CORRECTED

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of August 13, 1994
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

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

Kathy Chase, liaison from the Oregon State Bar Procedure & Practice Committee, and Susan Evans Grabe, with the Oregon State Bar were in attendance. 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 July 16, 1994 minutes. The minutes of the July 16, 1994 meeting were approved without objection.

Agenda Item 3: Report of subcommittee on subpoenas of hospital records. In Mr. Alexander's absence, Mr. Hart led the discussion of this item. Note was taken of written comments received from Karen Creason, Bill Gaylord and Larry Thorp (attached to these minutes) regarding proposed amendments to ORCP 55 prepared by the OSB Procedure and Practice Committee ("P&PC"). There was agreement with Mr. Hamlin's suggestion that the meeting proceed with consideration and discussion of each of the Rule 55 amendments proposed by the Council's subcommittee and those proposed by the P&PC in the numerical order in which they appear in Attachment B to the agenda of this meeting. Mr. Hart

added that, as each amendment proposed by the P&PC was encountered, he would ask Ms. Kathy Chase to explain briefly its rationale.

Regarding **proposed amendment #1** (all numerical references are to the numbers appearing in the margins of the aforesaid Attachment B), Ms. Chase explained that this procedure of automatic amendment would be the most efficient means of dealing with objections of non-requesting parties wanting a more formal method of production than mailing. Mr. Hamlin questioned just what was meant by "automatic amendment," whether the original subpoena would have to be reissued, etc. Mr. Lachenmeier stated that, under the existing rule, any party dissatisfied with production by mail can issue his or her own subpoena to require production by inspection and copying or by appearance duces tecum. Mr. Jolles agreed and questioned whether this proposed amendment was needed. Mr. Chase commented that the P&PC was trying to avoid the need for duplication of subpoenas.

Maury Holland suggested that perhaps the Council should first consider proposed amendment #6, the proposed new subsection F(3), because there would be no point to #1 unless #6, or some variant of the latter, is approved. Justice Graber commented that, for the reason earlier stated by Mr. Lachenmeier, she did not see that #1 was needed even if #6 is adopted.

Discussion then focused upon **proposed amendment #6.** Justice Graber said that there might be occasions when the subpoenaed non-party would prefer to produce by allowing inspection and copying or even by appearance duces tecum, and thus questioned whether the subpoena should be explicit in informing non-parties that they can exercise some choice. Several members commented that the current and widespread actual practice regarding records subpoenas is that many things, such as the mode of compliance, are worked out informally and by agreement among the attorneys. Mr. Cramer, however, expressed some concern that if the availability of options is concealed in the rule, young, inexperienced lawyers could be misled into unwarranted complexity and formality.

Mr. Lachenmeier then moved the tentative adoption of proposed amendment #6, and Mr. Jolles seconded. Mr. Hamlin suggested that, before a vote is taken, some redrafting of the proposal be attempted to delete proposed language that might be redundant in repeating concepts already provided for earlier in the text of Rule 55. He suggested that the following might be deleted: "copies of designated" in the second line, and "in the possession, custody or control of the person to whom the subpoena has issued" in the third and fourth lines. This suggestion was not followed up by any motion to amend.

Justice Graber asked whether the P&PC had any reason for omitting any requirement of an affidavit to accompany mailed copies, similar to what H(3)(a) requires for hospital records. Ms. Chase responded that this was not discussed by the P&PC draftspersons.

Mr. Phillips stated that he thought that proposed amendment #6 presents some drafting problems that cannot be effectively dealt with in this meeting. There was general agreement that some redrafting is needed. Justice Graber then produced a redraft of proposed amendment #6, which she read to the meeting before handing it to Gilma Henthorne. This redraft read as follows:

F(3) Notwithstanding sections A through G of this rule, a party who issues a subpoena may command the person to whom it is issued, other than a hospital, to produce books, papers, documents, or tangible things by mail or otherwise, at a time and place specified in the subpoena, without commanding inspection of the originals or a deposition. In such instances the person to whom the subpoena is directed complies if the person produces the specified items in the specified manner and by certifying in substance that the person signing the certificate has knowledge of the facts stated and that the copies are true copies of all the items responsive to the subpoena or, if all items are not included, why they are not. The person may also comply by permitting inspection and copying of the originals.

