorsed the currently proposed amendments and recommended their promulgation (attached to these minutes).

Attention then turned to a discussion of the amendments to Rule 55 proposed as legislation by the OSB Procedure and Practice Committee ("PPC") set forth in the July 1, 1994 letter of Mr. Dennis James Hubel, Chair of the PPC, and attachment, distributed to Council members under Maury Holland's covering memo of July 6, 1994 (attached to these minutes). Note was taken of the July 7, 1994 letter of Mr. Laurence E. Thorp, who participated as an "outside" member of this subcommittee, to Maury Holland commenting upon the PPC's proposed amendments (attached to these minutes). Mr. Hart asked whether the members present believed the Council should take the PPC proposed amendments under consideration or not. Mr. Gaylord stated that he believed that these proposals should have come through the Council. Mr. McMillan was strongly of the opinion that the Council should take the PPC proposals under consideration and give the Legislature the benefit of its judgment by approving them as formulated, by amending them, or by disapproving them. He added that, by taking these proposals under consideration, the Council would provide

the Legislature and others with an excellent example of the Council's usefulness. Ms. Kathy Chase stated that the PPC had no desire to circumvent the Council, but was under time pressure to move forward as it did because of the June 30 deadline established by agreement with the Legislative Counsel. She added that she would be happy to assist the Council with its consideration of the PPC's proposed amendments, and believed that Mr. Hubel and others involved in their drafting would also be willing to help.

Judge Marcus stated that the Council certainly should attempt to reach a consensus concerning the PPC's proposals, and there was general agreement with his view. Mr. Hart directed that these minutes reflect a decision to review and discuss these proposals at the August and September meetings, and asked Ms. Chase to inform Mr. Hubel and Mr. Dennis Hutchinson, along with any other PPC members involved with drafting them, that they are cordially invited to attend the Council's August 13 meeting when, in response to Justice Graber's suggestion, this would be the first item of business on the agenda. Mr. Gaylord said that he had some concerns about one or more of the PPC proposals. Mr. Hart directed Maury Holland to prepare for distribution with the agenda of the August meeting a text of Rule 55 showing the amendments proposed by the Council's subcommittee and those proposed by the PPC annotated to highlight the range of issues that appear to require some focused discussion. Mr. McMillan wondered whether time might be saved if there were some discussion between the Council subcommittee and those members of the PPC involved in drafting its proposals prior to the August meeting. There was general agreement with this suggestion, and Mr. Hart suggested that members of the 55 H subcommittee forward any concerns they might have to Ms. Chase as promptly as possible.

Agenda Items 6 and 7 were deferred to a future meeting. Mr. Hart directed Maury Holland to provide notification concerning Agenda Item 6, the recommendation of the PPC regarding jury voir dire (ORCP 57 C), to the judges' associations and to the other organizations receiving notification concerning the amendment proposed to ORCP 68 C(4)(c)(ii), with solicitations of their comments.

Agenda Item 8: Other matters for consideration. No other matters were proposed.

Agenda Item 9: Old business. Maury Holland reminded the members that, at the August 13 meeting, the subcommittee on the future of the Council would present the report it is preparing in response to the budget note to the 1993-95 appropriation bill. Mr. McMillan, a member of that subcommittee, said that it planned

to meet prior to the August meeting for the purpose of putting its draft report in final form.

Agenda Item 10: **New business.** No item of new business was raised.

Agenda Item 11: Adjournment. The meeting was adjourned at 12:06 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

Phil Goldsmith
Attorney at Law
1100 S.W. 6th Avenue
Suite 1212
Portland, Oregon 97204

(503) 224-2301
FAX: (503) 222-7288

July 14, 1994

Via Hand Delivery

The Honorable Michael H. Marcus
District Court Judge
1021 S.W. Fourth Avenue
Portland, OR 97204

RE: ORCP 32 F(2)

Dear Judge Marcus:

I have now completed my review of the legislative history of the class action bill enacted by the 1973 legislature, SB 163. Based on that review, I believe the latest proposed revision of ORCP 32 F(2), reflected in your memorandum of June 13, 1994, would require the use of claim forms in a broader range of circumstances than the 1973 legislature intended. To be consistent with its intent, that proposal should be amended by inserting at the beginning, "Except in a class action in which the court makes a finding of superiority based in part or in whole on subsections B(1) or B(2)."

I enclose the critical piece of legislative history, a ten page memorandum described by the State Archives in their summary of the legislative history of SB 163 as "No exh. no: unidentified source." I believe this is a valuable source of legislative history for the following reasons.

1. Much of the language of SB 163 represents a compromise between proponents and opponents of class actions. See Bernard v. First National Bank, 275 Or 145, 168, 550 P2d 1203 (1976). That compromise was reached before the June 13, 1973 hearing before the House Judiciary Committee. Id., 275 Or at 169 n8. Consequently at the time this memorandum was written all parties had an interest in the legislative history accurately reflecting the nature of the compromise reached. The tone of the initial paragraph of this memorandum -- "The answers to several of the questions at the hearing on SB163 on June 13 were in some cases either incorrect or (unintentionally) misleading" -- suggests that it demonstrates legislative intent as compared with

simply being the expression of an advocate for a particular outcome.

2. I have contacted all the people still living who represented interested parties in the 1973 legislative debate on class actions, along with George Cole, the chair of the House Judiciary Committee, and Keith Burns, the most active member of the Senate Judiciary Committee. Of course, after 20 years, memories have faded, and most of the people with whom I talked could provide no information about this memorandum. However, both Charlie Williamson, who then was lobbying for Multnomah County Legal Aid Service, and Tom Donaca, who then was lobbying for Associated Oregon Industries, told me that this document appears to have been prepared by the staff person for the House Judiciary Committee, the late Jena Schlegel.

Page 5 of this memorandum clearly identifies when claim forms must be used -- "in th[e] type of action [subject to] Section 4(1)." Section 4(1) eventually became former ORCP 32 F(1), which applied to ORCP 32 B(3) actions only. Therefore, the 1973 legislature only intended claim forms to be required in former ORCP 32 B(3) actions.

It is easy to imagine why the legislature drew the line in this fashion. A broader claim form requirement, even if limited to actions for individual monetary recovery, would have created great administrative problems, particularly in former ORCP 32 B(1) class actions. For example, former ORCP 32 B(1)(a) created a mandatory (i.e. not opt-out) class when there was the risk that separate lawsuits "would establish incompatible standards of conduct for the party opposing the class." Because ORCP 32 F(3) dictates that a class member who fails to file a claim form is dismissed from the class action without prejudice to the right to file a separate lawsuit, requiring claim forms in former ORCP 32 B(1)(a) class actions would be self-defeating. A person who desired to create difficulties for a defendant through court orders imposing incompatible standards of conduct could avoid the effect of the mandatory class by failing to submit a claim form, getting dismissed from the class action and then filing a separate case.

Requiring claim forms in former ORCP 32 B(1)(b) class actions would create similar problems. Such cases are usually certified as classes when there is a fund smaller than the claims

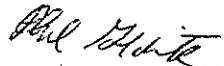
that could be brought against it. To avoid the inequalities and inefficiencies created by the first-come, first-served rule, courts under such circumstances sometimes create mandatory classes.

Without claim forms, distribution of the class recovery is simple. Claim forms would greatly complicate the matter. The first round of claims would be based on everyone sharing the recovery on a pro rata basis. But some class members would not file claim forms. Would another round of claim forms be required to distribute the remaining money? If so, what happens if not all of these claim forms are returned?

These examples show that the 1973 legislature sensibly could have limited claim forms to former ORCP 32 B(3) class actions. As I understand the Council's approach to amending ORCP 32 F(2), however, the critical factor is not policy but what the 1973 legislature actually intended. And it is clear from the face of the enclosed memorandum that the legislature only intended claim forms to apply in former ORCP 32 B(3) class actions.

With the elimination of the tripartite scheme of class actions, some drafting ingenuity is required to replicate the 1973 legislature's policy choice. The language proposed in the first paragraph of this letter is the best I can think of, but there may be better alternatives.

Sincerely,



Phil Goldsmith

PG:lr

cc: R. Alan Wight (via FAX)

Re: Oregon Civil Rule 23 - Class Actions

The answers to several of the questions at the hearing on SB163 on June 13, were in some cases either incorrect or (unintentionally) misleading.