{Note by SPG: Should this allow recipient either to (a) demand actual cost of copies or (b) ask for personal appearance (deposition) or inspection of records?}

Mr. Hart then called for a straw poll vote, which was taken and which indicated general agreement in principle with Justice Graber's redraft. Maury Holland was directed to try to polish this redraft and put it in final form for further consideration at the Sept. 10 Council meeting.

Discussion then returned to **proposed amendment #1.** Judge Marcus moved that it be rejected on the grounds that if one party does not like another party's subpoena, the latter can always

issue his or her own. This was seconded by Mr. Lachenmeier. This motion carried by unanimous agreement.

Discussion then turned to **proposed amendment #2.** Ms. Chase stated that the P&PC thought that this was the only efficient way of expressing the thought that non-parties complying with subpoena should receive some compensation for time and trouble, over and above direct copying costs. In response to Mr. Hart's query, there was general agreement with this proposed amendment, which he said he thought would lend credibility to a legal event, although Judge Brockley stated he thought the present rule was fair as it is.

Discussion then turned to **proposed amendment #3.** Mr. Lachenmeier stated that he did not believe that the additional seven days were really needed. If this were changed to 14 days, he added, this would mean a total of nearly a month before records and so forth could be obtained, since an additional 14 days are allowed for compliance. Ms. Chase stated that this amendment was proposed simply in the interest of consistency with the 14 days provided for hospital subpoenas. Mr. Hart then asked whether there was a consensus regarding this proposed amendment. A consensus was expressed that this amendment not be adopted.

Discussion then turned to **proposed amendment #4.** There was general agreement that this was needed, but should be dealt with in connection with proposed amendment #6. Maury Holland was directed to do appropriate redrafting in this connection.

Discussion then turned to **proposed amendment #5.** Judge Brockley said he thought the present rule should be left alone. Justice Graber stated that she agreed with this proposed amendment. There was general agreement with this proposed amendment.

Discussion then turned to **proposed amendment #7.** Justice Graber said she was in agreement with the comment of Karen Creason that the term "duces tecum" should be deleted throughout section H, where it doesn't make sense. Justice Graber also moved to change "injured party" to "person whose records are sought," with which Mr. Hamlin stated his agreement. There was also agreement that the first appearance of the word "only," as proposed by the P&PC, should be deleted.

Discussion then turned to **proposed amendment #8.** There was general agreement with Justice Graber's suggestion that the word "requested" be added before "records." There was otherwise general agreement with this proposed amendment.

There was general agreement that **proposed amendments #9 and #12** are acceptable in their present form.

Discussion then turned to **proposed amendment #10.** Mr. Phillips expressed concern that this proposal might be construed to require 14 days advance notice of subpoenas for trial. He added that he had no objection to the 14 days advance notice requirement provided it is made clear that it applies only to (iv). Mr. Jolles expressed agreement with this point. Mr. Phillips said that he would submit some redrafting of this provision to deal with this problem.

Discussion then turned to **proposed amendment #11.** Ms. Chase explained that the purpose of this proposal was to place the burden on requesting parties, rather than hospitals, to provide additional copies to non-requesting parties who wanted them. Mr. Hart then invited attention to the written comments of Ms. Creason and Mr. Gaylord that for the original requesting party to make and provide copies of protected medical records to other parties might be illegal, since such additional distribution would not be responsive to a court order. Ms. Chase commented that the P&PC had not really considered the redisclosure problem. Mr. Hart said that he opposed this proposal for essentially the reason expressed by Ms. Creason. Judge Marcus expressed concern that this proposal would make the party who first requested records a kind of gatekeeper, who could then control the terms of access on the part of other parties, with which point Justice Graber stated agreement. This discussion concluded with the members expressing disapproval of this proposed amendment.

Mr. Phillips stated he wished to give notice that, at the September 10 meeting, he would move repeal of H(2(b(iv), which he described as the genesis of the problems the Council has been trying to solve in this area. The meeting was then recessed for approximately 10 minutes. When the meeting reconvened, Mr. Hart mentioned that there is a new appellate court opinion out dealing with findings of fact, which he thought might have some bearing on the proposal currently before the Council regarding findings in rulings on attorney fee petitions.