In discussing Federal Rule 23 (43? or 53?) the impression may have been created that under Rule 23 you only have one notice per class action; it is more common place to see multiple notices involved in virtually all federal class actions that proceed in any meaningful manner.

Representative Cole asked both Senator Keith Burns and Hugh Biggs why the class could not be identified at the outset of the action. Pursuant to Section 4(1) of SB163, individual notice shall be given to all class members who can be identified through reasonable effort. Pursuant to this provision the reasonable effort must be exerted prior to the first notice in order to identify the class. Section 21 authorizes the Supreme Court to set rules for the practice and procedure relating to a coordination of actions, including provisions for giving notice and presenting evidence. The scope of Section 21 should be broad enough to include the determination of the members of the class through reasonable effort at the

outset. Depending upon the case and the trial judge, the provision involving the so-called "second notice" is not required in the federal courts. Unless the Eisen rationale is adopted in all districts, the courts could utilize the so-called "fluid recovery" theory to avoid the burden of determining actual damages attributable to each class member. The provisions of SB163 couple to require the court to determine damages in relation to actual class members without the utilization of the floating calculation of damages based upon the projection of estimates. In short, the Bill foresees the use of traditional damage theories as applicable in a non-class action lawsuit or action raising the same theory of liability. Section 6 as it relates to Section 2 and 4 would allow a court to proceed in a flexible, yet efficient manner to resolve the damage issue.

In passing, note that Section 6 authorizes the severance of issues to an extent along with authorization to proceed with subclasses.

Another question related to the unascertainable class (such as all citizens of Portland) and how the defendant could approach the questions. Considering Section 4(1), check Section 2(2), in particular subsection (c)(D). It is the

parallel provision in the recent Eisen opinion that resulted in the determination that the action was unmanageable as a class action.

Unfortunately, the testimony on June 13 did little to clear the air. The general act of knowledge regarding class actions and the technicalities of them on most people's part is unfortunate but does not help in the resolution of the difficult questions.

To understand 163 and how a class action would proceed, one starts with Section 2 to classify the action and determine the maintainability of the action as a class action. Section 2 indicates that the common questions involved must predominate over questions effecting only individual members. The court is directed to not allow the action to proceed as a class action if it finds that the final determination would require separate adjudications of numerous claims unless those separate adjudications relate primarily to the calculation of damages. This criteria relates to the question of determination of damages provided in Section 4. The court is then given some standards to look at in determining the maintainability of a class action. Some of the fears expressed in relation to the

notice question are answered by the criteria for the maintainability of the action. See subsection 2(2)(c)(A)-(F). It is in the Eisen decision that we find some guidance on maintainability and management of a class action. Unmanageable class actions generally present questions that are more appropriately resolved by legislative action or public enforcement proceedings rather than private litigation on behalf of everyone conceivably involved. In short, a class action to be maintainable under Section 2 must be manageable.

Section 3 directs the court to make a manageability and maintainability decision as soon as practicable after the commencement of the action. These orders are conditional and may be altered or amended including a determination that the action shall not proceed as a class action at a future time depending upon the results of discovery.

As a footnote, the question as to whether Federal discovery would be advisable in the action would again only benefit the plaintiff and the court in determining maintainability and management of the action. No substantial objection, however, has been made by defendant representatives, and, in fact, they have recommended the inclusion of the power to engage in Federal court discovery in a state class action.

This is a procedural question beyond the scope of the present paper.

Section 4 is basically the notice Section. It provides in Section 4(1) that notice shall be given in any Section 2(2)(c) action to all members who can be identified through reasonable effort. The Section continues to provide that in that type of action the class members determined pursuant to the reasonable effort required by Section 4(1) must eventually return an affirmative statement. This affirmative statement must be sent out by the court prior to the entry of a final judgment against the defendant. This could be prior to the determination of liability, not necessarily after the determination of liability, depending upon the case. However, because of the expense involved in providing notice and the fact that in many Federal Court class actions you have multiple notices involved it is foreseeable that quite often the defendant would prefer to have the request for affirmative relief wait until after a determination of liability particularly if a question is raised under Section 4(4). The court under Section 4(2) is given a great deal of discretion along with considerable guidance to facilitate the affirmative relief. The fact that the court prescribes the form of the proof of claim or request for affirmative relief is not unique as the court must always

approve various court orders, notices and proofs of claim. The Section does prohibit the use of the so-called fluid recovery theory in determining damages to be awarded in a judgment. It does not prohibit the use of the fluid recovery theory by consent for settlement purposes. It should be noted that the major uses of the fluid recovery theory has been in settlement such as the drug cases and the Yellow Cab case discussed on June 13. One should be careful in discussing California cases as California does not have class action guidance in its statutory framework as found in Federal Rule 23. Section 4(4) indicates that the proceeding as a class action can be stayed while a determination of the validity or applicability of a statute, law, or interpretation of a regulation is determined where the party seeks to have the statute, etc, declared invalid or where the party has in good faith relied upon such statute or a legislative, judicial, or administrative interpretation of the statute or regulation. This provision is limited in its terms to certain circumstances to where the applicable statute would have to be voided or held inapplicable, but in many instances of class actions involving the target defendant, a solvent corporation, this is the type of issue raised. This provision provides for a more expiditious and economical determination of the issue.

Section 5 provides that a judgment must specify certain things including the names of the members of the class and the amount determined to be recovered by each member.

Section 6 provides that an action may be maintained as a class action with respect to particular issues or tried in subclasses. This Section would seem to provide part of the authorization that Mr. Biggs indicated was not present in Oregon law in relation to severance of issues.

Section 7 authorizes the court to make appropriate orders in a class action including provision for notice. It is in part upon this section that the provisions of Section 4(2) are based. It is also in this Section which an amendment could be made authorizing the court to order the parties to utilize appropriate discovery means as allowed by the Federal Court. One could argue that the provision authorizing a court to make orders dealing with similar procedural matters is sufficient power for a court to authorize the use of discovery means such as interrogatories and motions to produce documents.

Section 8 provides that a class action may not be dismissed or settled without approval of the court and notice

to the class unless the dismissal is to be without prejudice to the class or with prejudice against the class representative and no consideration, direct or indirect, has passed from the defendant to the class representative.

Sections 9 and 10 are self-explanatory and do not need to be discussed. However, this is not to decrease their importance as they are two key Sections providing protection against frivolous or harassment type lawsuits against target defendants.

Section 11 is also self-explanatory.

Sections 12 through 15 provide for the prelitigation notice. These provisions would primarily resolve problems in the area of misrepresentations and deceptive trade practices as opposed to cases involving the question of the applicability of statutes, including interpretation thereof.

Section 14 is a key section in that it provides for the bringing of an action for immediate equitable relief without requiring the prelitigation notice. These provisions are balanced and provide an important means of avoiding unnecessary litigations where mistakes have been made and the defendant is

willing to acknowledge that error.

Sections 16 through 22 relate to the coordination of civil actions. These provisions are designed to prevent the duplication of class litigation where a defendant or defendants in the same industry are subjected to a series of class actions involving the same question. The obvious waste of money involved in the multiple litigations situation as presently exists in California is self-evident. In most of the multiple litigation situations the question involved is one of statutory applicability, the validity of statute, or the validity of actions of a defendant under a given set of statutes. The coordination provisions would allow for these actions to be handled in a single forum for the just, economical and efficient adjudication of the issue. There is an analogy here to the Federal Multidistrict and Complex Litigation Panel procedures for handling similar types of problems in the Federal Courts. The specific sections are based upon a California Act for the Coordination of Class Actions to be effective on January 1, 1974. The California Act was enacted in the 1972 legislative session.

This paper attempts to set out how a class action would proceed under SB163 and does not attempt to comment upon

the pros and cons of class actions nor the arguments of the proponents or opponents of SB163 as to the desirability or undesirability of further amendments. Quite obviously, a single act of legislation cannot contemplate the resolution of all the problems that may be presented in a given type of proceeding; therefore, the Bill as it stands does have some areas where it is open to questions as to what would happen in a given situation as well as flexibility for trial courts to handle those types of actions that do create problems not expressly dealt with in the Bill.