Agenda Item 4: Report of subcommittee on future of Council (Bruce Hamlin). Mr. Hamlin, as chair of the subcommittee on the Council's future, distributed a brief report prepared in response to the budget note appended to the Council's 1993-95 appropriation bill (attached to these minutes). He noted that the report recommends that the Council continue to exist and function in its present form and also states that the Oregon State Bar is not regarded as the appropriate place from which to seek continued funding for the Council. He added that if the Bar were asked to take over support for the Council, the staff

support would probably come from Bar Headquarters and not from the UO Law School as in the past. Mr. Hamlin stated that if the Council approves the essential points of this summary report, his subcommittee would flesh it out with a longer report that goes into matters of background and detail, to be submitted to the Chair of the Emergency Board over Mr. Hart's signature by September 1.

Ms. Susan Grabe, the OSB staff member in charge of legislation and public policy, commented at some length to the effect that the report should be "beefed up" to demonstrate the precise ways in which the Council is needed, to explain in greater detail exactly what it does, to stress its independence, and to emphasize that it serves the citizens of Oregon, not just lawyers. Mr. Hart expressed his and the Council's appreciation for what he described as very valuable comments. He asked her whether some expressions of support might be obtained from the OSB. She replied that she thought the Chair of the Procedure and Practice Committee might be willing to write a supporting letter, and perhaps the Bar Counsel as well, although she could not make commitments on behalf of other people. Mr. Cramer stated that the report should highlight the savings in time and cost to the Legislature that the Council provides.

Mr. Hamlin responded that he was well aware that a great deal of persuasive lobbying would have to be done during the leadup to the 1995 session, and did not regard even the fleshed-out report to the Emergency Board as anything like the full extent of the broad effort that must be made. Judge Marcus stated his agreement with this thought, and pointed out that many interests, such as the banks, are involved that are not part of the Bar. Mr. Hart noted that, with the ORCP being now in existence for many years, the Council should not be expected to produce voluminous amendments every biennium, and should not be judged as unimportant simply on the basis of its quantitative work product sometimes being modest in scope. Mr. Phillips added that he would support a full report along the lines of the summary version presented at the meeting, and also stated that he thought that serious separation-of-powers questions might arise under the Oregon Constitution if the Council were a body of the Legislature. This discussion concluded with an expression of general support and approval for the summary report presented by Mr. Hamlin.

Agenda Item 5: Recommendation of OSB Procedure and Practice Committee re voir dire--ORCP 57. Maury Holland noted that this proposed amendment to ORCP 57 C (see materials at pp. 45-47 attached to minutes of July 16, 1994 meeting) was submitted some time ago by the P&PC. This proposal was intended to bring section 57 C into conformity with what an extensive survey by the

P&PC found to be the generally prevailing "fast track" procedure in connection with jury voir dire.

Judge Brockley stated that he liked the proposal, but said he had concern that it might be a "lightning rod" for criticism from some quarters that judges are too inclined to curtail attorneys' freedom in conducting voir dire. Mr. Hart commented that he thought this change was inevitable. Judge Marcus expressed some reluctance about changing the rule in such a way as to negate the right of attorneys to insist upon the traditional method of juror-by-juror voir dire. Mr. Hamlin noted that there are some cases where there is apparently concern about juror privacy, but said this could be accommodated by the discretionary feature of the proposed amendment. Mr. Lachenmeier said he was concerned that the proposed amendment would allow plaintiffs' attorneys to interact with jurors for a very prolonged period of time before defendants' attorneys would get a chance to put in a word. Mr. Phillips said that he thought that some improved drafting was needed, and agreed to undertake to do that for distribution with the agenda of the September 10 meeting.

Agenda Item 6: Query by Russell S. Abrams re ORCP 82 A. There was general agreement that the Council should respond to the query made by Mr. Abrams. Maury Holland stated that he thought that the problem raised really derives from a perhaps unfortunate per curiam opinion in *Tamblyn*, and that no change in Rule 82 is called for. He added that in that opinion the Supreme Court for some reason simply failed to square its holding that security is mandatory with 82 A(6)'s provision that security may be waived. He further added that, in his view, this was something for the Court to clarify, if it so chooses, the next time the issue is presented. There was general agreement that Mr. Abrams' query did not warrant any amendment to Rule 82, and Maury Holland said he would so inform him.