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

ATTORNEYS AT LAW

CHARLES D. BURT
D. KEITH SWANSON
NEIL F. LATHEN
J. MICHAEL ALEXANDER
DONALD W. McCANN
GREGORY A. SMITH

388 STATE STREET
SUITE 1000
SALEM, OR 97301-3571

FAX (503) 588-7179
(503) 581-2421

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**

No conflict

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.

No conflict

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

Acknowledged 7/13/94
File

STOEL RIVES BOLEY
JONES & GREY

ATTORNEYS AT LAW
SUITE 2300
STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE
PORTLAND, OREGON 97204-1268

Telephone (503) 224-3380
Telecopier (503) 220-2480
Cable Lawport
Telex 703455
Writer's Direct Dial Number

(503) 294-9336

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

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

Dennis C. Karnopp
James E. Petersen
James D. Noteboom
Dennis J. Hubel *
Martin E. Hansen *
Howard G. Arnett * *
Thomas J. Sayeg * * *+
Ronald L. Roome * * *

* Also admitted in Washington
** Also admitted in Arizona
*** Also admitted in California
+ LL.M. in Taxation

Karnopp, Petersen
Noteboom, Hubel
Hansen & Arnett
ATTORNEYS AT LAW

Riverpointe One
1201 N.W. Wall Street, Suite 300
Bend, Oregon 97701-1936
(503) 382-3011

Mark P. Amberg * * *
Brian L. Gingerich
Brent S. Kinkade
Tia M. Lewis

Lyman C. Johnson
(1929-1986)

FAX (503) 388-5410

July 1, 1994

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

John E. Hart
HOFFMAN, HART & WAGNER
1000 S.W. Broadway, Suite 2000
Portland, Oregon 97205

Re: OSB Procedure & Practice Committee Recommendations on ORCP 55 Changes

Gentlemen:

A subcommittee of the Procedure & Practice Committee has been studying ORCP 55 for the past year. The subcommittee consisted of Robert Neuberger, Gary Berne, Kathryn Chase and myself. The entire Procedure & Practice Committee has approved the unanimous recommendation of the subcommittee for changes to ORCP 55. Proposed deletions from the current version of ORCP 55 appear as strikeovers; proposed new language appears as redline text. The proposed new ORCP 55 is enclosed with this letter. In hopes that it will be of assistance, I am also enclosing a WordPerfect 5.1 disk of this proposed rule. The balance of this letter will discuss the changes and reasons for them.

The first change is at the end of current ORCP 55B, where a new section has been added. There was a desire, on the one hand, to have it clear that books and records that are produced without the need for a deposition can be produced by mail. However, in some circumstances it will be important to one party or another that the original documents be available for inspection rather than copies, and that they be available for production in a deposition setting. Therefore, language was added allowing for an automatic amendment of the subpoena to require inspection of the original documents where a party objects on that basis. Likewise, if the objecting party requires a deposition of the records custodian, such an

objection will automatically result in the amendment of the subpoena to require a deposition. On the other hand, if the requesting party believes this is unreasonable, inefficient or simply too expensive for the case involved, the requester has the option of going to the court for an order that will result in the fair and efficient identification and production of the items requested.

It appears that some lawyers have taken the position that a witness fee need not be provided to the party from whom records are requested, so long as testimony is not taken from them in a deposition. Given the potential inconvenience to the party of responding to the request for documents, which could be quite voluminous, it does not seem reasonable to eliminate the witness fee for those subpoenas not requiring a deposition. Therefore, we have inserted language making it clear that, whether or not personal attendance is required, an attendance fee is required to be served along with the subpoena, even for simple production of documents. This change appears in ORCP 55D(1).

Further down in paragraph D(1), we changed the time period prior to actual service of the subpoena when the copy of the subpoena shall be served on other parties to the litigation from seven to 14 days, so that it mirrors the time period in the procedure for the production of hospital records in ORCP 55H(2)(b). Our committee could see no reason for differentiation in the time periods.

We have proposed deleting the entire paragraph D(3)(d), which, in its current form, disallows service by mail of a subpoena which commands production of books, papers, documents or other tangible things when not accompanied by a command to appear at trial or at a deposition. The purpose of these procedures was to make the litigation process more streamlined and less expensive. If we are allowing the service of a subpoena for deposition or trial testimony to be done by mail, it doesn't seem to make any sense to not allow a mail service of subpoena upon a party who is going to produce records only, presumably by mail. The only other way to serve the subpoena for production of documents, when a deposition or trial appearance is not requested, is by process server, with the attendant extra expense.

The next change appears in ORCP 55F(2), which was simply a grammatical change to parallel the language used for both residents and non-residents.

The next change is the addition of paragraph F(3). The purpose of this new paragraph is to provide express authority for the production of the records by a non-party via mail rather than personal appearance. Some attorneys have been unwilling to agree

to production by mail and, therefore, completely blocked the efficient production of documents from many counties around the state. As you no doubt realize, if records are located in a county other than where the case is filed, a party may not compel the attendance of a non-party to a deposition or, presumably, to a production of records without a deposition, outside their county. This change is to facilitate, for example, production of employment records from a variety of employers in multiple counties around the state and avoid the need for traveling to each county simply to gather the records.

The next change appears in ORCP 55H(2). The Committee understands some hospitals through their association are concerned that ORCP 55F could be used to eliminate the protections built in for hospital records in ORCP 55H. Therefore, the word "only" was added to H(2) to make it clear that only the two alternatives set forth in ORCP 55H may be used for production of hospital records.

The next change appears in ORCP 55H(2)(b). In the current version near the end of that section, the party subpoenaing the records was required to serve a copy of the subpoena only on the injured party. This has been changed to reflect the more appropriate practice of serving a copy of any subpoena for discovery on all parties to the litigation and on the injured party whose records are being sought.

The next change is the addition of paragraphs H(2)(b)(1) and (2)(b)(2). The purpose of these changes is to, again, try to accommodate the request of hospitals that they need not produce records multiple times during the course of one piece of litigation. Therefore, anytime the records are subpoenaed by one party, any other party to the litigation need only make request for the records from the party who obtained them and pay the reasonable charge of copying the records to get them. The hospital will not have to reproduce the records at their request unless there is some showing of good cause for that to be done. Provision was made for subsequent subpoenas to obtain only subsequently generated records by the same hospital.

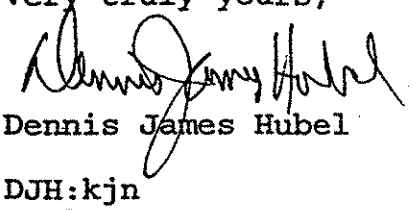
There was quite a bit of discussion about the perceived problem that records will not be accurately copied by the party receiving them from the hospital when providing them to the other parties. It was felt that it was not appropriate to try to deal with this issue in a rule, as any attempt to provide other than complete records as a party obtains them from the hospital would be something more appropriately covered by ethics rules and the concept of professionalism. We cannot provide in the Rules of Civil Procedure for every possible mis-step by a practitioner. To the extent the Rules of Civil Procedure need to address this, ORCP 46 appears to have sufficient flexibility to handle any problem.

There was also some discussion amongst the Committee about these changes and whether or not it would lead to wholesale subpoenas to produce doctors' office charts in personal injury litigation. The Committee agreed that these changes are not intended to change any rules of physician-patient privilege as they may exist now, nor are they intended to change any rules of admissibility of evidence at trial.

As this is my last year on the Procedure & Practice Committee and my term of office as Chairman ends with the Bar Convention, I will be available to answer questions up through the end of September regarding this, as will any other member of the subcommittee on ORCP 55 identified above. After the end of September, Mr. Neuberger and Ms. Chase will continue on the Procedure & Practice Committee and I'm sure they would be glad to respond to questions from the Council as you approach your December meeting. Please communicate directly with them any questions the Council has.

Over my years on the Procedure & Practice Committee, I have enjoyed working with the Council, and I believe your work is both important and essential. I wish you luck with your proposed changes for the next legislative session.

Very truly yours,



Dennis James Hubel

DJH:kjn
Enclosures

cc: Procedure & Practice Committee

Rule 55 Subpoena

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. Where any party objects to copies of books, papers, documents, or tangible things being produced without an inspection of the originals, the subpoena shall be amended to command the person to whom it is directed to produce and permit inspection at a time and place specified therein. If any party objects to copies of books, papers, documents, or

tangible things being produced for inspection without a deposition, the subpoena shall be amended to command appearance at a deposition. Any such objection shall be made promptly and, in any event, before the time specified in the subpoena for compliance therewith. If objection is made, any party or the person commanded to produce or permit inspection and copying may move the court for such orders as may permit the fair and efficient production and identification of the books, papers, documents, or tangible things requested.