Agenda Item 7: Other matters for consideration. No new matters were raised for consideration.

Agenda Item 8: Old business. Judge Marcus said that he had heard from Mr. Phil Goldsmith about a possible proposed amendment to ORCP 32 F(3). He added that Mr. Goldsmith is consulting with some of the groups who have expressed particular concern with class action procedures. He further stated that if Mr. Goldsmith is able to obtain agreement to the amendment he is formulating, he will presumably touch base with Maury Holland so that something can be distributed prior to the Sept. 10 meeting.

Agenda Item 9: New business. No item of new business was raised.

Agenda Item 10: Adjournment. The meeting adjourned at 12:37 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

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

acknowledged 8/5/94

August 3, 1994

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

Re: Council on Court Procedures

Dear Maury:

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

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

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

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

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

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

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

Sincerely,

Karen Creason

GAYLORD & EYERMAN, P.C.
ATTORNEYS AT LAW
1400 S.W. MONTGOMERY
PORTLAND, OREGON 97201-6093

WILLIAM A. GAYLORD
LINDA K. EYERMAN
TODD A. BRADLEY
PEGGY M. TOOLE*

*ALSO ADMITTED IN WASHINGTON

TELEPHONE
(503) 222-3526
FAX
(503) 228-3628

August 9, 1994

Maurice J. Holland
Executive Director
Council On Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403-1221

RE: August 13, 1994 Council on Court Procedure Meeting

Dear Maury:

I regret to report that I will be unable to attend the August 13, 1994 meeting of the council which conflicts with the annual Oregon Trial Lawyers Association Convention at Sunriver. I had agreed to speak at the convention before I recognize the conflict.

I am going to take a stab at expressing my views on the subjects I know will be addressed at the meeting in this letter. It is my understanding that no "final" votes to publish proposed changes will occur before the September meeting, and no action of the council will be truly final before the December meeting.

Here are my comments on the items I understand will be before the council based on the current published agenda:

1. The council's subcommittee's proposed amendments to ORCP 55 (changes Nos. 8, 9, and 12 of Attachment B to the agenda). I would favor and plan to vote for each of these changes. I understand change No. 8 to be a clarification for the benefit of hospitals, to resolve any apparent conflicts between ORCP H(2) and laws (primarily federal) restricting their disclosure of certain records. The amendment would make clear that the hospitals are expected to obey such non-disclosure laws, absent proof of an exception to such non-disclosure.

Amendment Nos. 9 and 12 appear to clarify ORCP H(2)(a) and ORCP H(3)(a)(ii) to make clear that the records to be copied and provided by the hospital may be less than all of those described in the subpoena and still be "responsive to" the subpoena, in view of the federal restrictions.

2. The OSB Practice and Procedure Committee proposed changes to ORCP 55:

a. Change No. 1 of Attachment B: I oppose this amendment. It would have the effect of reversing the burden of going forward and requiring a party seeking production to start over in order to get what they have already directly requested, just because some other party makes an objection (which they apparently do not have to support). I believe the intent of the long standing rules for production of documents and things is that the originals should be produced for inspection and copying unless some other arrangement is made. I have had frequent experiences requesting access to for example textbooks in the possession of physicians or hospitals on subjects relevant to the medical-legal issues in litigation. Invariably, attorneys for the doctors and hospitals claim permitting access to their libraries is unduly burdensome. However, I have never lost a motion to compel such production, and when it was provided there has never been any special burden at all on the defendant, and the exercise has frequently produced important evidence. I am afraid such requests will meet this new "objection" every time.

Of course it is often true that copies of various papers and documents are good enough. In my experience this is handled informally with a phone call or a letter and agreement that copies will suffice. Existing mechanisms provide ample opportunity for the responding party to object and be protected, upon a proper showing, when the production of originals would be unnecessary or unduly burdensome.