C. Issuance

C(1) **By whom issued.** A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance of a person, to produce books, papers, documents, or tangible things and to permit inspection thereof: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C, or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the

county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

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

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

D(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and, whether or not personal attendance is required, one day's attendance fees. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f). Copies of each subpoena commanding production of books,

papers, documents, or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, shall be served on each party at least 14 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 that 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)(e) 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.

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

F(3) Production without Examination or Deposition. Notwithstanding ORCP F(1) and (2), where a subpoena commands production of copies of designated papers, books, documents, or tangible things in the possession, custody, or control of the person to whom the subpoena has been issued without commanding inspection of the originals or a deposition, the person to whom the subpoena has been issued may be compelled, without a personal appearance, to produce the copies by mail or otherwise, at a time and place specified in the subpoena.

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(14)(a) through (d) and licensed under ORS 441.015 through 441.097 and community health programs established under ORS 430.610 through 430.700.

H(2) **Mode of Compliance.** Hospital records may only 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 or 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, 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 a 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 (A) the injured party, and (B) all other parties to the litigation not less than 14 days prior to service of the subpoena on the hospital.

(2)(b)(1) Each party who wants copies of the subpoenaed records shall notify the party issuing the subpoena. If a non-issuing party requests copies of the subpoenaed documents as set forth in this subpart, the procedure set forth in sub-part (2)(b)(1)(A) shall be followed, unless a non-issuing party objects thereto. Any such objection shall be made promptly and in any event, before time specified in the subpoena for compliance

therewith. If objection is made, any party or the person commanded to produce and permit copying, may move the Court for such orders that may permit the fair and efficient production of the documents.

H(2)(b)(1)(A) The party issuing the subpoena shall, upon receipt of the records from the hospital, forward copies of all records provided by the hospital, at a reasonable charge to the requestor of the copies.

H(2)(b)(2) Unless good cause is shown therefor, the hospital will not be required to respond to subpoena's for the same records from any party who had notice of the first subpoena. This rule does not preclude subsequent subpoenas issued by a party who received notice of the subpoena discussed in subpart H(2) (b) (iv) above for records generated by the responding hospital, after the response to the first subpoena.

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 records 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)(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 thank 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.

OR ST 41.930
O.R.S. s 41.930

1993 OREGON REVISED STATUTES
TITLE 4. EVIDENCE AND WITNESSES
CHAPTER 41. EVIDENCE GENERALLY

41.930. Admissibility of copies of original records.

The copy of the records described in ORCP 55 H is admissible in evidence to the same extent as though the original thereof were offered and a custodian of hospital records had been present and testified to the matters stated in the affidavit. The affidavit is admissible as evidence of the matters stated therein. The matters stated therein are presumed to be true. The presumption established by this section is a presumption affecting the burden of producing evidence.

(1973 c.263 s 4; 1979 c.284 s 77)

O. R. S. s 41.930
OR ST s 41.930
OR ST 41.945
O.R.S. s 41.945

41.945. Application of ORS 41.930 and ORCP 55 H.

ORS 41.930 and ORCP 55 H apply in any proceedings in which testimony may be compelled.

(1973 c.263 s 8; 1979 c.284 s 78)

NOTES, REFERENCES, AND ANNOTATIONS

Acknowledged 7/11/94

THORP
PURDY
JEWETT
URNESS &
WILKINSON, P.C.
ATTORNEYS AT LAW
Laurence E. Thorp

644 NORTH A STREET
SPRINGFIELD, OREGON 97477-4694
FAX: (503) 747-3367
PHONE: (503) 747-3354

MARVIN O. SANDERS
(1912-1977)
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

Acknowledged 7/13/94
File

STOEL RIVES BOLEY
JONES & GREY

ATTORNEYS AT LAW
SUITE 2300
STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE
PORTLAND, OREGON 97204-1268

Telephone (503) 224-3380
Telecopier (503) 220-2480
Cable Lawport
Telex 703455
Writer's Direct Dial Number

(503) 294-9336

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