On review of Dennis Hubel's July 1, 1994 letter about this change, he refers twice to "automatic amendment of the subpoena," but the concept is not defined, and nothing in the amendment explains to me how it is suppose to be accomplished. As I read the new language (and as I commented above), anytime the subpoenaed party objects, the party issuing the subpoena will have to take an additional step and serve an amended subpoena indicating that they really mean it when they say they want to see the original documents and/or to depose a person about them. If I am not reading this correctly, perhaps someone can explain how an automatic amendment of a subpoena takes place, how notice of it is conveyed to other parties, and how it is served effectively on the respondent.

b. OSB Practice and Procedure Committee proposed Amendment No. 2: If I understand this, I do not oppose it. It

has been my assumption that subpoenas required service of the witness fee to be enforceable whether or not personal attendance was required. I assume this change is to make that clear. However, I also assume that the witness fee, when paid to a person who is not required to attend, is in lieu of minor costs for copying and handling of records to be produced, or at least an offset against such costs if they exceed the witness fee. If this latter point is not clear in the current rule, perhaps additional amendment is necessary.

c. OSB Practice and Procedure Committee Amendment No. 3: No comment.

d. OSB Practice and Procedure Committee Amendment No. 4: I agree with the deletion of ORCP 55D(3)(d). Whoops! After reading Maury's alternative amendment, I agree with it instead.

e. OSB Practice and Procedure Committee Amendment No. 5: I agree.

f. OSB Practice and Procedure Committee Amendment No. 6: I disagree. I agree with Maury's comment that this is a new and substantial change. I assume it is true that the reason medical records have been treated differently for a long time is that the lobby for medical providers is powerful, and the problems involved in copying and sending medical records have been met so many times they are institutionalized. Thus, it makes some sense to have a routine methodology for dealing with copying, certifying, and distributing them in the least burdensome way. The same cannot be said for the unlimited category of other documents and things that would be subject to this new rule, and there is therefore no basis for any comfort that the "easy" way of handling such materials will work reliably, will result in good compliance with the subpoena and provision of accurate, trustworthy records and evidence, or in the alternative, any way to tell when the stuff produced is not accurate, complete, and bona fide.

I personally do not subscribe to the view, which may underlie such efforts to streamline procedures, that everything we do as lawyers and courts constitutes undue burden on each other or society, especially business interests. I believe instead that carefully monitored functioning systems for civil dispute resolution, including the resources necessary to keep them moving and effective, are legitimate costs of doing business as a

society, and legitimate costs to business interests of doing business in a society that is lawful.

Therefore, I think the presumptions should remain where they are, i.e., that a subpoena to produce evidence requires a personal appearance of the keeper of that evidence, and production of the original evidence, unless the parties agree it is not necessary, or a court so rules. There are too many true stories of records or evidence being changed or invented, inadvertently or otherwise, to reduce the whole process of discovery to an exchange of copies by mail.

g. OSB Practice and Procedure Committee Amendment No. 7: I will oppose this change in its present form. In our July meeting, those of us present agreed that the word "only" should appear after "duces tecum" to make clear the intent (that <u>if</u> subpoena duces tecum were used, then it could only be done in accordance with this section). However, even with that improvement, I am concerned now that some hospitals will take the position that they do not have to produce records even to their patient or patient's attorney except when subpoenaed. Therefore, if the word "only" is going to be added to this sentence, it should be made even more clear as follows: "Hospital records may <u>only</u> be obtained by <u>the presentation of a valid written authorization from the patient or patient's legal representative</u> or by subpoena duces tecum as provided in this section. Otherwise, leave out the word "only" and leave the sentence as it was with a period after the word "section," a la "don't fix it if it ain't broke."

h. OSB Practice and Procedure Committee Amendment No. 10 on Attachment B: I agree.

i. OSB Practice and Procedure Committee Amendment No. 11 of Attachment B: I have no problem with the first two of the three parts of this change i.e., H(2)(b)(1), and H(2)(b)(1)(A). This describes a procedure that is common place and seems to work. However, I will vociferously oppose the third part, i.e., H(2)(b)(2). The problem is this: In 21 years of practicing law I do not believe I have ever received two identical sets of records from the same medical provider, even when they have been copied by different persons on the same day. Having explored this phenomenon with a number of medical records clerks, administrators, physicians, and miscellaneous staff persons, it is apparent that there are a number of unwritten rules, mores, and pseudo-legal authorities effecting what those

people believe should be included in the response to a request for medical records.

For example, someone (do I dare suggest their legal counsel) has advised many of them that they are not required to pass along medical records that did not originate in their facility even in response to an unambiguous subpoena. Some medical records personnel interpret this as permitting them to exclude consultation reports from physicians they do not directly work for, or e.g., radiology, laboratory, pathology, etc., or reports from different parts of the medical facility. Some staff members in multi-physician clinics even interpret it as excluding copies of portions of a single medical chart that were entered by a physician on-call for the primary care provider, or any other person not the named physician whose records are identified in the request or subpoena.

I do not know how to correct this very serious problem. But I know restricting the number of times records can be obtained from any one provider is the wrong direction to move in. I am convinced that any limitation on accessibility of medical records, including, when necessary, repeat requests for copies at later times during litigation, will only increase the provider's current level of indifference to the completeness and accuracy of what they copy and provide to the legal profession. To the extent that the inaccurate copies we now receive are due to completely innocent reasons, nevertheless, the only safeguard we have is to acquire additional copies later.

3. Proposed changes to ORCP 57C by the OSB Practice and Procedure Committee: I agree with the proposed change to ORCP 57C, though I am not sure I agree with all of the committee's reasons. My experience is that the so-called "fast track" style of voir dire is usually more efficient and effective than the old style of individual examination. However, I do not agree with the premise that all things which reduce the time taken by trials, or the time taken by attorneys to select a jury, are good. As an aside, my impression is that trial judges generally look with disdain on voir dire, no matter how quickly or slowly or well or poorly it is done. As a trial lawyer, I am sometimes tempted to ask "What else were you planning to use the courtroom for on the day I needed to select a jury for my client's trial?"

At any rate, I view the proposed amendment to ORCP 57C as permitting the attorneys to in effect use their time to question

jurors in whatever order they choose, including by the numbers through the chairs. So long as no artificial time limit is placed on the number of turns each side can take, or the total time they can use, they should be free to use their turns and their time as they choose.

In practical effect, most attorneys will learn to prefer the en masse method; and they will find it is impossible to take very long that way. To the extent that the proposed change removes a perceived restriction on allowing that method, I favor it.

4. Maury Holland's memo of 5/28/94 regarding ORCP 82: I have no feel for this issue at this point.

5. Old Business: If the discussion about amending ORCP 68C to require some statement of the factual basis for an award or refusal to award attorney fees is continued in this meeting, I would continue to support such a change. I would still prefer some language such as was attributed to me in the last minutes, i.e., "if requested by any party effected by the award or denial."

Sorry I have to miss this meeting.

Very truly yours,

GAYLORD & EYERMAN, P.C.

William A. Gaylord

WAG:jki

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

Memorandum

To: **Council on Court Procedures**

From: Subcommittee on Future of the Council

Date: August 13, 1994

Subject: Response to Budget Note

During the 1993 legislative session, the Council on Court Procedures was funded for the 1993-95 biennium, subject to the following budget note:

> "The Council is directed to work with the House Interim Judiciary Committee, the Senate Interim Judiciary Committee, and the Oregon State Bar to develop recommendations by September 1, 1994 for changes in the substance and process of the Council. The Committee directed the Council to report to the Emergency Board on these recommendations."

A subcommittee consisting of Judge Janice Wilson (then a member of the Council), Bruce Hamlin and John McMillan was appointed to consider an appropriate response to this budget note. The subcommittee met, discussed the matter with legislative and bar leaders, and reached the following conclusions:

(1.) Not to recommend any changes in the substance or process of the Council; and

(2.) To report to the Emergency Board (in response to its implied question) that the Oregon State Bar is not the appropriate entity to fund the Council.

Each of those conclusions will require discussion at the August 13 meeting of the Council. It is anticipated that the Council would adopte those conclusions, and then authorize the subcommittee to prepare a more detailed draft of a report to be submitted by the Council's Chair to the Emergency Board by September 1, 1994.

BCH